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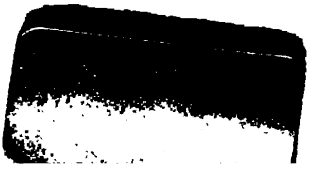

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THE

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APPELLATE HIGH COURT.

CONTAINING

Decisions of the Appellate High Court in all its branches, viz., in Civil, Revenue, and Criminal Cases, as well as in Cases referred by the Mofussil Small Cause Courts and the Recorder's Courts; together with Rules, and the Civil and Criminal Circular Orders issued by the High Court; also Decisions of Her Majesty's Privy Council in Cases heard in Appeal from Courts of British India.

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BITRATION AWARD.
An award having been made upon a reference to arbitration without the intervention of the Court, the plaintiffs applied to the Moonsiff, in accordance with the terms of Section 327 Act VIII of 1859, to be allowed to file the award in Court. The application was at first refused on the ground that the award had not determined all the matters referred for arbitration; but, on review, the Moonsiff having considered all the objections taken to the award,—the main one being that before the award was made the defendants had revoked their authority to the arbitrators,—decided that there was no valid ground for not enforcing the award, and accordingly upheld it:
HELD by *Norman, C. J.* and *L. S. Jackson, J.* (*Paul, J. contra*) that an appeal lay from the decision of the Moonsiff.
Per Norman, C. J., and *Jackson, J.*—It is open to an appellant to show that a paper which has been filed is not an award; but if it be an award, and judgment be given in accordance with such award under the provisions of Section 327, such judgment is final.
Per Paul, J.—Where an award has been filed, and judgment entered according to the award, such judgment is final.
Per Lock and *Kemp, J. J.*—A judgment drawn up in conformity with an award is final, but a judgment of that kind cannot be made when the fact of the award having been made with the consent of parties is disputed; and in such a case the

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ARBITRATION AWARD—(*Continued.*)
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In a suit in which the zemindar sought to recover possession with mesne profits, the tenant declared the land to be rent-free. The decree gained by the zemindar declared the land to be mál, but refused to give possession and mesne profits, and it declared the defendant entitled to possession so long as he performed the service for which the land was granted, but that on his failure to do so the zemindar might resume the land. The zemindar did not resume; but the present plaintiff, who is a purchaser from the zemindar, sued for a kubooleut from the tenant who is still in possession. HELD that the plaintiff was not entitled to a kubooleut as the tenant might be perfectly willing, so far as was known, to perform the service which he was required to render.
Per Norman, C. J.—As a general rule, the holder of a tenure cannot be sued by owners of fractional shares in the superior tenure for separate kubooleuts according to the proportions to which they allege themselves to be entitled in the superior tenure.
Per Mitter, J.—The share-holders of an undivided estate have no right to divide a holding or tenure without the consent of the tenant. The payment to each share-holder of his quota of the rent is of itself no

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HELD that that question has been decided by two previous Full Bench judgments, cited,—in one of which it was ruled that the sale or mortgage of joint undivided property, is invalid if made without the consent of all the co-sharers, and not valid even for the seller's own share when undivided;—and in the other of which it was held that the terms upon which such decree should be made will depend on the equity which the purchaser may have to a refund of the purchase-money, or

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The interest of an heir according to Hindoo Law expectant on the death of a widow in possession is not property, but a mere expectancy, and therefore is not rendered liable to attachment and sale in execution of a decree by the 205th Section of Act VIII of 1859 ...

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It cannot be treated as a universal rule that no point can be raised on an application for a —— which has been already discussed and decided in the original hearing of the appeal; or that no new point which has not been raised at the hearing of the appeal can be argued on the application for ——. In each case the Court to which application is made must consider and decide whether a —— is necessary to correct any evident error or omission, or is otherwise requisite for ends of justice ...

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(1) A Deputy Magistrate passed a sentence of 6 months' rigorous imprisonment and whipping of 20 stripes on a person whom he convicted of house-breaking. The Sessions Judge on appeal set aside the sentence of whipping and commuted that portion of the sentence into one of rigorous imprisonment for 3 months:

HELD that the Sessions Judge acted rightly in setting aside the sentence of whipping, as the conviction was a first conviction of the offence; but that the commutation of the sentence of whipping into one of 3 months' rigorous imprisonment amounted to an enhancement of the sentence which had been passed by the Deputy Magistrate, and was therefore illegal, having regard to Section 419 of the Code of Criminal Procedure. The High Court accordingly set aside the sentence of 3 months' additional rigorous imprisonment ... 7

(2) *Per Mitter, J.*— Section 12 of the Whipping Act, VI of 1864, refers to the Court by which a case is tried in the first instance, and not to a Court of appeal ... *ib.*

(3) *Quære.*—Can a sentence of fine be substituted for one of imprisonment *ib.*

(4) Under Act VIII of 1869, the Appellate Courts are limited to pronouncing judgment in the manner prescribed by Section 419 ... 33

Section 408 does not apply to the case of a person whose appeal has been dismissed after additional evidence has been taken under the provisions of Section 422, and no appeal lies from a judgment upon an appeal under Section 422 Act VIII of 1869 ... *ib.*

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ASSESSORS.

(1) Although the Code of Criminal Procedure does not expressly provide for a summing up of the evidence in trials with the aid of ——, there is nothing in the Code to prevent a Judge from summing up the evidence, which is in fact only a mode of going through and discussing it with the —— ... 25

(2) The real object of appointing —— is to assist the Court, and the discussion and statement of points by a Judge sitting with —— cannot be said to be otherwise than in furtherance of the object of getting the best assistance for the proper adjudication of the case ... *ib.*

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BOND.

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BREACH OF THE PEACE.

(1) Where the terms of a bond to keep the peace are general, the recognizances may be forfeited on any ——, whether the assault be committed against the person on whose charge the bond was originally taken or not ... 14

(2) Where *A* has been bound over to keep the peace under Section 281 of the Code of Criminal Procedure at the instance of *B*, a Deputy Magistrate is not competent to order him to enter into fresh recognizances to keep the peace on account of fresh disputes with *C*, but should refer the case to the Court of Sessions under Section 298 of the Code ... 18

(3) In a proceeding under Section 318 of the Code of Criminal Procedure, the finding of the Magistrate that he believes that a dispute exists likely to induce a —— must depend upon *legal* evidence in the case which he is investigating. A police report is *per se* no legal evidence in such a case ... 42

(4) The summons to a person to show cause why he should not be required to furnish recognizances to keep the peace should, under Section 283, Code of Criminal Procedure, set out the substance of the information against him ... 43

(5) When the party summoned shows cause, the Magistrate in taking evidence should look not merely to

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BREACH OF THE PEACE—(*Continued.*)

the question of possession, but also whether he is satisfied that there was a probability of a—— ... 43

(6) *Per Ainslie, J.*—In a case in which proceedings are taken for forfeiture of recognizances, the person against whom they are held is competent to give evidence on oath on his own behalf ... 87

(7) *Quære.*—When recognizances are forfeited, is a Magistrate bound to forfeit the whole amount of the bond, and is the power of reducing the sum to a penalty corresponding to the——confined only to the Government? ... *ib.*

See Land Disputes.

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CAPITAL SENTENCE.
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See Procedure (23)
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CONFESSIONS.
See Procedure (18)

CONFISCATION.
See Contraband Salt.

CONTRABAND SALT.
If salt exceeding 5 seers is found within the limits prescribed by Section 12, Act VII, B. C., of 1864, unprotected by a rowannah, as required under Sections 13 and 15, the salt must be held to be contraband under Section 16. The power of a Magistrate under Section 29 to confiscate salt not protected by a rowannah in a prohibited district, is not affected because there was no attempt or intention to sell the salt within the prohibited district ... 21

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CONVICTION.
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CORROBORATION.
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COUNTERFEIT DEVICE.
In order to a conviction under Section 475 of the Penal Code, the document which the accused has in his possession must have some counterfeit device or mark upon it, and it must be proved that the accused has the document in his possession with the intent of using such device or mark for the purpose of giving the appearance of authenticity to the document. The document must be of the nature mentioned in Section 457 of the Penal Code ... 19

CRIMINAL MIS-APPROPRIATION.
The mis-appropriation of each separate item of money with which a person is entrusted is a separate offence, and the facts connected with it should form the subject of a separate enquiry. The duty of a committing officer in such a case is to select certain distinct items to frame his charges upon them, and to adduce evidence specially upon those items ... 5

CRIMINAL TRESPASS.
(1) To bring a case under the definition of —— in Section 441 of the Penal Code, the entry must be made with the intent to commit an offence or to intimidate, insult, or annoy ... 6

(2) One member of a joint family commits no trespass by entering the house which forms the joint property, but he is guilty of that offence when he enters the room ordinarily occupied by another member of the family ... *ib.*

CROPS, PLUNDER OF—
See Procedure (8)

CROSS-EXAMINATION.
The complainant's pleader is at liberty before the Deputy Magistrate to cross-examine the witnesses for the defence on points respecting which they had made statements before the Joint Magistrate, and he might do so, as regards previous statements which were reduced to writing, without showing the writing.——Section 34 Act II of 1855 explained ... 23
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CULPABLE HOMICIDE.
Where a Sessions Judge, in charging a Jury in a case of —— not amounting to murder, omitted to draw their

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CULPABLE HOMICIDE—(*Continued.*)

attention to the two classes of —— mentioned in Section 304 of the Penal Code, the High Court considered that the accused were found guilty of the lighter description, and sentenced the accused to the punishment for such lighter description ... 17

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DEFENCE.
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DISCHARGE.
The —— by a Deputy Magistrate of a person charged with an offence triable only by a Court of Sessions is no bar to the Sessions Judge ordering the committal of such person to the Sessions under Section 435 Act VIII of 1869 ... 61
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DYING DECLARATION.
(1) Before a —— can be received in evidence it must be distinctly found that the person who made the declaration knew or believed at the time he made it that he was dying or was likely to die ... 11
(2) Where a Sessions Judge sees from the Magistrate's record that there is evidence which could prove that the declaration was a —— he should call for that evidence. A Magistrate should, in all cases in which ——s are made, examine the complainant on the point and record the question as well as the answer to it upon the record of the examination.. *ib.*

E

EVIDENCE.
(1) Section 200 relates only to the oral —— of witnesses. As to documentary ——, although a prisoner has a right to have all or any part of any document used on his trial translated or interpreted to him, yet where a document is put in for the purpose of merely giving formal proof of that which is an incontestable fact, it is not necessary to interpret it at length. It would be sufficient if the prisoner was made to understand what the document was, and for what purpose it was used ... 25

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(2) Under Section 370 of the Code of Criminal Procedure, the original report of the Chemical Examiner bearing his signature, and not a copy of the report, should be put in —— 49
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F

FINE.
See Appellate Court (1) (3)

FLOGGING.
See Procedure (11)

FORFEITURE.
See Breach of the Peace (1)

FULL BENCH RULINGS.
(1) In the case of an offence under Section 94 of the Registration Act XX of 1866, if a Magistrate thinks that a more severe sentence is necessary than he is competent to inflict under the power vested in him by Act XXV of 1861, it is competent to him to proceed under Section 226 of that Act and to commit the accused to the Sessions; and on such commital a Sessions Judge has jurisdiction to deal with the charges and to convict and sentence the accused as provided for in the several Sections of Act XX of 1866... 58
(2) When an Appellate Court directs further evidence to be taken by a subordinate Court under Section 422 of the Code of Criminal Procedure, it is competent to the subordinate Court before which such evidence is given, if any offence against public justice as described in Section 169 is committed before such Court by a witness whose evidence is being recorded therein, to send the case for investigation to a Magistrate under the provisions of Section 171 ... 64
(3) The words "whether for the decision of such cases in the first instance or on appeal, or for commitment to any other Court or Officer," in Section 11 of the Code of Criminal Procedure, are not intended as an exhaustive enumeration of the functions of Criminal Courts ... *ib.*
(4) Held (*Kemp and Phear, J. J., dissenting*) that notwithstanding Section 46 of the Code of Criminal Procedure, a person convicted at the same time of two or more offences

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FULL BENCH RULINGS—(*Continued.*)

punishable under the Penal Code may, in addition to the punishments prescribed by the Penal Code, be sentenced to whipping under Act VI of 1864. The Penal Code and the Code of Criminal Procedure must be read as if the Whipping Act formed a part of the Penal Code from the date of its enactment, and Section 46 of the Code of Criminal Procedure is applicable to all offences and punishments as prescribed by the Penal Code in its present and amended form ... 89

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GOVERNMENT LETTER.
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HIGH COURT.
(1) In a case under Chapter XIV of the Code of Criminal Procedure in which the accused had full opportunity given him to answer the case which was made against him, the —— felt itself precluded by Section 426 of the Code of Criminal Procedure from interfering with the judgment of the lower Court,—even if it found that there was an irregularity in the proceedings in consequence of the absence of a formal charge ... 30
(2) A Judge of the —— making an order in the original criminal jurisdiction of that Court is not a Court subject to the control of the Court under Section 15 of the 24 and 25 Vic., C. 104 ... 60
(3) The —— has power, under Section 29 of its Letters Patent, to transfer a criminal case from a Court in the mofussil for trial before itself 69
(4) The mere possibility or probability that difficult questions whether of law or of fact will arise is no reason for transferring a case under Section 29, there being a sufficient remedy provided in the right of appeal to the —— ... *ib.*
(5) *Per Macpherson, J.*—It is under Section 35 of the Criminal Procedure Code, and under that Section alone, that the —— ought to order the

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transfer of criminal cases from one Court to another,—except in every special cases (indicated) ... 69
(6) In a case in which a legal sentence, however light it may be, has been passed, the —— sitting as a Court of revision under Section 404 of the Code of Criminal Procedure, has not the power to interfere with that sentence, inasmuch as under Section 405 the Court cannot say that the sentence is contrary to law .. 83
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JURISDICTION.
(1) The Queen *versus* Chunder Seekhur Roy,—ruling that a Court before which an offence is committed under Chapter X of the Penal Code cannot try the case itself,—followed, notwithstanding the argument of the Sessions Judge in this case that that ruling should apply only to certain cases under Chapter X ... 2
(2) The Magistrate of a District can alone hold proceedings in a case (such as the removal of a thatched house) under Section 308 of the Code of Criminal Procedure. The Joint Magistrate while in charge of the Magistrate's office has no such jurisdiction ... 36
(3) Proceedings under Section 308 of the Code of Criminal Procedure for the removal of obstructions may be originated by a Joint Magistrate in charge of a division of a district.... 41
(4) In the case of a complaint under Section 308 of the Code of Criminal Procedure for the removal of an obstruction from a thoroughfare, a Magistrate should first enquire if the road is a public one or not. If

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he finds in the affirmative, he has —— to proceed; if in the negative, he should withhold his hand and abstain from carrying out the order for removal of the obstruction ... 67

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JURY.

(1) Where a Sessions Judge in his charge to the —— in a case in which an approver accomplice gave his evidence drew the attention of the —— to the necessity for requiring corroboration to the approver's evidence before they could convict upon it, and the —— notwithstanding his charge convicted upon the uncorroborated evidence of the accomplice, it was held, following a Full Bench case cited, that the High Court could not interfere with such conviction 37

(2) Where a Sessions Judge omitted in his charge to the —— to comment on different parts of the evidence for the defence, to which he simply alluded as being unimportant, and allowed evidence as to character and hearsay evidence to go to the ——, the High Court acquitted the prisoner, the other evidence in the case being insufficient for conviction ... *ib.*

(3) Evidence as to character ought not to be laid before a——, but should only be taken and considered by the Sessions Judge in awarding punishment ... *ib.*

(4) Conviction by a —— set aside in a case of murder in which there was a total absence of all evidence to show that the prisoner had committed the crime ... 46

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(1) A Sessions Judge has no power to interfere with an order of a Magistrate attaching disputed land under Section 319 of the Code of Criminal Procedure ... 1

(2) The power of attaching land regarding which there is a dispute conferred on a Magistrate by Section 318 of the Code of Criminal Procedure, extends to disputes as to possession of land of which rival zemindars are in possession by their ryots ... *ib.*

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Where the accused was charged with a breach of Section 77 Act III of 1864 in not taking out a —— for a woodyard, and he pleaded that the yard had been in existence prior to 1864, it was held that the Magistrate was wrong in refusing to enquire into the allegation as to the existence of the yard prior to 1864 84

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Capital sentence should be pronounced on a conviction for—— even if the accused be pregnant, although the execution of the sentence should be deferred till after delivery 66

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(1) No legal conviction can take place unless the opinion of the Assessors is taken on the whole of the evidence in a case ... 3
(2) In a case falling under Chapter XIV of the Code of Criminal Procedure, a Magistrate is bound by Section 253 to summon the witnesses for the defence even if he entertain doubts as to the value of their evidence, as it is impossible to state beforehand what credit will be given to their evidence ... 15
(3) Following the Queen *vs.* Gora Chand Gope, the Court set aside an order of acquittal passed by a Deputy Magistrate in a case which he tried, on evidence not taken before himself in the case, but entirely on evidence in another case before another Officer (the Joint Magistrate) ... 23
(4) Having regard to Section 375 of the Code of Criminal Procedure, a Magistrate is bound to take steps to procure the attendance of all the witnesses mentioned by the accused in the list delivered to the Magistrate by whom he was committed ... 34
(5) *Per Kemp, J.*—Where a witness called by one of the parties is a competent witness the opposite party has a right to cross-examine him though the party calling him has declined to ask a single question ... *ib.*

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(6) An accused should *plead* by his own mouth and not through his counsel or pleader, though his counsel or pleader may at the proper time address the Court on his behalf ... 42
(7) Where sanction under Section 170 of the Code of Criminal Procedure to prosecute a person criminally for fabricating false evidence was not given, it was held that the error was not cured by Section 426 of that Code, and the person charged was ordered to be discharged. The sanction given by the Sessions Judge after the case was committed to him and the prisoner had pleaded to the charge is not a sanction contemplated by the law ... 45
(8) The mere assertion of a fair claim of property or right, or the mere existence of a doubt as to right is not sufficient to justify an acquittal in a case of plunder of crops. The claim to the property must be *proved* by evidence to be fair and good ... 47
(9) In a case in which the accused was charged under Sections of the Penal Code of an offence which was committed before the Penal Code came into operation, it was held that having regard to Section 4 Act XVII of 1862 and Section 426 of the Code of Criminal Procedure, the error of procedure was not sufficient to vitiate the conviction so long as the punishment awarded as under the Penal Code did not exceed that which was the legal penalty for the offence before the Penal Code became law ... 48
(10) Where a Magistrate convicted under certain repealed Sections of a law, the High Court refused to set aside the conviction, having regard to Section 426 Code of Criminal Procedure, as the conviction and sentence might have been passed under Sections of the Penal Code and no substantial injury had been done to the accused ... 49
(11) As a rule, before flogging is given as an additional punishment, there ought to be formal evidence upon the record of the previous convictions relied on. The conviction and identity of the prisoner ought to be proved in the regular way. A mere kyfeut is no evidence whatever ... 52
(12) A mere kyfeut from the record office is not sufficient to prove a former conviction against a prisoner. There should be sworn testimony

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to the fact, and also to the identification of the prisoner with the person previously convicted ... 53

(13) Where the accused who has been duly summoned or arrested under a warrant in a case under Chapter XIV, Code of Criminal Procedure, is present to meet any charge, and no evidence is forthcoming against him owing to the absence of the prosecutor and his witnesses, if it be not shewn to the Magistrate that the case is one in which he ought to adjourn the inquiry under Section 224, the Magistrate is bound to discharge such accused person ... *ib.*

(14) Section 180 of the Code of Criminal Procedure was not intended to enable a Magistrate in ordinary cases to examine witnesses in the absence of the accused. Under Section 67 of the Code of Criminal Procedure, a complainant has a right to an adjudication upon the point whether in the judgment of the Magistrate there is sufficient ground for proceeding ... *ib.*

(15) Where sanction to prosecute on a criminal charge under Section 169 of the Code of Criminal Procedure was given in the case of only one prisoner out of two prisoners who were tried together, the High Court directed the release of the prisoner in regard to whom such sanction was not given ... 55

(16) An order calling for recognizances under Section 280, or for security under Section 281, Code of Criminal Procedure, must be passed at the time of deciding the original case. If no such order is then made, subsequent proceedings must be taken under Section 282 and the parties summoned to show cause ... 56

(17) Where a complaint was made by *A* that timber belonging to his master which had been cut and stacked in a certain place had been removed by *B*, who said that the timber was cut, not by *A's* master but by himself and that he had stacked it in a place where he always put his timber; it was held that the Magistrate could not proceed under Section 62 of the Code of Criminal Procedure, but was bound to try the charge brought against *B*, and either restore the timber to *A* or leave it where it was, according to the result of the investigation ... *ib.*

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(18) Points out the importance of properly recording and attesting the confessions of prisoners under Section 205 of the Code of Criminal Procedure ... 63

(19) It is not necessary under Section 205 of the Code of Criminal Procedure to state in the body of the examination of the accused that the statement comprises every question put to the accused and every answer given by him, or that they were recorded in full and read to him, and that he had full liberty to add to or explain his answers. The Magistrate's attestation at the foot of the examination when duly recorded in the terms of that Section, is sufficient *primâ facie* evidence of such examination, unless the Sessions Judge doubts the genuineness of the Magistrate's signature, in which case he should take evidence on that point. The examination of the accused properly recorded is evidence, and should be allowed to go to the Jury under Section 365 of the Code ... 68

(20) Before the examination of a prisoner in the presence of the committing officer can be used as evidence against him under Section 366, Criminal Procedure Code, the provisions of Section 205 of that Code must have been complied with and the committing officer's attestation affixed in full to the examination... 83

(21) When both the disputing parties are examined and state that men were collected by their opponents for the purpose of committing a breach of the peace, a Magistrate is justified, without enquiring who was the aggressor or the aggrieved party, to proceed under Section 318 of the Code of Criminal Procedure, and to take whatever steps are in his opinion necessary to prevent a breach of the peace ... 84

(22) Where a Magistrate proceeding under Section 318, Code of Criminal Procedure, decides on the evidence in favor of a party as being in possession of the disputed land, the High Court cannot re-consider the Magistrate's decision and decide which party is in actual possession 8

(23) A complainant in a case who mentioned the names of several witnesses on his behalf was requested to produce them on a certain date. Instead of doing that, he produced only 2 witnesses, who were examined. Held that as the com-

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plainant did not apply to the Magistrate to issue summonses on the other witnesses or ask him to proceed under Section 262, Code of Criminal Procedure, the Magistrate was not wrong in law in deciding the case on the evidence which was before him ... 87

(24) In a case in which the accused person cited a number of witnesses, and the evidence already before the Magistrate was contradictory, it was held that the Magistrate should have summoned and examined the witnesses whom the accused wanted to call ... *ib.*

(25) The plain intention of the Legislature in Section 171 of the Criminal Procedure Code was that the Court before which an offence was committed and by which the preliminary enquiry was made should not be the Court to investigate, try, or commit for trial ... 88

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(1) The special limitation of the period for prosecution (three years) in cases of —— and misprison of —— under Stat. 7, Wm. III, Cap. 3, Section 5, is an exception to the general rule in criminal cases; and in enacting Section 121 of the Indian Penal Code, the Legislature has not thought fit to limit in any way the period within which a prosecution for an offence against that enactment may be commenced, and consequently such limitation does not form part of the Penal Code ... 25

(2) *Quære*, whether with reference to the 28th Section of Act II of 1855, a prisoner charged with —— can be convicted on the evidence of a single witness? ... *ib.*

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(2) Before a —— can issue attaching the property of a surety, he should be called on under Section 220, Code of Criminal Procedure, to show cause why he should not pay the penalty mentioned in his bond, and it must appear clearly on the face of the record that he had such notice given him ... 82

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The plaintiff sued his elder brother for a share in certain family property. The defendant raised a question of family custom, and relied on a certain deed of release which he said the plaintiff had given him, but the existence of which the plaintiff denied. That document was not stamped, though on the face of it it stated that it was to be ——ed. No objection was taken on that score to the document before the first and the Lower Appellate Courts, who considered that the document was a genuine

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STAMP—(*Continued.*)

document executed by the plaintiff. After its production it had an insufficient —— of 2 annas put upon it. The High Court, on appeal, left the deed as part of the evidence in the case, but qualified its effect and the extent of its operation by making it a deed of release, releasing so much of that which the plaintiff might otherwise claim as would be covered by the insufficient —— of 2 annas. Held that the High Court might either have refused to admit the document for want of a ——, or, which would be more correct, it might have required it to be properly —— ed and the penalty paid into Court; but the course taken was entirely without precedent, without principle, and without authority ... 32

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(1) By the common law of Hindoostan, the descent is in coparceny where no other custom or right is proved 10

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WILL.

(1) The case of a Hindoo claiming by adoption under a —— which was put forward shortly after the testator's death and which was acted upon and recognized for a period of 27 years by the whole family, the validity of which —— was questioned

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The Weekly Reporter,

APPELLATE HIGH COURT.

The 4th January 1871.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Limitation—Cause of action—Reversioners—Right of suit.

Case No. 1292 of 1870.

Special Appeal from a decision passed by the Officiating Judge of Gya, dated the 31st March 1870, *affirming a decision of the Subordinate Judge of that District, dated the 30th September* 1869.

Pershad Singh and others (Defendants) *Appellants,*

versus

Chedee Lall and others (Plaintiffs) *Respondents.*

Mr. C. Gregory for Appellants.

Babco Kalee Kishen Sein for Respondents.

In a suit against a widow for acts of waste and alienation alleged to have taken place during the lives of the plaintiff's mothers who were then the next heirs to the property:

HELD that, as the mothers allowed more than 12 years to elapse, their cause of action expired, and that it did not revive in favour of the plaintiffs who had since been born and had now arrived at majority:

HELD that, if by the death of the widow a new cause of action accrued to the plaintiffs as reversioners entitled to the property, they might sue again; but they could not succeed in the present suit.

Jackson, J.—WE think that upon the first ground raised in this special appeal, the decision of the lower appellate Court must be reversed.

The plaintiffs sued complaining of acts of waste and alienation on the part of the widow, such acts having taken place more than 30 years ago. The widow was still alive, and certain other parties who are also defendants are in possession of part of the property.

As regards the particular cause of action on which the plaintiffs sued, it seems to us that the suit is barred by limitation. At the time when the alienation complained of occurred, the mothers of the plaintiffs were alive and were then the next heirs entitled to this property, and they might have brought the suit which the plaintiffs have now brought, but they did not do so. They allowed more than 12 years to elapse, and this cause of action is not revived in favour of the plaintiffs who have since been born and have now arrived at majority.

It seems that the widow whose acts were complained of died during the pendency of the suit; and the plaintiffs contend that this being so, they are entitled to have their suit dealt with as if she had previously died, they being now the reversioners entitled to the property. It seems to us that this is out of the question. The plaint was framed on a different cause of action altogether, and no application was made to amend the plaint. It seems to us clear that the plaintiffs were not entitled to have the decree which they have got upon the plaint which they brought into Court. They have probably a new cause of action upon the death of the widow, and may sue again if so advised, but the present suit ought to have been dismissed.

The decision of the Lower Appellate Court will, therefore, be reversed with costs.

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The 4th January 1871.

Present :

The Hon'ble R. V. Bayley and Dwarkanath Mitter, *Judges.*

Rent suits—Judgments.

Case No. 1523 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Purneah, dated the 31st March 1870, affirming a decision of the Deputy Collector of that District, dated the 27th November 1869.

Dhunraj Koonwar (Defendant) *Appellant,*

versus

Ooggur Narain Koonwar (Plaintiff) *Respondent.*

Baboo Tarucknath Dutt for Appellant.

Baboo Obinash Chunder Banerjee for Respondent.

Unless the circumstances of one rent-suit are on all fours with those of another, it is a serious error for a Court to refer to its judgment in one case for the reasons of its decision in another case.

Bayley, J.—We think that in this case the judgment of the Lower Appellate Court, so far as it regards the plaintiff's claim to enhanced rent for 12-16th of 1276, must be reversed.

The plaintiff sued for arrears of rent at the old rate for 1274 and 1275, and at an enhanced rate for 1276. As to the arrears claimed at the old rate for 1274-1275, the plaintiff got a decree, and no appeal was made by the defendant on that point. The claim as to enhanced rate was on the grounds, (1) of the increased productiveness of the soil, (2) of the increased value of the produce, and (3) of the defendant paying at a lesser rate of rent than the *prevailing* rate as paid by the same class of ryots for lands with similar advantages in the neighbourhood.

It was, under the ordinary rules of pleading, for the plaintiff to prove these allegations.

In regard to the first two grounds of enhancement, however, the plaintiff's pleader here gives up the case. The only remaining question is whether the plaintiff has proved the last ground of enhancement, *viz.*, whether the rate paid by the defendant was less than the prevailing rate as paid by the same class of ryots for adjacent lands with similar advantages, and whether on this ground plaintiff could get a decree at the enhanced rate sued for for the 12-16th of 1276.

We have heard all the evidence adduced by the plaintiff on this point, and it is clear that plaintiff does not by it prove that the rate claimed by the plaintiff (rupee 1-6 annas per beegah) is paid by the *same class of ryots* for adjacent lands with similar advantages and is the *prevailing* rate, that is to say, the rate paid by so large a majority of the same class of tenants for such lands as would justify one to hold the rate claimed to be the "*prevailing*" rate. Upon this ground, therefore, the plaintiffs, being unable to prove his claim to the enhanced rate, must fail to obtain a decree in this case for the 12-16th of 1276.

Another objection taken to the judgment of the Lower Appellate Court is, that there is no decision by that Court on the contested question as to what was the standard measurement pole of the pergunnah. It is true that there was a dispute on this point before the Ameen who preferred to the Collectorate and adopted the pole thence received as the standard pole, but still it was for the Lower Appellate Court to adjudicate in this suit for enhanced rent the question whether such pole was the standard of measurement for the particular pergunnah or division in which these lands were. No decision whatever has been come to by the Lower Appellate Court on this point.

There is also no decision by the Lower Appellate Court on the question, distinctly raised before it by the defendant, *viz.*, whether certain lands claimed by the plaintiff as subject to enhancement were liable to assessment at all, the averment of defendant being that they were lakheraj land. But be it as it may, it is sufficient to say that the Lower Appellate Court has given the plaintiff a decree to enhanced rent at the rate of rupee 1-6 annas without any evidence as to that being the "*prevailing*" rate *generally* paid, and not only by five or six witnesses, by the same class of ryots for lands adjacent with similar advantages. It is true that while, on the one hand, the defendant's written statement was a clear averment of his right under Section 4 Act X of 1859 for having held at one uniform rate from the time of the permanent settlement; yet, on the other, defendant's

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deposition and that of his agent on oath was a little contradictory to that statement; but it was for the plaintiff to prove his case before he could rely on the weakness of the defendant's case.

As the plaintiff, therefore, has failed to prove his claim to enhanced rent of 12-16th for 1276, the judgment of the Lower Appellate Court on this point must be reversed and the plaintiff's suit dismissed.

Each party will bear his own costs in all the Courts.

This decision, however, must not be understood to prejudice any future claim that the plaintiff may have to enhanced rent. It simply dismisses the plaintiff's present claim to enhanced rent for 12-16th of 1276, because the plaintiff has failed to prove the particular grounds which he urged in this particular case.

We will only add that in this case the Lower Appellate Court has seriously erred in referring to his judgments in other cases for his reasons for the decision of this case. When a plaintiff sues several defendants under Act X of 1859, the separate tenants are in a position to make and often do make quite separate defences. The Lower Appellate Court, therefore, should always see how far the circumstances of one case are really on all fours to those of another before it refers to the judgment in the one for that in another.

The 4th January 1871.

Present:

The Hon'ble F. B. Kemp and G. C. Paul, *Judges.*

Survey maps—Evidence.

Case No. 1314 of 1870.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 3rd June 1870, *affirming a decision of the Moonsiff of Bistopore, dated the 17th February* 1870.

Gudadhur Banerjee and others (Plaintiffs) *Appellants,*

versus

Tara Chand Banerjee and others (Defendants) *Respondents.*

Mr. M. M. Dutt and *Baboo Bungshee Dhur Sein* for Appellants.

Baboo Rash Beharee Ghose for Respondents.

In a case involving a boundary dispute, a survey map, if not conclusive evidence, is evidence of an important character which ought to be looked into and considered.

Kemp, J.—LOOKING to the plaint in this case, the cause of action appears to be that the defendant cut down trees belonging to the jungle mehal Mouzah Bashdeopore, the property of the plaintiffs. The defendants set up an independent title, stating that the lands were not included in the plaintiff's talook; that they really belonged to the dewuttur lands of Baboo Brijo Kishore Singh; and that those lands had been purchased by them in execution of a decree against the said Baboo Brijo Kishore Singh. Looking to the judgment of the first Court, it is very clear that the first Court treated this suit as a boundary dispute, for the issues were whether the jungle in suit has been held khas by the plaintiffs as belonging to their putnee talook, or whether it was the ancestral rent-free property of Baboo Brijo Kishore purchased by the defendants. The first Court states that the plaintiffs produced no documentary evidence in support of their title, and with reference to the witnesses the Moonsiff says that they are men of low caste and tenants of the plaintiffs, and therefore he considers their evidence not trustworthy. It appears that an Ameen was deputed to hold a local investigation in this case, and as the plaintiffs could not with their plaint file the survey map which was subsequently filed,—inasmuch as they could not, until the defendants put in their written statement, know that the case would be in the nature of a boundary dispute,—this map, to which it is alleged the predecessors of the defendants and the plaintiffs were parties, was put in, and the Moonsiff ordered the Ameen to enquire into and compare the survey map, if two days' fees were put in by the plaintiffs. It appears that the plaintiffs paid these fees. But the Judge on appeal held that this survey map could not be received as evidence in the case.

We are of opinion that in a case of this description which involves a boundary dispute, a survey map, if not conclusive, is evidence of an important character which ought to be looked into and considered. It is not evidence which it was within the power

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of the plaintiffs to manufacture, nor under the circumstances of the case was it imperative upon them to file this evidence with their plaint. The document is one which has come from a public office, and which has been to a certain extent admitted by the first Court. The Judge was, therefore, wrong to reject it. We remand the case and direct the Judge to admit as evidence and consider the survey map put in by the plaintiffs.

The decision passed by the Judge is reversed, and this appeal decreed with costs.

Paul, J.—I concur.

The 4th January 1871.

Present:

The Hon'ble F. B. Kemp and G. C. Paul, *Judges.*

Deposits—Act VI (B. C.) of 1862.

Case No. 825 of 1870.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 17th February 1870, *reversing a decision of the Deputy Collector of that District, dated the 31st December* 1869.

Kristo Protibar and others (Defendants) *Appellants,*

versus

Alladinee Dossee and another (Plaintiffs) *Respondents.*

Baboo Bungshee Dhur Sein for Appellants.

Baboos Romesh Chunder Mitter and *Nulleet Chunder Sein* for Respondents.

A party is not entitled to benefit from a deposit under Act VI (B. C.) of 1862, if it was paid in without a tender to and refusal by the opposite party.

Paul, J.—In this case, there are no grounds for special appeal. The questions raised between the parties are simply questions of fact. The Appellate Court has disbelieved the oral evidence adduced by the defendant in support of the payments pleaded. With regard to the money paid under Act VI, it is quite clear that that money was not paid in after a tender to and refusal by the plaintiff, and therefore the defendant is not entitled to any benefit from such deposit.

The decree of the lower Court will, therefore, stand. As to the money paid in under Act VI the party who made the deposit will be entitled, on a proper application being made to the Collectorate, to get the same back.

The special appeal is dismissed with costs.

The 4th January 1871.

Present:

The Hon'ble F. B. Kemp and G. C. Paul, *Judges.*

Costs—Section 189 Act VIII of 1859.

Case No 381 of 1870.

Miscellaneous Appeal from an order passed by the Judge of Hooghly, dated the 23rd June 1870, *reversing an order of the Subordinate Judge of that District, dated the 14th February* 1870.

Janokee Nath Mookerjee and others (Judgment-debtors) *Appellants,*

versus

Joy Kishen Mookerjee (Decree-holder) *Respondent.*

Baboo Umbika Churn Banerjee for Appellants.

Baboo Mohendro Lall Shome for Respondent.

The mere specification of costs in a decree without an allotment of responsibility, is not a sufficient compliance with Section 189 Act VIII of 1859.

Kemp, J.—The points taken in this special appeal are, first, that as the decretal order is silent as to costs no costs can be recovered by the special respondent in execution of the decree. The next point is that no interest having been awarded, the decree-holder cannot recover in execution any interest on the costs. The first Court held that as there was no separate order in the decree with reference to costs, the Court could not in the present execution case award any amount on account of costs, and that the decree-holder ought to get the decree amended and take out fresh execution of the same. The Judge on appeal reversed the decision of the first Court, observing that the order of the Judge in English distinctly states that the appeal is decreed with costs. On referring to the judg-

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ment in English, we find that such is the case, but then in the decretal order which is drawn up in the vernacular there is no provision made as to costs. Under Section 189 of Act VIII of 1859, the decree must state the amount of costs incurred in the suit, and by what parties and in what proportions they are to be paid, and this decree is to be signed by the Judge. The Judge appears to think that because there is a schedule appended to the decree of the costs incurred by both the appellant and respondent, this is a sufficient compliance with the provisions of Section 189; but such is not the case, for there is no order as to what parties and in what proportion the costs are to be paid. The mere array of costs incurred without saying who is responsible for these costs is not a sufficient compliance with the Section above quoted. It is, therefore, with regret that we are obliged to remand this case in order that the decree-holder may take steps to have the decree amended. In doing so, the Judge must distinctly understand that he is not to go behind the original judgment, but simply amend the decree so that it may accord with the judgment.

With reference to the question of interest, under the ruling of the Full Bench published in Volume VI, Weekly Reporter, page 109, no interest can be awarded in execution.

Each party must bear his own costs of this appeal.

Paul, J.—I concur.

The 4th January 1871.

Present:

The Hon'ble F. B. Kemp and G. C. Paul, *Judges.*

Execution—Bona fides.

Case No. 327 of 1870.

Miscellaneous Appeal from an order passed by the Judge of East Burdwan, dated the 5th July 1870, *affirming an order of the Moonsiff of that District, dated the 21st January* 1870.

Seetanath Mundul (Decree-holder) *Appellant,*

versus

Anund Chunder Roy and others (Judgment-debtors) *Respondents.*

Baboo Oopendro Chunder Bose for Appellant.

No one for Respondents.

If a person is to be concluded by the contention that his application to execute is not *bonâ fide*, he should be given an opportunity of explaining fully and clearly all his acts.

Paul, J.—In this case, it appears to us that the appeal should be allowed. An application was made on the 17th of January 1870 to execute a decree dating so far back as the month of March 1859. On the present application for execution being made, the Moonsiff called for a report from his seristah, and on a perusal of that report considered the application barred by limitation, and refused to issue execution. The Appellate Court, with some general observations with reference to the utility of applying a fixed principle of law in matters of this description, upheld the decision of the Moonsiff; but neither in the one Court nor in the other do I find that the facts of the case were at all investigated, or that the judgment-creditor was given any opportunity of explaining that matters which appeared to impute to him laches were *de facto* capable of explanation. In this case a certain application was made in 1865, and certain proceedings were held upon that application, on which, however, we have no very clear information. Again, in 1868 certain other proceedings took place, and it appears that through the apparent negligence of the judgment-creditor in not depositing some Ameen's fees, the sale fell through. It appears to us that if a person is to be concluded by the contention that his application to execute is not *bonâ fide*, he should be given an opportunity of explaining fully and clearly all his acts. In this case that opportunity has not been given, and it is therefore impossible to uphold either of the judgments of the Courts below. The decision of the lower Court will be reversed and the case sent back for trial.

Kemp, J.—I entirely concur in this judgment. The Judge should send for the proceedings in the execution case of 1865. He has the power and is bound to do so under Section 168 of Act VIII of 1859.

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The 4th January 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Reversioners—Parties.

Kristo Sunkur Dutt Roy (Defendant) *Petitioner,*

versus

Koylashnath Dutt Roy (Plaintiff) *Opposite Party.*

Baboo Mohinee Mohun Roy for Petitioner.

No one for Opposite Party.

In a suit to recover possession of property held by a widow, the reversioner was held to have been erroneously made a co-defendant.

Jackson, J.—THIS is an application to be allowed to appeal in *formâ pauperis* from a decision of Moulvie Syed Abdoollah, Subordinate Judge of Mymensingh. Kristo Sunkur Dutt Roy, who is the applicant, states that his interests are affected by the decree in this case. The plaintiff had brought a suit to recover possession of certain property as the adopted son of the husband of one Hurro Soondurree, who, as the widow, was in possession of her deceased husband's property. Kristo Sunkur Dutt Roy came in claiming to be the reversioner. He was at first made a co-defendant. Subsequently, however, the Subordinate Judge considered that as his interests were remote and contingent upon his being alive upon the death of the widow, and that he at present had not any interest in the property, he accordingly in deciding the case removed Kristo Sunkur Dutt Roy from the category of the defendants, and ultimately decreed the plaintiff's claim only against the widow. Kristo Sunkur Dutt Roy now asks this Court to allow him to appeal from that decision.

We are inclined to think that Kristo Sunkur Dutt Roy ought not to have been made a defendant in this litigation at all. He is not at present interested in this property, and it is a question whether he will ever have any interest at all. At the same time, it is a great pity that the Subordinate Judge did not see this from the very first. The applicant's rights may undoubtedly be very much injured by the course adopted by the Subordinate Judge, first by making him a defendant and then striking his name off, and finally actually inserting his name in the decree as one of the parties to the suit. Looking at the circumstance that Kristo Sunkur Dutt Roy should not have been made a party, we think we ought not at present to allow him to appeal. But we direct that the Subordinate Judge strike his name out of the list of the defendants in the decree. The Subordinate Judge, having previously removed him from among the co-defendants, appears to have made a mistake in inserting his name in the decree afterwards. If there is any difficulty in carrying out this order, we will admit an appeal to carry out the order.

The decision in this case will not in any way affect the interests of the reversioner as he was no party to that decision.

A copy of this order will be forwarded to the Subordinate Judge.

The 5th January 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Sale of portion of a tenure—Section 108 Act VIII. 1859.

Case No. 1401 of 1870.

Special Appeal from a decision passed by the Additional Subordinate Judge of Dacca, dated the 4th May 1870, *reversing a decision of the Moonsiff of Lechragunge, dated the 30th September* 1869.

Nund Lall Roy and others (Plaintiffs) *Appellants,*

versus

Gooroo Churn Bose and others (Defendants) *Respondents.*

Baboo Hem Chunder Banerjee for Appellants.

Baboos Kishen Dyal Roy, Grija Sunkur Mojoomdar and *Chunder Mohun Sein* for Respondents.

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Where a sharer in an undivided talook, after obtaining a decree for money due to him on account of his share of the rent, brings to sale a portion of the tenure corresponding with the share of the rent for which he obtained a decree, the sale has no further effect than any other sale in which the right of the judgment-debtor is sold.

Jackson, J.—THERE seems from the facts of this case as put before us to have been a shikmee talook called Prankisto Roy, which was the joint property of Tripoorah Soondurree and Ram Soondur Roy, each holding an 8 annas share. The share of Ram Soondur Roy was purchased, we are not told when, by Soodharam Roy, and that share was afterwards sold in execution of a decree against the sons of Soodharam Roy, and was purchased partly in August 1860 by the plaintiffs Nos. 2 to 8, and partly in September 1864 by the plaintiff No. 1. Subsequent to these purchases, the 4 annas proprietor of the zemindaree in which the shikmee talook was situated brought an action for arrears of rent due to him upon his 4 annas share of that talook. He made Tripoorah Soondaree and Ram Soondur Roy defendants in that case. Against them he obtained a decree, and in execution of that decree he put up for sale 4 annas of the shikmee talook, and one of the defendants in this suit became the purchaser.

The present plaintiffs allege that by these proceedings in the Collector's Court, and the purchase by the defendant who has been put into possession by the Collector, they have been dispossessed of 2 annas out of the 8 annas share belonging to Ram Soondur Roy, and they bring this suit to recover possession.

The first Court gave the plaintiffs a decree, considering that they had been in possession of Ram Soondur's share with the knowledge of the zemindar. The Lower Appellate Court reversed the decision of the first Court and dismissed the plaintiffs' suit, because the plaintiffs after their purchase had not registered themselves as proprietors of the shikmee talook in the zemindar's serishta, and because the Appellate Court presumed from that fact that the zemindar was not acquainted with the fact of the purchase; and he considered that in the absence of the registration, the zemindar was entitled to sue for arrears of rent against the registered talookdar, and that the Collector was right to sell the property as against such registered talookdar, and that the defendant obtained a good title under such sale.

There has been a long contention on both sides as regards the law which is applicable to this case. The first question which appears to arise upon it is as to the law under which the sale by the Collector was held. It has been argued that it was the tenure which was sold. But we are quite satisfied that the sale, whatever might be the effect of it, was held under the provisions of Section 108 Act X of 1859, and that it was not the tenure which was sold. Under this Section, a sharer in an undivided talook, after obtaining a decree for money due to him on account of his share of the rent, can bring to sale the whole under-tenure under certain circumstances. But in this case the proprietor, instead of adopting that course, brought to sale only a portion of the tenure which corresponded with the share of the rent for which he obtained a decree. There might possibly be some argument, if he had brought to sale the whole tenure, that the sale would have come under the provisions of Act VIII of 1865, B. C., by which a tenure is sold free from all incumbrances. But looking at the course which the proprietor has adopted by selling only a portion of the tenure, that portion was sold, as stated in Section 108, "in the same manner "as any other immoveable property may be "sold in execution of a decree for money "under the provisions of the two next following Sections." The sale, therefore, would have no further effect than any other sale in which the right of the judgment-debtor was sold.

Applying this view of the law to this case, there can be no doubt about the effect of the sale, as the right of Ram Soondur Roy had long ago passed away from him by sale, first to Soodharam Roy, and afterwards to the present plaintiffs. The sale of 2 annas of Ram Soondur Roy's share in the tenure in the year 1868 by the Collector carried with it no results whatever. The purchaser having purchased only the rights and interests of Ram Soondur Roy in those 2 annas, and those rights being no longer in existence, purchased nothing. This is the point upon which the special appeal has been laid before us, and we think that the contention is good. We shall, therefore, set aside the decision of the Subordinate Judge on this point, and decree the plaintiffs' suit for 2 annas of the shikmee talook, with costs.

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The 5th January 1871.

Present:

The Hon'ble F. B. Kemp and G. C. Paul, *Judges.*

Documents—Mofussil procedure—Special appeals.

Case No. 1344 of 1870.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 10th June 1870, *reversing a decision of the Subordinate Judge of that District, dated the 30th March* 1870.

Nund Kishore Doss Mohunt (Defendant) *Appellant,*

versus

Ram Kulpo Roy (Plaintiff) *Respondent.*

Baboos Ashootosh Dhur and *Rajendro Nath Bose* for Appellant.

Baboos Juggadanund Mookerjee and *Hem Chunder Banerjee* for Respondent.

The rules which regulate the conduct of cases in the Mofussil Courts do not necessitate the proving of documents which are not disputed.

Grounds of special appeal should be specific, and should indicate clearly the error of law assigned, or the substantial error or defect in law in the procedure or investigation which is imputed; and in the latter case it should be made to appear on the face of the ground of appeal that such error or defect probably produced error or defect in the decision on the merits, by stating what bearing it had on the merits.

Paul, J.—If the rule which is now being adopted by the Chief Justice in hearing applications for the admission of special appeals required an illustration of its utitity, this case will afford a very striking example. In this case, the decision turned entirely upon certain questions of fact upon which the Appellate Court came to a very clear conclusion as follows:—"That by judicial documents, the plaintiff has proved that he "carried on business separate from the family; that he has always been in possession "of this estate on this own account; that "the family separated in 1263 B.S.; and that "he has been in possession since the separation." The questions of facts were thus very clearly and very distinctly found by the Lower Appellate Court; and that Court also devoted considerable time and trouble to the dissection of the case, and to the consideration of the evidence. Under these circumstances, one would have thought that the most contentious mind in the world could hardly have discovered any thing justifying a resort to a special appeal.

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If the case of Beglar *versus* Toka Sherol, reported in Volume VI, Moore's Indian Appeals, page 522, be consulted, it will be found there to be substantially laid down by the Privy Council that the rules which regulate the conduct of cases in the Mofussil Courts do not necessitate the proving of documents which are not disputed. The remarks of the Privy Council are as follows:—"It is said on the part of the appellant that "that will was not properly in evidence, for "although a will was produced (or rather "an official copy of a will was produced) "there was no examination of witnesses, "&c., &c. If it would be necessary to de"cide that question, their Lordships would "be inclined to hold that the will was suffi"ciently in evidence for the purposes of this "suit. The Regulation provides that where "documents are produced and they are not "disputed, they shall be received without "proof." Therefore, I am right in holding that the ground as drawn is no ground of special appeal.

The other grounds I do not notice in detail, because they fall within one or the other of the two criteria within which I have said these grounds of special appeal came.

I desire here to point out that the grounds of special appeal should be specific, and should indicate clearly the error of law assigned or the substantial error or defect in law in the procedure or investigation which is imputed; and in the latter case it should be made to appear on the face of the ground of appeal, that such error or defect probably produced error or defect in law in the decision on the merits, by stating what bearing the supposed error or defect had on the merits of the case.

If the grounds of special appeal are not so drawn, I think the special appeal should be dismissed without further consideration being accorded to the case. It must also be borne in mind that mere criticisms of the

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reasoning employed by Courts below are not grounds of special appeal. The fact that a Judge's mind was influenced by circumstances which in another mind would not carry the same weight or produce the same effect, is not a matter which warrants a ground of special appeal. In the practice of an honorable profession, too much stress cannot be placed on the propriety of drawing and certifying grounds of special appeal, which are so in law, and which are at least arguable and capable of being supported by some distinct matter or circumstance in the case.

It appears to me that beyond taking up the time of the Court most unnecessarily, no possible advantage has accrued to the appellant, either from filing the special appeal, or from the arguments addressed to us. The case turned upon questions of fact properly investigated and carefully decided in the Court below, and these specious grounds of special appeal were merely put in against the interests of justice for the purpose of causing delay.

These being my views, it is unnecessary to add that the special appeal should be dismissed with costs.

Kemp, J.—I concur in dismissing the special appeal with costs.

The 5th January 1871.

Present:

The Hon'ble F. B. Kemp and G. C. Paul, *Judges.*

Review—Additional evidence.

Case No. 1316 of 1870.

Special Appeal from a decision passed by the Officiating Judicial Commissioner of Chota Nagpore, dated the 18th April 1870, affirming a decision of the Deputy Commissioner of Hazareebaugh, dated the 15th April 1869.

Tekeet Khood Narain Singh (Defendant) *Appellant,*

versus

Toolsee Roy and others (Plaintiffs) *Respondents.*

Mr. C. Piffard and *Baboo Ram Chunder Mitter* for Appellant.

Mr. R. T. Allan and *Baboo Mohesh Chunder Chowdhry* for Respondents.

In a suit for confirmation of title to a village alleged to be in the possession of plaintiff under a mokururee pottah, the first Court found the pottah to be genuine and gave plaintiff a decree. The Lower Appellate Court at first doubted the genuineness of the pottah and reversed that decision, but on an application for review admitted additional evidence on both sides and dismissed the appeal.

HELD that the Lower Appellate Court ought not to have allowed points to be explained away in the review stage by admitting additional evidence thereon, though in this particular case injustice was not done.

Kemp, J.—THE plaintiffs in this case, the special respondents before us, sued alleging that they and their ancestors were in possession of the village in dispute under a mokururee pottah dated Magh 1244, executed by the great grand-father of the defendant. It appears that the plaintiffs having sued certain ryots under Act X of 1859, the defendant, special appellant, intervened, and the Deputy Collector, instead of trying under that Section the question of actual receipt and enjoyment of the rent, went into the title of the plaintiff in that case, and finding, for reasons stated in his decision, that the mokururee of the plaintiffs was not proved, dismissed the plaintiff's suit. The consequence was that the plaintiffs were obliged to bring this suit in the Civil Court. The defendant denied the mokururee set up by the plaintiffs, admitting at the same time that the village was in the possession of the plaintiffs under a pottah given by the defendant's ancestor in payment of a certain debt, and subsequently the village was mortgaged to the plaintiffs under a bhurnanamah; that according to the terms of the bhurnanamah, the plaintiffs remained in possession up to the year 1273 Fuslee; and that in 1272 Fuslee the defendant took possession of the village in dispute.

In the first Court, the Deputy Commissioner of Hazareebaugh, in a very carefully considered judgment, found that the defendant had made no effort whatever to produce the deed of bhurnanamah; that he had attempted to prove it by secondary evidence which the first Court, for reasons given in great detail in the judgment, would not believe. The first Court then observes upon the facts, that the plaintiffs were admittedly in possession before the bhurnanamah deed, and that the defendant had it in his power to show, if such was the case, that that possession of the plaintiffs was under a terminable lease, by producing the plaintiff's kubooleut which he failed to do; that on the contrary, the plaintiffs had produced their deed of mokururee which was 30 years old, and had been followed admittedly by possession;

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and on the whole case he was of opinion that the deed produced by the plaintiffs was genuine.

On appeal to the Officiating Judicial Commissioner, he, on the first instance, was of opinion "that the execution of the mokurruree pottah had been proved to a certain "extent, but that, looking at the case altogether and taking into consideration the "absence of all corroborative proof," he considered that the proof of execution was not sufficiently reliable as to warrant a decree in the plaintiffs' favour. He therefore reversed the decision of the first Court.

There was then an application on the part of the plaintiffs for a review of judgment, which review was admitted, and certain documents were put in, namely, certain farkhutees as corroborative of the pottah. Both parties also adduced evidence, witnesses were examined, and the Officiating Judicial Commissioner on grounds stated in his decision considered that his former decree should be reversed, and that the appeal of the defendant must be dismissed. He has gone fully into the case, and has given his reasons for admitting the additional evidence.

The learned Counsel for the special appellant has asked the Court to treat this case as a regular appeal. His main objection is that he has been deprived of the decision of two Courts upon that portion of the evidence, which has been adduced for the first time in the review stage in the Appellate Court, and he objects that the Judicial Commissioner has allowed points to be explained away in review. He also candidly admits that treating this as a special appeal, he is not able to say that there is no evidence in support of the farkhutees, although in his opinion that evidence is not sufficient.

On the first objection, we think that a sufficient answer may be given in this way; that the first Court having found the mokurruree to be a genuine one without the assistance of these farkhutees, the special appellant cannot say that he has been deprived of any advantage, or has been unjustly treated by the first Court not considering these farkhutees.

On the second point, we think that it may be said that the Officiating Commissioner was wrong in allowing points to be explained away in the review stage, but at the same time we think that no injustice has been done to the special appellant in this particular case. It appears that the review was applied for in January, and was not disposed of till April. There was, therefore, ample time for the special appellant to object to this proceeding; he has, however, not done so, and on the contrary has himself adduced evidence on review. Both parties well knew what points were to be decided and adduced evidence on those points.

Being, therefore, of opinion that no injustice has been done to the special appellant, by the procedure adopted on review by the Lower Appellate Court, I do not think it right to treat this case as a regular appeal; and treating it as a special appeal, there can be no doubt, as admitted by the learned Counsel for the special appellant, that the judgment of the lower Court is unassailable. The appeal is, therefore, dismissed with costs.

Paul, J.—I think it necessary in this case to add a few remarks to the judgment already given, and in which I fully concur. The real point in issue between the parties was, whether the mokurruree pottah produced by the plaintiffs in the first Court was genuine or not. The first Court, after having given the case a very full consideration, came to the conclusion that the mokurruree pottah was genuine. That decision was reversed in appeal, principally upon the ground that the genuineness of the mokurruree pottah should have been exhaustively proved, by showing that possession had been held under it, by the production of the receipts and farkhutees for the various years during which the pottah was held; and inasmuch as these farkhutees were not produced, the Court was of opinion that the genuineness of the mokurruree pottah was not established to its satisfaction. It appears that in this case the fact of the existence of these farkhutees was a matter well known to the defendant, both from the circumstance of their having been filed in the Act X proceedings, and from the petition filed by the defendant himself, in which he sought to have these very farkhutees introduced into this case with the file of the Act X case. The circumstance of their existence having thus been brought to the notice of the Judge, one would have thought that, as his doubts as to the genuineness of the mokurruree pottah on the ground of the non-production of the farkhutees could have been instantly removed by sending for the record

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in which they were filed and trying an issue as to their genuineness, the Judge would have adopted this course of proceeding before pronouncing judgment. It appears, however, that the Judge preferred deciding the case without removing the doubts he entertained, as he might have done by a very simple enquiry and investigation.

The error into which he thus fell, the party against whom the decree was passed endeavoured to rectify by an application for review. That application was admitted, and the case was ordered to be heard two months after the admission of the application for review. At the hearing on review, both parties came prepared with their evidence upon the principal issue then before the appellate Court, namely, whether these farkhutees were genuine or not, and upon this issue additional evidence was adduced on both sides. The additional evidence adduced by the plaintiff satisfied the Court that these farkhutees were genuine, and relying principally upon their genuineness the Judicial Commissioner reversed his former decision. If the matter of complaint put forward by the special appellant merely consisted of the particulars I have mentioned, hardly any objection could be raised to the decision of the Court below; but unfortunately various other matters, which appear not altogether relevant to the case, were introduced into the judgment of the Lower Appellate Court, and other points which the Judicial Commissioner had at first thought went far to negative the genuineness of the mokururee pottah were further allowed to be explained by fresh evidence, and these circumstances have given rise to the just complaint of Mr. Piffard which he has very ably put forward,—that it would be highly dangerous to allow parties on review to explain away such parts of a judgment as are obnoxious to them by the production of fresh evidence. In this remark I believe every one here fully concurs; but inasmuch as it appears that these farkhutees did exist to the knowledge of the defendant, and it was simply an omission not to have gone into the question whether they were genuine or not, I do not think that any injustice has been committed in investigating and adjudicating upon their genuineness, and in fact I consider injustice would have been committed if such investigation had not taken place. Therefore, while admitting the correctness of the general remarks made by Mr. Piffard as to the impropriety of allowing parties the liberty to prop up a failing case by the production of additional evidence in the appeal or review stage, the present case is, I think, clearly distinguishable. In this particular case, the Judicial Commissioner was perfectly right in satisfying his conscience in the way he has done on a matter as regards which he was admittedly not satisfied, and in making the enquiry which he has made for the purpose of removing the doubts which he at first entertained, and which on being removed enabled him to give judgment in favour of the plaintiffs. This being so, there is no reason why this case should be heard as a regular appeal; and as it is admitted that in special appeal the judgment of the Lower Appellate Court is impregnable, this special appeal must be dismissed with costs.

The 6th January 1871.

Present:

The Hon'ble E. Jackson and Onookool Chunder Mookerjee, *Judges.*

Act VIII of 1835—Sale of tenure—Incumbrances.

Case No. 1382 of 1870.

Special Appeal from a decision passed by the Additional Judge of Chittagong, dated the 22nd April 1870, *reversing a decision of the Moonsiff of that District, dated the 25th August* 1869.

Meer Jaseemooddeen (Plaintiff) *Appellant,*

versus

Shaikh Munsoor Ali and others (Defendants) *Respondents.*

Baboo Debendro Narain Bose for Appellant.

Baboo Okhil Chunder Sein for Respondents.

A sale under Act VIII of 1835 does not convey a tenure free from all incumbrances, unless there was a stipulation in the documents by which the tenure was created providing for its sale for arrears of rent.

Mookerjee, J.—THE plaintiff brought this suit for possession of a certain piece of land, on the ground that it is covered by his *howladaree* pottah dated 1267; that the land is situated in talook Mojid Mali, which has been sold under the provisions of

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Act VIII of 1835, and purchased by the defendants who have dispossessed him from this *howala*.

The defendants, among other pleas, contended that this pottah was a false and fabricated document and that the plaintiff's claim was a false one; that the sale having been held under Act VIII of 1835, they acquired the talook free from all incumbrances, and that therefore the plaintiff has no right to recover possession of this land.

The first Court gave a decree to the plaintiff, finding that the pottah produced by him was genuine, that it was registered, that possession was held under that pottah, and that the defendants having dispossessed him the plaintiff was entitled to recover.

On appeal, the Judge, after having required the appellant, defendant, to produce the pottah constituting the original tenure which had been sold, takes up the case on another day and says:—"The original *talookee* "*pottah* of 1856 has been filed. It con- "tains no clause the effect of which would "be to render such tenures as might be "created by *howladaree pottahs*, such as "that relied on by the plaintiff, superior to "the result of a sale of the talook for its "own arrears." And he considers that the sale under Act VIII of 1835 has cancelled the pottah, because it was a sale of the tenure for its own arrears.

We find, however, that the original *talookee pottah* has not been filed.

It has been contended on special appeal before us, that the sale of this tenure under Act VIII of 1835 did not, under the Full Bench Ruling of this Court reported in VII Weekly Reporter, page 260, confer upon the purchaser any right to hold the tenure free from all incumbrances imposed upon it by the former holder; and that therefore it has not the effect of rendering inoperative the pottah created by the defaulting talookdar, but that the purchaser is only entitled to rent.

We find this contention to be good. The sale under Act VIII of 1835 does not convey to the purchaser the tenure free from all incumbrances, "unless there was a sti- "pulation in the documents by which the "tenure was created providing for the sale "of such tenure for arrears of rent." The pottah of the tenure sold has not been filed in this case, nor is there any contention that the documents contain the stipulation referred to above. The only plea raised by the defendant was that the *howladaree pottah* set up by the plaintiff was false. The *howla pottah* of the plaintiff, therefore, if proved to be genuine, would not fall by the operation of the sale under that Act. The Judge, being of opinion that the mere fact of the sale gets rid of the tenure, considers "that the question of the genu- "ineness of the pottah in question need "not be gone into." As we are of opinion that the view taken by the Judge of the law is not correct, the case must go back to him for an adjudication upon the question of the pottah. The Judge should enquire into the genuineness or otherwise of the pottah, and decide the case according to the result of that enquiry. We, therefore, remand the case to the Judge for a decision on the merits with reference to the above remarks.

Costs to follow the final result.

The 6th January 1871.

Present:

The Hon'ble E. Jackson and Onookool Chunder Mookerjee, *Judges.*

Parties—Benamee purchases—Beneficial ownership.

Case No. 1130 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Tipperah, dated the 21st March 1870, *reversing a decision of the Moonsiff of Soodharam, dated the 31st May* 1869.

Akbur Ali (Plaintiff) *Appellant,*

versus

Mahomed Faiz Buksh and others (Defendants) *Respondents.*

Mr. J. S. Rochfort for Appellant.

Baboo Chunder Madhub Ghose for Respondents.

In a suit by a father against a son to recover the title-deeds of certain property alleged to have been purchased by the plaintiff in the name of the defendant when the latter was about 2 or 3 years old, which title-deeds were said to be fraudulently retained by the son, the defendant did not appear, but two other persons who alleged that they were mortgagees from the son were made parties:

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HELD that these parties should not have been allowed to appear as defendants, simply on the allegation that they had lent money to the son on the security of the property.

In cases of benamee purchase in India, the criterion of beneficial ownership is the source from which the purchase-money is derived.

Mookerjee, J.—THE present suit was instituted by one Akbar Ali originally against his own son, defendant, Mahomed Faiz, to have it declared that the property in dispute belongs to him, and not to the defendant Faiz. Plaintiff states that he purchased the property so far back as 1253, B. S., with his own money in the name of the defendant, his son, when that son was 2 or 3 years old; that he remained all along in possession, but that having occasion to go to Mecca in Pous 1273, he left the title-deeds of the property with the defendant, and entrusted him with the management of his affairs; that the defendant taking advantage of his absence has assumed the ownership of the property, and refused to give him back the deeds when the plaintiff asked him so to do on his return from the pilgrimage; that this son had, moreover, sued some ryots on this property for rent in his own name, and that when the plaintiff intervened, his intervention was disallowed on the objection of the defendant who got a decree for rent on the 7th February 1868. Plaintiff, therefore, sues for the confirmation of his right to the property.

Mohamed Faiz, the son, does not appear, but two persons of the name of Muddun and Vyrab appeared as third parties, stating that they are mortgagees of the property from the son who, they contended, was the real and beneficial owner of the property. They further alleged that the father and the son have collusively instituted this suit to obtain the required declaration in order to defraud them, the creditors of the latter; and lastly, they prayed that they may be made parties to this suit under Section 73 of the Civil Procedure Code.

The Court of first instance thereupon made them parties, and in their presence, holding on the evidence that the plaintiff has satisfactorily proved his case, gave a decree to the plaintiff.

Against this decree, there was no appeal on the part of the Mahomed Faiz, but the defendants Muddun Mohun and Vyrub Chunder only appealed.

The Subordinate Judge remanded the case for fresh investigation, laying down several issues for the determination of the Court below.

The Moonsiff has again decided the case in favor of the plaintiff. The Subordinate Judge having reversed his decision, the plaintiff has preferred this special appeal.

It is contended before us for the appellant, that Muddun Mohun and Vyrub have been unnecessarily made defendants in the cause; that they have no share or interest in the subject-matter of the suit, and are not likely to be affected by the result thereof; that the interest they themselves allege they have in the property is of such a remote and contingent nature, that possibly they may have nothing to do with the property in dispute.

We find that these added defendants are not parties in possession of the property; that they are allowed to appear as defendants simply on an allegation that they have lent money to the son on the security of the property, and may have to fall upon it in case they succeed in obtaining a decree on the bond executed in their favor, and in the event of that decree not being satisfied by their debtor. This assuredly is a very remote interest in the subject-matter of the suit. We do not think, therefore, that the Court of first instance has exercised a sound discretion in allowing such parties to be added as defendants in the cause, and thereby complicate the proceedings in this suit; but as the trial in both the Courts has proceeded in the presence of these parties as the only defendants contesting the claim of the plaintiff, and evidence gone through at great length, we do not think it proper at this stage of the case to quash the whole of the proceedings had in the Courts below.

On the merits of the case, however, we are not at all satisfied with the decision of the Subordinate Judge. He states in his judgment that the "plaintiff during the "minority of the son might have bought the "property for his son, or he might have "bought it for himself in his son's name;" but the contention raised before him by the mortgagee defendants was, that Mohamed Faiz, the son, got this property from his own sister by a hibbanamah, and that no money was paid by the father or anybody. If the Subordinate Judge was of opinion, and there is ample evidence in the record including the testimony of the vendor's husband to support such a conclusion, that money was actually paid by the plaintiff and that the property was purchased by him

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from his daughter on payment of a consideration, we cannot understand why this issue should not be decided in favor of the plaintiff.

The Subordinate Judge, likewise, remarks that "this point can be best explained by "the kobala or hibba through which the "property was transferred by Mymoona "Bibee. This document is not forthcoming." Now, the plaintiff distinctly alleged that at the time of his going to Mecca, he made over all the title-deeds of the property to his son, and had actually prayed that the defendants might be called on to produce the documents in Court. This allegation, as far as we have seen, was never traversed by the defendants, and it is no part of their case that plaintiff holds that document in his possession. If the defendants have not chosen to produce that deed in Court, although basing the title of their mortgagor on it, the plaintiff is not to suffer, but was in a position to adduce evidence to show that it was in fact a bill of sale executed in his favor for a valuable consideration.

In another part of the Subordinate Judge's judgment occurs the following passage :—"Now, for 24 years the land was in the son's name, and it was in his possession likewise for years together after he attained his majority, and the plaintiff, that is, the father, never made any attempt to convince the money-lendors and neighbours that he was the actual owner of the property. He stood by and saw the public deceived by his son, and therefore he cannot, after nearly 24 years, say that the property does not belong to his son." Now, the Subordinate Judge does not find when the son attained his majority, and from what year the son assumed the management of this property on his own account. We find on reference to the record that it is almost an admitted fact that in 1253 when the property was acquired, the son Mohamed Faiz was 2 or 3 years of age ; he must, therefore, have been a major not until 1268 or 1269. The father went to Mecca in 1273 and the mortgage is dated 1274.

The first Court has distinctly found that the father has all along been in possession of this land from the date of the purchase. If the Subordinate Judge was of a different opinion as to this point of possession, it was incumbent on him to find when that possession commenced and the nature of such possession ; for assuredly during the son's minority the plaintiff was in possession, and it remained to be seen when the possession of the father ceased and that of the son began. Moreover, we do not clearly understand what the Subordinate Judge means by the remark, that "the father never made any attempt to convince the money-lendors, &c., that he was the actual owner of the property." The Subordinate Judge could not have been unaware that benamee purchases in the names of children are always made in India, and are in conformity to the general usage and custom of the country prevailing among Hindoos as well as Mahomedans. The criterion in cases of benamee purchases in India is, as held by the Lords of the Privy Council in Gossain *versus* Gossain, in V Moore's Indian Appeals,* to see from what source the money required for the purchase came. If a father has thought fit, following the custom of the country, to make such a purchase in the name of his infant son, we do not know what measures, if any, he is to resort to, to convince money-lendors that he, the father, was the owner of the property. The presumption in these cases, especially where the son was an infant of 2 or 3 years of age at the time of the purchase, and there is no suggestion that he had any separate funds of his own, is always in favor of the father ; and it is on the defendant to rebut that presumption, and show according to his allegation in this case that the acquisition of the property was not by purchase, but by a gift to the defendant Faiz by his sister Mymoona Bibee, and therefore an acquisition of the son.

As regards the last remark of the Subordinate Judge that "the plaintiff stood by and saw the public deceived by his son," the pleader for the respondent admitted before us that there is no evidence in the record to support such a finding. We also find on a reference to the evidence in the case that not only is that finding wholly unsupported by evidence, but the contrary appears to be the case, namely, that the mortgages to the defendants were executed at a time the plaintiff was absent on a pilgrimage to Mecca.

We are, therefore, of opinion that the decision of the Subordinate Judge ought to be reversed, and the case sent back to him to pass a fresh decision, keeping in view the law and tests by which cases of this nature are to be governed, and with reference to the remarks made above. Costs to abide the final result.

Jackson, J.—I quite concur.

* 4 W. R., P. C., p. 46.

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The 6th January 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Benamee transactions—Bona fides—Evidence.

Case No. 265 of 1870.

Regular Appeal being Appeals Nos. 673 *and* 674 *of* 1869 *of the Court of the Additional Subordinate Judge of Dacca, dated the* 31*st March* 1871, *against the decision of the Sudder Moonsiff of that District, dated the* 27*th August* 1869, *transferred to this Court for determination after the remand of the case on the* 13*th December* 1870. *upon the hearing of the Special Appeal No.* 1236 *of* 1870.

Bhoobun Chunder Burral and others (Defendants) *Appellants,*

versus

Sreemuttee Nagoree Dassia (Plaintiff) *Respondent.*

Baboos Hem Chunder Banerjee and *Luleet Chunder Sein* for Appellants.

Baboos Gopal Lall Mitter and *Huree Mohun Chuckerbutty* for Respondent.

Registration of a deed does not affect the question of *bona fides*, nor is a conveyance to be considered *bonâ fide*, simply because there is proof of its execution and some statement that money was on the occasion actually paid by the vendee into the hands of the vendor in the presence of witnesses unacquainted with the circumstances of the parties and the relation they bear to each other; but in coming to a conclusion, the circumstances and probabilities are to be carefully considered and weighed, *e. g.*, the object for the purchase, whether the purchase-money really belonged to the purchasers, and whether possession was taken after purchase, and, if not, why possession was not taken.

Mookerjee, J.—THE present suit is instituted by the plaintiff, Nagoree, widow of one Nemy Churn, to have it declared that the property attached by her in execution of her decree is the property of her judgment-debtors; that the sales were fictitious and nominal; and that the judgment-debtors are still the parties beneficially interested in it and are still in possession of it. The defence raised by the purchasers, defendants, are that the purchases were *bonâ fide*, and that they are in possession of the shares purchased by them.

It appears that Nemy Churn, the proprietor of this property, had 2 wives; by one wife he had 4 sons, Bindabun, Radhanath, Judoonath and Juggernath, and the other wife is the respondent. Radhanath and Judoonath have both died leaving Oma Tara and Russomonjoree as their widows.

On the 13th of June 1855, the plaintiff obtained a decree for maintenance against the sons of her co-wife, who denied she was entitled to any, on various grounds,—unchastity and the like. It does not appear whether this decree is still satisfied or not, but the plaintiff was obliged again to sue the defendant for maintenance in 1868, when she obtained a fresh decree on the 15th August 1868.

The present suit arises from the proceedings had in execution of this last decree. When the plaintiff executed this decree, the purchasers, defendants, set up the plea under Section 246 to the effect that the property belongs to them, and cannot be sold for the debt of their vendors. The defendant Bhoobun Burral set up a purchase from his cousin Juggernath of his 4 annas share in the family dwelling-house. The defendant Heera Lall, the brother of Oma Tara, pleaded that he purchased the share of his sister and that of his brother-in-law Bindabun for 200 rupees each, though in different years. Lastly, the defendant Madhub, who is the father-in-law of Juggernath, states that one Gungabishen Dass held a decree against the said Juggernath and Russomonjoree, the widow of his brother Judoonath; that Gungabishen sold this decree to him; that in execution of that decree, he, Madhub, purchased the share of Judoonath in 1864 and had since been in possession of the same.

The plaintiff has examined several witnesses, relatives and next-door neighbours of the parties, who depose to the effect that the sales are collusive and benamee made in the name of near relations of each of the judgment-debtors; that the judgment-debtors are still in possession of their respective shares as before; that the decree having been fraudulently obtained by Gungabishen, the brother-in-law of Juggernath, on the confession of Juggernath, and *ex-parte* as against Russomonjoree, he, Gungabishen, sold the same to Juggernath's father-in-law, the defendant Madhub Chunder, who executed the same and became himself the purchaser at the sale; that this purchaser never took possession, but that the four shareholders are in the beneficial enjoyment of the property on their own account,

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and that all these transactions are fraudulent and collusive. The first Court, believing the statement of these witnesses, and finding that the original judgment-debtors are still in possession of their shares in the dwelling-house, and disbelieving the story set up by one of the purchasers that he was in possession by receipt of rent from his relative as per a kuboolent executed in his favour, gave a decree in favour of plaintiff.

In appeal, it is contended before us by the defendants, private purchasers from the judgment-debtors, that they have proved their purchase of the property in question by their witnesses; that the witnesses prove that consideration actually passed; and that although the judgment-debtors are all allowed to remain in possession of the house, they are allowed so to remain as they are near relatives whom persons, especially Hindoos, would not be disposed to evict.

We find on referring to the record that the purchasers are all near relatives of the judgment-debtors; that each of them has purchased an undivided share of 4 annas belonging to his own relative in this family-house for a sum of 200 rupees; that none of them has ever been in possession of the shares purchased, though the purchases were made so far back as 1862, 1863, and 1864; that though two kubooleuts are produced to show that the judgment-debtors were allowed to remain in possession as tenants, and therefore that the object of the purchase was to get a fair return of the outlay in the shape of rent, yet no rent has ever been demanded, much less paid. The other two purchasers give no reason why they purchased undivided shares of a family dwelling-house, and why, notwithstanding their purchase, no possession has been ever attempted to be taken.

The auction-purchaser, Madhub Chunder, examines no witnesses and gives no proof of the *bona fides* of his purchase. He is admittedly the father-in-law of the judgment-debtor, Juggernath, and though he purchased the decree from the brother-in-law of the said Juggernath; who was the original holder of it for value, and though he took the trouble and incurred the expense of executing that decree against his own son-in-law and purchasing in execution in 1864 the right and title of Russomonjoree, Juggernath's share as alleged having been sold by him to Bhoobun before, yet we find that he does neither take actual possession, nor seek to derive any benefit from his purchase. This Russomonjoree is no friend of Madhub, and there is, therefore, an utter absence of any explanation for forbearance except in the theory propounded by the plaintiff, that all these transactions of decree, purchase, and sale having been made by and with the money of Juggurnath, he, Juggurnath, remained in the beneficial enjoyment and possession of the same as before, under the new title acquired in the name of Madhub Chunder.

It is next contended by the pleaders on behalf of the appellant, that there is no proof on the part of the plaintiff that the money was the money of the judgment-debtors; but there is proof that the bills of sale were executed and registered, and the witnesses speak of considerations having actually passed. The lower Court who examined the witnesses disbelieve their testimony for reasons which appear to us to be correct and proper. Many of these witnesses are unacquainted with the relationship between the vendor and the vendee, and appear from their own statement to be wholly ignorant as to who is in possession of the premises after the sale. Others are near relatives and dependants of the vendors, who state that the purchasers are in possession by receipt of rent from the judgment-debtors having taken kubooleuts from them. The pleader for the appellant, however, did not think it proper to make any allusion to rent having been either paid by or intended to be received from the judgment-debtors, the argument being confined to the simple fact that being relatives the purchaser could neither evict them nor demand rent. We find, however, that beyond the two kubooleuts from two of the judgment-debtors, there is not a particle of evidence to show that any rent has ever been demanded, much less received.

Registration of the deeds does not affect the question of *bona fides*, for even in undoubted cases of fraudulent and colorable transactions parties would resort to registration for the object of creating a belief that the transactions are honest and above board. A conveyance is not to be considered a *bonâ fide* one simply because there is proof of the execution of the deed, and some statement that money was on the occasion actually paid by the vendee into the hands of the vendor in the presence of witnesses, who are unacquainted with the circumstances of the parties and the relation they bear to each other; but in coming to a conclusion as to whether a purchase is honest and

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bonâ fide, the circumstances and probabilities are to be carefully considered and weighed. It should be seen what could have been the object for the purchase by the vendees, whether the purchase-money really belonged to the purchasers, or was the money of the vendors themselves paid into the purchaser's hands to be repaid to the vendor before the attesting witnesses,—whether possession was taken by the purchasers after the purchase, or what explanation, if any, is given for not taking possession of properties for which it is alleged valuable consideration has been paid. Here, in this case, besides the near relationship of the parties, the absence of any satisfactory explanation as to why possession was not taken, notwithstanding that the purchases were made 6 or 7 years ago, the purchaser buying an undivided one-fourth share, the exact share of each of their own relatives who are proved to have been in debt at the time, there are many other badges of fraud which throw the greatest suspicion on the *bona fides* of the purchases made by the defendant. No evidence has been adduced to show that the money belonged to the purchasers; that they had any object in the purchases; that any of them got actual possession or ever demanded rent or received it; the purchasers themselves do not come forward to speak to the honesty of their purchase; they merely content themselves by examining some witnesses who are either strangers to the family, and had been only called on to witness the execution of the deed or are dependants of the vendors, who speak in such a vague and general way as to the passing of the consideration that we are unable to place any credence on their testimony. On the whole circumstances of this case, we come to the conclusion that the purchases are not true and honest; that the consideration-money which the witnesses speak of, if ever it passed, belonged to the vendors themselves; and that the judgment-debtors are the parties beneficially interested in the purchase ostensibly made in the names of their relatives. We, therefore, uphold the decision of the first Court and dismiss the appeal with all costs.

Jackson, J.—I also think that the appeal should be dismissed on the grounds stated by my learned colleague.

The 6th January 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Sale for arrears of rent—Notice—Jurisdiction—Section 13 Act VIII (B. C.) of 1865.

Case No. 1365 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Chittagong, dated the 19th April 1870, reversing a decision of the Moonsiff of Satkaniah, dated the 17th November 1869.

Nugendro Chunder Ghose and another (two of the Defendants) *Appellants,*

versus

Musruff Bibee (Plaintiff) *Respondent.*

Baboo Nil Madhub Sein for Appellants.

Baboo Banee Madhub Dutt for Respondent.

The fact of no notice having been served in the mofussil is sufficient ground for setting aside a sale for arrears of rent.

An appeal to the Collector is not necessary as a condition precedent to a suit in the Civil Court under Section 13 Act VIII (B. C.) of 1865.

Mookerjee, J.—THE point urged in this special appeal is that the Judge was wrong in not trying the question whether the rent had been paid by the plaintiff as alleged by him, and that no suit lies in the Civil Court under Section 13, Act VIII of 1865, B. C., when there was no appeal to the Collector on the ground of irregularity.

As regards the first point, we find that there were two objections raised by the plaintiff before the Courts below; first, that no notice had been published, as required by

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law, in the mofussil ; and secondly, that he paid rent for the period for the arrears of which the sale had taken place. If, as the Judge finds, there is reason to believe that no notice had been issued in the mofussil, that ground was of itself sufficient to set aside the sale.

As regards the question under Section 13, Act VIII of 1865, B. C., we find that the law does not lay down that the plaintiff must appeal to the Collector, and that this step by the plaintiff is a condition precedent to his having recourse to the Civil Court for his redress. An appeal has been provided by law in order that parties injured may resort to it for invalidating the sale ; but it certainly does not say that the parties cannot come to the Civil Court to set aside the sale, unless there was previously an appeal to the Revenue authorities. We think the Judge is right in setting aside the sale, as having been held without any service of notice in the mofussil as required by law, and we see no reason to interfere with his decision.

The appeal is dismissed with costs.

The 6th January 1871.

Present :

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Objections—Section 348 Act VIII of 1859.

Case No. 1588 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Hooghly, dated the 20th June 1870, *reversing a decision of the Moonsiff of Serampore, dated the 30th March* 1870.

Thakoor Dass Goshamee and others (Defendants) *Appellants,*

versus

Gopee Kristo Goshamee (Plaintiff) *Respondent.*

Baboos Hem Chunder Banerjee and *Bama Churn Banerjee* for Appellants.

Baboos Obhoy Churn Bose and *Mohendro Lall Mitter* for Respondent.

Objections under Section 348 Act VIII of 1859 may be urged at any time in the course of hearing of an appeal.

Mitter, J.—We think that the Lower Appellate Court was wrong in refusing to entertain the objections urged by the special appellants under the provisions of Section 348. The law says that such objections can be urged at any time in the course of the hearing, and the special appellants were therefore entitled to bring them forward before the case was closed on their side.

We, therefore, remand this case to the Lower Appellate Court to try it *de novo* after hearing all the objections urged by the special appellants under Section 348. The costs will abide the ultimate result.

The 6th January 1871.

Present :

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Jurisdiction—Zemindar—Ijardar.

Case No. 1372 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Officiating Judge of Mymensingh, dated the 25th April 1870, *reversing a decision of the Deputy Collector of that District, dated the 30th December* 1869.

Mussamut Gobind Monee and others (Plaintiffs) *Appellants,*

versus

Rajendro Kishore Chowdhry and others (Defendants) *Respondents.*

Baboo Sreenath Banerjee for Appellants.

Baboos Sreenath Dass and *Bhugobutty Churn Ghose* for Respondents.

A suit on the ground of illegal ejectment effected by the zemindar or by a servant acting under him cannot be brought under Act X of 1859, when the defendant is the ijardar entitled to the rents.

Jackson, J.—We think this case must be remanded to the Judge for re-trial. The plaintiff alleging himself to be a tenant of a certain plot of land, has brought this suit against the defendant, who, the plaintiff alleges, is the ijaradar of the village and is entitled to receive rent for the land, and who has illegally ejected him from his jote.

The first Court, *viz.*, the Deputy Collector, after investigation on the spot, has decided that the defendant was the ijaradar of the

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village, and that he had dispossessed the plaintiff from this piece of land. The Judge, on appeal, refers the plaintiff to a civil suit, and holds that the revenue Court has no jurisdiction. He says that "the alleged act "of dispossession is not stated to have been "done, either by the order of the zemindar "or of a servant acting under him." This is very true if it had been done by the zemindar or by a servant acting under him, the case could not have come under Act X of 1859, while the defendant was the ijaradar entitled to the rents.

The Judge goes on to say:—"Moreover, "the defendant in his written statement does "not seem to claim any right as a farmer, "but alleges that he received the small por-"tion of ground in dispute from the zemin-"dar's gomastah as a ryot.

"Under the circumstances of the case, it "seems to me that the plaintiff had no *locus* "*standi* against the defendant in the revenue "Court, and that his proper course would "have been to sue the defendant as a tres-"passer in the Civil Court."

The Judge cannot decide this case upon the mere allegation of the defendant. It may be that the defendant denies that at the time he dispossessed the plaintiff he was the ijaradar, but then this comes to be a question for decision; the plaintiff states that the defendant was the ijaradar and the defendant states that he was not, and until this point is decided the case cannot be thrown out of the revenue Court. It may be that upon the trial the plaintiff will be able to prove that the defendant was at the time the ijaradar. If so, the suit was very properly brought in the revenue Court.

The Judge has not in any way decided any single fact connected with the case. The Judge must go into the facts of the case and apply the law to the facts he finds.

Costs will abide the final result of the case.

The 6th January 1871.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Benamee sale—Bona fides.

Case No. 1605 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of East Burdwan, dated the 5th May 1870, *reversing a decision of the Moonsiff of Kytee, dated the 26th November* 1869.

Shaikh Golam Russool (Plaintiff) *Appellant,*

versus

Shaikh Abdool Ruheem and others (Defendants) *Respondents.*

Baboos Sreenath Doss and *Mohinee Mohun Roy* for Appellant.

Mr. R. T. Allan for Respondents.

Where property is bought from a wife as the ostensible owner, the husband consenting to the sale and the transaction is *bonâ fide* on the part of the purchaser for a consideration, the purchase is a good one, even if the property is not the wife's but the husband's.

Glover, J.—THE facts of this case are to be found in the judgment of the Lower Appellate Court in special appeal No. 1562. In this case, the plaintiff bought a one-third share of a certain tank ostensibly owned by Izzutunnissa, the name of Irshad Ali, her husband, being added to the deed of sale as one of the subscribing witnesses. A party who had a decree against the husband took out execution and attached this one-third share of the tank. The plaintiff then made a claim under his purchase, but his objections were rejected, and therefore he brings this suit to establish his right in the property. The Judge has decided the case in connection with the case abovementioned, simply on the ground that the "hibbah-bel-ewuz" granted by the husband to the wife was a collusive transaction in fraud of creditors. But he has not gone into the question as to whether the plaintiff in this suit bought the property from the wife with the consent of the husband in good faith and without collusion. If he bought

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from the ostensible owner Izzutunnissa, if the husband consented to the sale, and if the transaction was *bonâ fide* on the part of the plaintiff for consideration, the purchase would be a good one even if the property were not the wife's but the husband's, and would not depend, as the Subordinate Judge has supposed, upon the validity or otherwise of the hibbah-bel-ewuz.

The case must, therefore, be remanded for a fresh trial. Costs to follow the result.

The 9th January 1871.

Present:

The Hon'ble G. Loch and W. Ainslie, *Judges.*

Rent-suit by sharer—Pleas.

Case No. 1442 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Officiating Judge of Nuddea, dated the 20th July 1870, *reversing a decision of the Deputy Collector of that District, dated the* 31*st March* 1869.

Brijo Lall Roy (Plaintiff) *Appellant,*

versus

Shama Churn Bhutt and another (Defendants) *Respondents.*

Baboos Romesh Chunder Mitter, Grish Chunder Mookerjee and *Rash Beharee Ghose* for Appellant.

Baboos Sreenath Doss and *Motee Lall Mookerjee* for Respondents.

In a suit by a dur-putneedar for rents for a portion of an estate, where the defendant abandoned in the first Court the plea that plaintiff could not sue separately from his co-sharer:

HELD that the plea could not be entertained in the Lower Appellate Court.

Ainslie, J.—IN this suit the plaintiff claims rent of certain lands situated in four villages. It is stated that six villages were granted in putnee to one Rakhal Doss Banerjee, and that in these six villages the defendant held lands at an annual rent of rupees 1,342.

Rakhal Doss Banerjee sub-let the villages in dur-putnee, 4 to the plaintiff and 2 to one Judoonath Chatterjee. In a written statement in a former suit, the defendant stated the amount payable on account of the last two villages and also in this suit at the time of settling the issues, that amount, *viz.*, rupees 293-3, was admitted before the Deputy Collector. The plaintiff claims the difference between the total rent of rupees 1,342 and the rent of the land in those two villages.

The Deputy Collector has held that the rent payable to the plaintiff is sufficiently determined by the defendant's own admissions. He has also adjudicated on the plea of non-occupation set up by the defendant, and deducting the amount paid as admitted by the plaintiff, he has given a decree for the balance with an order for ejectment on failure to pay the amount decreed within 15 days.

The defendant appealed to the Judge, who has dismissed the suit without going into the merits on the ground that the plaint fails to disclose a title in the plaintiff to sue separately from Judoonath Chatterjee, and says "the grounds of the claim "are so utterly inadmissible, that even "though the defendant has gone far in "admitting the claim (though not so far "to enable the Court to pronounce any "decision on the merits), the whole of the "costs must fall on the plaintiff."

In special appeal, it is contended that the defendant never pleaded that the lands of the six mouzahs constituted an indivisible tenure, and that there was no issue as to plaintiff's right of separate suit, and that defendant pleaded payment of a portion of the claim to the plaintiff. On the other hand, we have been referred to cases reported at page 109, Volume X, Weekly Reporter; page 30, XII Weekly Reporter; and page 469, XIII Weekly Reporter.

In the first case Mr. Justice Phear, while holding that a kubooleut given to a mother could not after her death be treated as two separate kubooleuts in favor of her two daughters for their respective shares of their mother's estate, remarks that the original contract might probably have been varied by a subsequent parol agreement so as to give each daughter a separate right of suit,

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In the second case Mr. Justice Macpherson, in commenting on the judgment of the Lower Appellate Court, which held that a clear and undisputed definition of shares was sufficient to warrant separate suits, observes if the plaintiff can prove that the defendants have heretofore recognized him as being the proprietor of a particular share and have paid him separately a certain proportion of the rent, then no doubt a suit will lie against them.

The third case is in no way in point.

In both the earlier cases, the defendants appear to have from first to last contested the plaintiff's right of suit.

But this case is clearly distinguishable from those cases.

The defendant claimed that plaintiff should specify the separate rents of all the villages with a view to showing that, owing to non-occupation of certain portions of the land in suit, he was entitled to abatement; but when the issues were framed, he did not insist on the plea that plaintiff could not sue separately from Judoonath Chatterjee. On the contrary, he appears to have admitted that the rent of his lands in the two villages held by Judoonath was rupees 293-3, and the issues on which he went to trial were only whether he was responsible to the plaintiff for the whole of the balance. He had on a previous occasion made a similar statement as to the apportionment of the rents. I think it must be held that defendant in this suit went to trial on the understanding that he was the tenant of the plaintiff, separately, for the four villages which originally bore a certain rent, and that the only contention was whether he was not entitled to an abatement of that rent for reasons which in no way affected Judoonath Chatterjee, and whether he had not paid to the plaintiff the full amount due to him as dur-putneedar of the four villages.

The plea on which the Judge has dismissed the suit appears to have been designedly abandoned in the first Court and should not have been entertained in the Lower Appellate Court.

In this view I would remand the suit for trial by the Judge on the issues laid down by the first Court.

Costs to follow the result.

Loch, J.—I concur.

The 10th January 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Bond—Section 8 Act XXIII of 1861—Section 204 Act VIII of 1859.

Case No. 271 of 1870.

Miscellaneous Appeal from an order passed by the Judge of the 24-Pergunnahs, dated the 4th July 1870, modifying an order of the Sudder Moonsiff of that District, dated the 18th April 1870.

Abdool Kureem and others (Sureties) *Appellants,*

versus

Abdool Huq Kazee (Decree-holder) *Respondent.*

Baboo Mohendro Lall Mitter for Appellants.

Baboo Bama Churn Banerjee for Respondent.

A bond taken by the Court as security under Section 8 Act XXIII of 1861 can be enforced under Section 204 Act VIII of 1859.

Norman, C. J.—SHAHZADAH Mahomed Shumsooddeen having been arrested under a warrant in execution of a decree for rupees 822-8, applied for his discharge under Section 273 of Act VIII of 1859 on the ground that he had no means of paying the debt.

Pending the enquiry which the Moonsiff considered necessary, he released the judgment-debtor on the security of Syud Abdool Kureem and Huro Pershad Bose, who by an obligation or bond addressed to the Moonsiff bound themselves thus :—"We do "hereby stand security for the said debtor, "and covenant that should his application "for the benefit of insolvency be refused "and he be called upon to pay, we shall "immediately produce him ; and should we "fail to produce him, we shall pay without "objection the above amount together with "costs and future interest due to the decree-"holder," &c.

This bond was dated on the 22d of December 1868.

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On the 20th of December 1869, the decree-holder prayed that the sureties might be ordered to produce the judgment-debtor, and in default that the decree be executed against them.

The Moonsiff thought that as the security-bond had been entered into subsequent to the judgment, it was not one which could be enforced under Section 204, and refused the application for execution.

From that decision there was an appeal to the Judge.

The Judge, as we think rightly, holds that the bond as a security taken by the Court under the 8th Section of Act XXIII of 1861 could be enforced under the 204th Section of Act VIII of 1859, which enacts that "whenever a person has become liable "as security for the performance of a decree, "the decree may be executed against such "person to the extent to which he has ren-"dered himself liable in the same manner "as a decree may be enforced against a de-"fendant."

The cases referred to by the Moonsiff, IV Bengal Law Reports, Appendix, 27, *Gujendro Narain Roy *versus* Hemanginee Dossee, and VII Weekly Reporter, 329, Ram Kishen Doss *versus* Hurkoo Sing, are distinguishable from the present. There the liability of the sureties did not arise in the course of or out of proceedings in the suit, but upon distinct and independent contracts made between the sureties and the creditor; —in the one case to pay the debt if certain attached property was released;—in the other to pay if the debtors could not pay.

Here the engagement arises in the regular course of a proceeding in the cause. The sureties do not contract with the execution-creditor, but enter into an *engagement with the Court* that the debtor shall appear when called upon, or in default of such appearance that they will pay the amount mentioned in the warrant. If the debtor failed to appear when called on within the time limited in a bond given under Section 8, the sureties as such would become liable to pay, and we think the case would fall within the terms of Section 204. The Judge says the sureties have had an opportunity of producing the debtor and have not taken advantage of it. He does not say when the default took place.

For ourselves we have great doubts whether the default in producing the defendant in the present case was such as to render the sureties liable under the bond.

By Section 8 the security is for the appearance of the party "at any time when called on while such enquiry is being made." We do not think that by the bond, though its language is not very clear, the sureties engaged or can be taken to have intended to engage for more than that. This engagement would not bind the sureties to produce the debtor at the end of an indefinite time, during which, not the enquiry contemplated by Section 8, but negotiations for a settlement were going on.

We do not understand how it was that the Moonsiff did not complete the enquiry within a week or fortnight at latest from the 28th of December 1868.

It is possible that the enquiry may have been postponed from time to time at the request or by consent of the sureties, and may not really have been concluded until the time when the sureties are supposed to have committed the default. No inquiry seems to have taken place as to the cause of the delay. We cannot, therefore, say whether there may not be circumstances which have not been made to appear before us to justify the Court in holding the sureties liable.

If there was unreasonable delay, it must be considered whether the plaintiff is in any way responsible for or consented to the delay, and whether the sureties, or either of them, consented to the delay.

The Judge will enquire and come to a finding upon the questions—when the defendant was called upon to appear and made default, what was the cause of the delay? and whether the enquiry under Section 8 of Act XXIII of 1861 was still proceeding at the time when the defendant was called upon to appear.

The Judge will return his finding with the evidence to this Court.

* 13 W. R., p. 35.

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The 10th January 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Measurement—Act VI (B. C.) 1862—Jurisdiction.

Case No. 1431 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Officiating Judge of Mymensingh, dated the 28th April 1870, *reversing a decision of the Deputy Collector of that District, dated the 30th November* 1869.

Goluck Kishore Acharjee (Petitioner) *Appellant,*

versus

Kesha Majhee and others (Objectors) *Respondents.*

Baboos Kash Beharee Ghose and *Umurendro Nath Chatterjee* for Appellants.

Baboos Hem Chunder Banerjee and *Bama Churn Banerjee* for Respondents.

Where a measurement under Act VI (B. C.) of 1862 was completed without any objections having been made to it by the ryots while in progress, it was held that it was not competent for the Judge in appeal to set aside the proceedings on objections made subsequently.

Jackson, J.—THIS was an application by the proprietor of 1 anna and 6 gundahs share of the estate called Gogra, under Section 10 Act VI of 1862, Bengal Council, to measure the lands comprised in his estate.

It appears that on the application being put in before the Deputy Collector on the 13th May 1869, orders were passed for the applicant to put in the Ameen's fee, and on the 26th May an Ameen was ordered to measure and prepare the rent-roll of the estate. He went to the spot in the month of June, and completed his measurement sending in his papers with a report on the 1st October 1869. Thirteen ryots out of 152 ryots who live upon the estate thereupon appeared before the Deputy Collector, and preferred several objections to the measurement, and subsequently they appealed to the Judge from the decision of the Deputy Collector. The Judge has, for reasons stated by him in his judgment, set aside the whole of the measurement proceedings and declared them illegal, null, and void. The special appeal to this Court is against this order.

The Judge was of opinion that the Collector had been too hasty in allowing the measurement on the application of the proprietor; that he was bound to call upon the proprietor to prove the facts upon which he grounded his application before allowing any measurement to take place; and the Judge also seemed to consider that even the facts stated in the petition of the applicant were not sufficient grounds upon which the Collector should have allowed the measurement to take place.

We may say that we think that it would have been far better if the Collector had satisfied himself by requiring the applicant to put in some evidence of the necessity of his resorting to the special provisions of Section 10 Act VI of 1862, B. C. We think he should have examined the agent of the proprietor, and required him to prove that he had made attempts to measure the lands, and then what had happened thereupon so as to require him to apply to the Collector. But at the same time, we are not prepared to say that in this case, as the application was admitted and the whole measurement had been carried out without any objection on the part of the ryots after the whole measurement had been completed and finished, it was right to quash the whole of the proceedings because sufficient enquiry was not made on that point. It is quite possible that there was some enquiry, though it does not appear upon the record.

It is said here that the Judge came to the conclusion that there were no *bonâ fide* grounds for making the application. The grounds stated in the application are very distinct, namely, that he was unable to measure the lands, that he could not ascertain who were the persons liable to pay rents in respect of the lands comprised in his estate; he

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stated that there had been numerous changes in the lands of his estate, and that when the Ameen went to measure the lands he could get no assistance from the ryots to carry out the measurement. If these facts were correct, it seems impossible to suppose that this application was not made *bonâ fide*. The applicant went to large expense in carrying out the measurement, the ryots made no objection to the measurement whilst it went on, and we think that after the whole measurement has been completed, it is not competent to the Judge to throw out the case upon objections which should have been urged in proper time, if they really had any validity in them. There is the fact also that the objection to the measurement has been raised by only 13 out of 152 ryots. We think this is an important circumstance that should be taken into consideration. We doubt very much whether the Judge has any authority to set aside the proceedings generally as regards the parties who did not appeal to him.

The case must go back to the Judge in order that he may determine the question which still remain pending, as regards the standard by which the measurement should be made, and also any other questions that were raised before him but not determined.

The Judge has come to no distinct finding, as to the question whether there was a special application for recording the rates of rent, &c. It was one of the points that was raised before the Judge, but he has not come to a distinct finding upon it. There seems, however, in the application of the petitioner to be a special application upon this particular point; the words are—that he specially applies that the rates of rent payable by the ryots and the persons by whom they were to be payable in respect of the lands should be ascertained and recorded. Under such circumstances, if the Judge did intend to hold by what he says upon this objection that there has been no such special application, we think that he is in error, that there is a special application, and the Collector was right under those circumstances to record the rates of rent payable by the ryots and the persons by whom they were to be payable.

The decision of the Judge setting aside the whole proceedings is reversed, and the case is remanded to him for further decision upon the other points which remain to be decided.

The 10th January 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Partnership accounts—Pleas.

Case No. 1593 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Beerbhoom, dated the 25th June 1850, *affirming a decision of the Moonsiff of Gopalpore, dated the 2nd March* 1870.

Nobin Chunder Koondoo and others (Plaintiffs) *Appellants,*

versus

Sreedhur Bhuttacharjee and another (Defendants) *Respondents.*

Baboo Ashootosh Dhur for Appellants.

Baboo Bama Churn Banerjee for Respondents.

In a suit to recover money on an adjusted partnership account between plaintiff and defendant, where the issues were framed solely on the alleged adjustment:

HELD that, as it was found that no such alleged adjustment existed, the suit was rightly dismissed.

Glover, J.—THE plaintiff in this case sues to recover 744 rupees 6 annas on an adjusted partnership account between him and the defendant.

Both the Courts below decided that there had been no such adjustment of accounts; and as this was the sole ground of the plaintiff's action the suit was dismissed.

In special appeal, it is contended that although the plaintiff may have failed to prove the settlement of accounts, he was entitled to have the general question of the defendant's indebtedness to him under a partnership between the two gone into, and to recover whatever amount might be found due to him; and in support of this contention, the special appellant's pleader has referred us to the case of Kishen Pershad *versus* Bhowanee Deen and others, reported at page 47 of the Agra High Court Reports, Volume I, Part I, in which the Full Bench of that Court laid it down that the former rulings of the late Sudder Court under which suits brought on a settlement of accounts

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had been dismissed on account of the plaintiff failing to prove the alleged settlement were erroneous, and that there was nothing to prevent the real question between the parties as to the amount due on a general account being gone into and decided upon the evidence on the record.

If the circumstances of this case were identical with the circumstances of the case now before us, no doubt the ruling of the Full Bench of the Agra High Court would have weight in influencing our decision; but we do not think that the cases are parallel. In the case before the Agra Court, the matter of general account appears to have been fairly within the scope of the plaint, and the evidence given in that suit was sufficient without taking any fresh proof to decide the question of general account between the parties. It appears from the referring Judge's statement of the circumstances, that both points, namely, that of general account and that of adjusted account, were raised in the plaintiff's written statement; and that it was only because the main contention between the parties was with reference to the adjustment, that the issue was framed on that plea and the case decided upon it. Now, in the present case, there is no room for saying that when the plaintiff came into Court, he put forward any other plea whatever than the one of adjusted accounts; and there is no evidence on the record which would go to show, that he had any intention of proving any thing else than the adjustment of accounts under which he was to receive the half of 1,488 rupees 13 annas. Moreover, when he appealed to the Judge, the plaintiff contented himself with denying the fact that the case was brought on an adjustment of accounts; and he never brought forward the plea that, notwithstanding that he failed to prove the adjustment, he was still entitled to call upon the defendant for an account.

It is contended in the second place that as the defendant admitted assets to the amount of 1,147 rupees as divisible between the partners, that admission is sufficient to entitle the plaintiff to an account. But if we are right in saying that having failed in proving the adjustment the plaintiff is not entitled to go into the question of general account with his late partner, it is immaterial whether that partner admitted or denied that he had any assets in his hands for the purposes of the present suit. If the plaintiff has to bring a fresh suit, he has only himself to blame for it by the way in which he has brought his case.

We dismiss the special appeal with costs.

Kemp, J.—I wish to add a few words to this judgment in which I concur. It is very clear that the plaint in this case was on the footing that a fixed sum was due from the plaintiff on an adjustment of accounts on a specified date, and the plaintiff gives as the date of his cause of action the date on which this alleged adjustment of accounts was made. It is also clear that both parties went to trial in the first Court on the issue whether an adjustment of accounts had been made or not. It was found in the first Court against the plaintiff, that the adjustment had not been proved and that his accounts were false. I find further that when the case went before the Subordinate Judge in appeal issues were distinctly raised, and the same issue which had been raised and tried between the parties in the first Court was fixed and tried in the Appellate Court, namely, whether an adjustment of accounts took place between the plaintiff and defendant, and whether it was found then that a balance in cash of rupees 1,488-13-15 of the capital of the trade remained in the hands of the defendant Sreedhur Bhuttacharjee. Therefore the plaintiff, not only in the first Court but also in the second Court, went to trial upon the same issue, namely, whether there had been an adjustment of accounts or not.

In the Agra case to which our attention has been called, it is stated in the referring order that the plaintiff had been questioned on the framing of the issues and rested his claim *mainly* on the adjustment of accounts —but not solely as in this case; and in that case the plaintiff having failed to prove the adjustment on which he mainly, but not solely, relied, the Full Bench of the Agra High Court held that if there was evidence on the record to decide the alternative plea, the Court was bound to do so, namely, that if the plaintiff failed to prove that there had been an adjustment of accounts, he was still entitled to have the case tried as a case for adjustment of accounts. But in the present case this element wholly fails, for the plaintiff in both Courts has allowed the issues to be framed, not *mainly* on the alleged adjustment of accounts, but *solely* on that alleged adjustment. Therefore, in my opinion, the ruling of the Full Bench of the Agra High Court does not apply to this case.

The special appeal is dismissed with costs.

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The 11th January 1871.

Present :

The Hon'ble E. Jackson and Onookool Chunder Mookerjee, *Judges.*

Cross-appeals—Section 348 Act VIII of 1859.

Case No. 1418 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Chittagong, dated the 2nd March 1870, *modifying a decision of the Sudder Moonsiff of that District, dated the 6th November* 1869.

Anwar Jan Bibee (Defendant) *Appellant,*

versus

Azmut Ali (Plaintiff) *Respondent.*

Baboo Okhil Chunder Sein for Appellant.

Baboo Huree Mohun Chuckerbutty for Respondent.

In a suit to recover possession of certain land against *A* who claimed to be its proprietor, in which *J. B.* who claimed to be a ryot was made co-defendant, plaintiff obtained a decree against the former, but his suit as against the latter was dismissed. *A* appealed from the decree, and during the course of the appeal the plaintiff was allowed to take a cross-appeal with regard to the dismissal of his suit against *J. B :*

HELD that the cross-appeal should not have been admitted.

Jackson, J.—THE plaintiff, respondent in this appeal, preferred this suit to recover possession of certain lands from one Anwar Ali, and he made co-defendant with Anwar Ali one Anwar Jan Bibee, the special appellant, who, he alleged, was colluding with Anwar Ali and setting up a false title as ryot on the disputed land.

The first Court decreed the plaintiff's suit as against Anwar Ali, but dismissed it as against Anwar Jan Bibee, being of opinion that she had given satisfactory proof that she had long been the ryot in occupation of the land. The plaintiff preferred no direct appeal from this decision dismissing his suit against Anwar Jan Bibee ; but Anwar Ali appealed from the decree passed against him. During the course of this appeal, the plaintiff was allowed by the appellate Court to take a cross-appeal as regards the dismissal of his claim against Anwar Jan Bibee, and the appellate Court taking a different view of the evidence from the first Court, decreed the plaintiff's suit against Anwar Jan Bibee also.

In special appeal it is contended that a co-respondent in an appeal cannot re-open, by a cross-appeal, a decision which has been passed between him and another co-respondent. At first sight the terms of the law, Section 348, Act VIII of 1859, are wide enough to permit a respondent in an appeal to take any objection to the decision of the first Court, as if he had preferred a separate appeal from that decision. But there are numerous precedents of this Court which have restricted those terms. It has been held in a long series of decisions, that the cross-appeal cannot re-open any questions which have been decided between co-respondents, but must have reference to the appellant and the points which are in dispute between the respondent who takes the cross-appeal and the appellant. It is quite possible that there may be cases in which, when an appellant succeeds in his appeal, questions will be opened up as between the co-respondents which would otherwise have been decided ; and it is also possible when interests are identical that a respondent succeeding in his cross-appeal may open up questions as between himself and his co-respondent. But that is not the case in this litigation. The interests of Anwar Ali and Anwar Jan Bibee are completely distinct and separate. Anwar Ali claimed to be the proprietor of the disputed land. Anwar Jan Bibee claimed to be the ryot upon it. The plaintiff submitted to the decision upholding Anwar Jan Bibee's ryotee interests, and he cannot prefer a cross-appeal as against that decision on an appeal of Anwar Ali as regards the proprietary right. The Subordinate Judge was in error in admitting this cross-appeal, and we set aside his decision upon it, restoring that of the Moonsiff who determined in favor of Anwar Jan Bibee.

The costs of this special appeal will be paid by the plaintiff, special respondent.

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The 11th January 1871.

Present:

e Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

ortgage—Money-decree—Right of action.

Case No. 1497 of 1870.

ecial Appeal from a decision passed by the Subordinate Judge of Sylhet, dated the 23rd April 1870, *reversing a decision of the Moonsiff of Lushkerpore, dated the 15th February* 1870.

dha Gobind Surmah (Plaintiff) *Appellant,*

versus

yud Umber Ali and others (Defendants) *Respondents.*

Baboo Debendro Narain Bose for Appellant.

Moulvie Syud Murhumut Hossein for Respondents.

A suit can be brought for the declaration of a person's right to have a mortgaged property put up for sale, notwithstanding a money-decree has already been obtained upon the mortgage bond and the property has passed into other hands.

Jackson, J.—THE plaintiff in this suit is pecial appellant. He obtained a mortgage om one Busseerooddeen of the disputed roperty in December 1864. Subsequently, in pril 1868, he obtained a money-decree upon at mortgage bond against Busseerooddeen. he defendants Nos. 1 and 2 appear in the eanwhile, namely, in the year 1865, to ave been engaged in litigation with the me Busseerooddeen, and to have obtained gainst him a decree for costs; and in xecution of that decree the rights and terests of Busseerooddeen in the disputed roperty were sold in June 1867, and were urchased by the defendants Nos. 1 and 2.

Afterwards, when the plaintiff sought to xecute his money-decree against this mortaged property, these defendants objected to he sale on the ground that they were then in possession of the property. Their objections were held good and the property was released. The plaintiff has now brought this suit upon the mortgage bond, for a declaration that this disputed property has been mortgaged to him by Busseerooddeen for the payment of the money due upon the mortgage bond, and that it is liable to be sold to recover that amount.

The first Court came to the conclusion that the plaintiff was entitled to a decree. It looked to the allegations of the defendants that this mortgage bond was a fraudulent and collusive transaction, and it came to the conclusion that no sufficient ground whatever existed for holding that it was fraudulent, and that the plaintiff had given evidence to prove his deed and that he was entitled to sell this mortgaged property into whatsoever hands it may have gone.

The Appellate Court has set aside this decision. He has given a long judgment, but it is somewhat difficult to follow his argument. He holds that as this property was sold in 1867 to the defendants, the plaintiff, though he has a prior mortgage upon it, cannot now enforce his right under that mortgage. The Subordinate Judge quotes a decision of the Court to be found in page 82, IX Weekly Reporter, in support of this view of the law. That decision, however, distinctly states that a suit can be brought for the declaration of a person's right to have a mortgaged property put up for sale, notwithstanding a money-decree has already been obtained upon the mortgage bond, and notwithstanding that that property has passed into other's hands. The same view of the law will be found in page 316, I Weekly Reporter, decision of a Full Bench of this Court. The question, then, for the decision of the Subordinate Judge was, whether the mortgage bond which the plaintiff put forth was a real *bond fide* document, or whether it was, as alleged by the defendants, fraudulent and collusive. The Subordinate Judge states in his decision that, in his opinion, the defendants have been unable to prove that it was fraudulent and collusive—but he is of opinion that it was collusive; first, because there was evidence to show that about the same time as this document was executed, another mortgage bond was also executed by the same Busseerooddeen to another party; and because some of the witnesses to the two documents are the same; and also because the plaintiff's document was not registered. None of these reasons are any reasons what-

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ever for holding that the document was fraudulent. It is by no means uncommon to execute a second mortgage of the same property, and the fact that the same witnesses were present at those two transactions, is no ground whatever for suggesting that either the one or the other is fraudulent. And it is hardly necessary to say that the fact that the mortgage is not registered, is no reason whatever for setting it aside. The plaintiff in this case put forward his claim upon this mortgage bond years before the defendants purchased this property as belonging to his mortgagor ; years before the defendants purchased the rights and interests of the mortgagor with their eyes open, fully knowing that the plaintiff claimed to hold certain interest in that property. The defendants having failed, as far as we can see from the Lower Appellate Court's decision, to satisfy that Court that this document is in any way fraudulent, the plaintiff was entitled to the decree which he obtained from the Lower Court. We set aside the decision of the Lower Appellate Court, and restore and affirm that of the first Court. The costs of this Court and of the Lower Appellate Court will be paid by the respondents in this special appeal.

Mookerjee, J.—I concur.

The 12th January 1871.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Declaratory suit—Cause of action.

Case No. 1646 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Hooghly, dated the 19th July 1870, *reversing a decision of the Moonsiff of Jehanabad, dated the 13th May* 1870.

Ram Gopal Tewaree (Defendant) *Appellant,*

versus

Gora Chand Poryal and others (Plaintiffs) *Respondents.*

Baboos Kishen Succa Mookerjee and *Grish Chunder Ghose* for Appellant.

Baboo Rajendro Nath Bose for Respondents.

In a suit for establishment of lakheraj title to, and confirmation of, possession in land which was alleged to have been brought to sale and purchased in execution by the principal defendant, who had then sued some of the plaintiffs for a kubooleut :

HELD that there had been no invasion of plaintiffs title even if they had a lakheraj title, and that therefore they had no cause of action.

Kemp, J.—THIS is a suit on the part of several plaintiffs, alleging that the 12 cottahs of land in suit formed their lakheraj holding ; that the principal defendant in execution of a decree against one Abdool Kurreem, No. 350 of 1865, attached the property in dispute with other properties, and secretly brought about a sale and purchased the rights and interests of the aforesaid Abdool Kurreem. Subsequently the defendant sued some of the plaintiffs for a kubooleut. The names of the plaintiffs who were then sued are stated in the plaint, and it is here unnecessary to name them ; and that the plaintiffs became aware of the sale from the fact of the suit for a kubooleut being brought. Then the plaint goes on to say—"although we are up to the present moment, "*i. e.*, at the time of bringing the suit, in "possession, still there are prospects in "future of our title being threatened or "otherwise invaded by this secret sale." Therefore, the suit is brought for confirmation of the plaintiffs' possession and for the establishment of their lakheraj title. The written statement of the defendant is to the effect, that the land in dispute was held by the plaintiffs as tenants and that they paid rent to his judgment-debtor ; and that he having purchased the rights and interests of his judgment-debtor was entitled to receive rent from the plaintiffs.

The Lower Appellate Court in a judgment which is very difficult to understand, states that the Court thinks "that when the defen-"dant was capable of adducing some witnesses, "as heirs of his judgment-debtor's vendors, "showing that they were not opposed to his "interests, he ought satisfactorily to have "established with plaintiffs' kubooleuts and "collection records that plaintiffs had held as "ryots and throughout paid rent at first to "Oojul, next to his heirs, and lastly to the "judgment-debtor, until defendant purchas-"ed the judgment-debtor's rights ; and as "such has not been done, and defendant has

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"not been able satisfactorily to establish that "plaintiffs ever paid rent as tenants to "Oojul and his heirs, and eventually to the "judgment-debtor, I cannot consider de-"fendant entitled as proprietor to recover "rents from plaintiffs as tenants." Now, without going further, this was not a suit by the defendant to recover rent from the plaintiffs as tenants. This was a suit by the plaintiffs alleging that their title had been invaded by this attempt on the part of the defendant to get a kubooleut from their co-sharers, and they therefore sued to establish, not only their lakheraj title, but for confirmation of their possession. It is, therefore, a suit in which the plaintiffs had, not only to prove their title as lakherajdars, but also that they had been in possession.

In appeal, the first point is that the plaintiffs had no cause of action; 2nd, that this being a suit for declaration of an alleged lakheraj title, the plaintiffs were bound to establish that title; 3rd, that there is no evidence of lakheraj title, that the oral evidence adduced by the plaintiffs is hearsay evidence, and that the evidence of the defendant does not, as stated by the Lower Appellate Court, admit the possession of the plaintiffs as lakherajdars, but admits only the possession of the plaintiffs as tenants of the defendants paying rent for the land they held.

We think that all these grounds have been fully made out. On the first ground, there really appears to be no cause of action on which the plaintiffs could sue. We see no invasion of the title of the plaintiffs, supposing them even to have a lakheraj title. On the second point, after reading the evidence of the three witnesses, Ameen, Panchoo, and another witness, it is clear that they gave evidence to the effect that they leased from the plaintiffs that this was their lakheraj land. There is no legal evidence of the alleged lakheraj title of the plaintiffs, and the evidence for the defence is not, as stated by the Lower Appellate Court, evidence admitting the possession of the plaintiffs as lakerajdars, but simply that the plaintiffs had been paying rents as tenants to the defendant's predecessors.

We think, therefore, that the decision of the Lower Appellate Court is wrong and must be reversed. We decree this appeal and dismiss the plaintiffs' suit with costs.

The 12th January 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Right of worship—Cause of action—Limitation—Clause 16 Section 1 Act XIV. 1859.

Case No. 1639 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Hooghly, dated the 18th May 1870, affirming a decision of the Moonsiff of that District, dated the 31st March 1870.

Gour Mohun Chowdhry (Plaintiff) *Appellant,*

versus

Muddun Mohun Chowdhry and others (Defendants) *Respondents.*

Baboos Hem Chunder Banerjee and *Umbika Churn Bose* for Appellant.

Baboos Romesh Chunder Mitter and *Kalee Mohun Doss* for Respondents.

A claim to exercise a right to a turn of worship of an idol is not a recurring cause of action, and a suit to enforce such a right is governed by the limitation prescribed in Clause 16 Section 1 Act XIV of 1859.

Kemp, J.—THE plaintiff is the special appellant in this case. He sued on the allegation that he was entitled to a turn of worship of a certain idol, which is kept at present in the female apartments of the house occupied by the defendant Muddun Mohun. In the plaint it is set forth that this idol was the ancestral idol of the family; that the defendants were entitled to the first 15 days of the month worship; that the plaintiff was entitled to 7½ days worship and another party to the other 7½ days; that the plaintiff's right of worship was suddenly interrupted by the defendant on the 16th of Falgoon 1275; that this interruption gave the plaintiff a cause of action, and he therefore brought this suit to enforce his right to a turn of worship of the idol.

Both Courts have dismissed the plaintiff's suit, holding that this suit is barred, inasmuch as the plaintiff has failed to prove

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that at any time within twelve years prior to the institution of the suit he enjoyed the right of worship.

In appeal to this Court, several grounds have been taken by the pleader for the special appellant. He contends, first; that the right of worship is a recurring cause of action; second, that Clause 16, Section 1, Act XIV of 1859 applies to this suit, and that the period of limitation must be computed from the 16th Falgoon 1275; and as the suit has been brought within six years from the time the cause of action arose the suit is within time. The next ground taken is that the Lower Appellate Court having found that Tarinee was in possession and that Tarinee was the sebait, such finding was opposed to the evidence adduced by the defendant, which went to prove that not Tarinee, but her son Muddun Mohun was in possession. The last ground is that certain material witnesses cited by the plaintiff, namely, Ram Coomar Gungopadhya, Protap Chunder Gungopadhya, and Gooroo Pershad Roy, the brother-in-law of the principal defendant, Muddun Mohun, were not examined, although the plaintiff cited them to prove that he had exercised the right sued for within a period which would save his suit from being barred under the statute of limitation, and that the lower Court refused to send for these witnesses.

We think on the first point that this is clearly not a case of a recurring cause of action. Baboo Hem Chunder Banerjee has attempted by some sort of analogy to a rent-suit to make out that this is a recurring cause of action. There is no doubt that a claim for rent is a recurring cause of action, but this is claim to exercise a right of worship of an idol, and cannot be said to be a recurring cause of action. We think that the period of limitation applicable to this case is that laid down in Clause 16, Section 1 of Act XIV of 1859, and not the limitation prescribed under Clause 13, Section 1 of the same Act.

Under Clause 13, Section 1, suits to enforce a right to share in any property, moveable or immoveable, on the ground that it is joint family property, &c., &c., 12 years is the prescribed period. Clause 16, Section 1, applies to all suits for which no other limitation is expressly provided, and gives a period of six years from the time the cause of action arose. Now, it cannot be said that this is a suit for a share in any family property, whether moveable or immoveable; it is not a suit for a share in the idol, but a suit for a turn of worship of the idol; and therefore it is a suit for which no other limitation is provided by the Act, and 6 years under Clause 16, Section 1, is the proper time within which the suit must be brought; but the suit must be brought under Clause 16 within 6 years from the date of the cause of action, and therefore what the lower Courts had to find was, whether the plaintiff's cause of action arose at the time he alleges it did, and, if so, whether this suit has been brought within 6 years of that cause of action.

In deciding this point, it is very material that the witnesses cited by the plaintiff who have not been examined should be examined. It is not very probable that the plaintiff or his father would give up their right to their turn of worship of the family idol, and it was therefore all the more necessary that every opportunity should have been given to the plaintiff to prove his cause of action, more particularly as we find that the case was bandied about from one Court to another between the Court of the Moonsiff of Hureepal and that of the Moonsiff of Jehanabad, at the expressmotion of the defendants. We find that the plaintiff in both these Courts expressed great anxiety to have these three witnesses examined, and he appears to have been put off by the Moonsiffs of these two Courts, and principally by the Moonsiff of Jehanabad, who refused to send for these witnesses on a purely technical ground, namely, because the said witnesses having been summoned by the Moonsiff of Hureepal, they were not bound to attend before the Court of the Moonsiff of Jehanabad. That may be so, but inasmuch as one month and five days elapsed from the date of the application to enforce the attendance of these witnesses to the date on which the case was decided by the latter Moonsiff, we think that the ends of justice require that these witnesses should be examined, particularly as they were parties who were likely to throw light upon the case. We, therefore, remand the case directing the lower Court to sumnon those witnesses and examine them, and after hearing them to decide the case; first, on the issue of limitation on the principle laid down by this Court, and, if necessary, on the merits after disposing of the issue in bar.

Costs to follow the result.

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The 13th January 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Splitting of causes—Appeal—Jurisdiction.

Ram Coomar Doss and another (Defendants) *Petitioners*,

versus

Bidhoo Mookhee Dossee (Plaintiff) *Opposite Party*

Baboo Dwarkanath Sein for Petitioners.

No one for Opposite Party.

Where a suit for rupees 13,777 was brought against defendants whose interests were not identical, and the Judge ordered separate trial of the different causes involved, as provided in Section 9 Act VIII. 1859, an appeal by the defendants from the decision in one of the suits valued at rupees 149 was held not to lie to the High Court.

Note by the Deputy Registrar.—The original suit was brought by the plaintiff against several defendants whose interests were not identical. The Subordinate Judge of the 24-Pergunnahs, before whom the suit was instituted, being of opinion that the suit was composed of several causes of action, and could not conveniently be tried together, ordered separate trials, and tried each cause separately, as provided in Section 9 Act VIII of 1859.

The original suit was valued at 13,777 rupees. The trial from the decision in which this appeal has come up involved a claim for possession of one-third of 6 beegahs and 12 cottahs of land, and was valued at 149 rupees and 17 gundahs.

The several trials arising out of the original suit were registered and numbered by the Subordinate Judge as separate suits.

It is a matter, therefore, of doubt, whether an appeal from a decree in such a case will lie to this Court and not to the Court of the Zillah Judge.

I beg to refer the point for the orders of the Court.

Norman, C. J.—The appeal does not lie in the High Court.

The 13th January 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Foreign Territory—Service of notice—Section 60 Act VIII. 1859.

Sonatun Bukshee and others, *Appellants*,

versus

Gopal Chunder Shamunto, *Respondent*.

Letter No. 32, dated the 25th November 1870, from G. A. Pepper Esquire, Additional Judge of Nuddea, to the Registrar of the High Court.

Where a respondent resides in Chandernagore, *i. e.*, out of British Territory, the notice of appeal should be forwarded to him by post under a registered cover, and if he does not appear, a verified statement should be put in to show that he is at present, or has recently been, residing there.

SIR—I have the honor to bring to your notice that the accompanying summons sent by the High Court to serve on the respondent, Gopal Chunder Shamunto alias Tincowree Shamunto, has to be served in the town of Chandernagore, and cannot, therefore, be served from this Court, the respondent living in French Territory.

Note by the Deputy Registrar.—The law which seems to me to apply to a case like the present is Section 60 Act VIII of 1859, which provides for the service of processes out of British Territory by post.

That perhaps is the course which the Judge should have followed in regard to the notice of appeal (not summons) which he has returned unserved, because the respondent is a resident of the Town of Chandernagore; and to ensure service, as well as to procure good evidence of it, the cover enclosing such a process should probably be registered.

To save time this notice may be forwarded to the address of the respondent in Chandernagore under a registered cover.

Norman, C. J.—If the respondent Gopal Chunder Shamunto has not been already so served, notice should be forwarded to him by post under a registered cover; and if the respondent does not appear, a verified statement should be put in to show that the said respondent is at present residing at Chandernagore, or has been living there recently.

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The 14th January 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Jurisdiction— Res-adjudicata—Possession—Onus probandi.

Case No. 1432 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of Chittagong, dated the 26th April 1870, reversing a decision of the Moonsiff of Raojan, dated the 29th November 1870.

Boistub Churn Sein (Defendant) *Appellant,*

versus

Trahee Ram Sein (Plaintiff) *Respondent.*

Baboos Chunder Madhub Ghose and *Kashee Kant Sein* for Appellant.

Baboo Okhil Chunder Sein for Respondent.

Where for the purposes of a rent-suit, a Revenue Court finds that a kubooleut propounded by the plaintiff is a genuine document, such finding is no bar to a Civil Court trying the question of right between the parties, and for that purpose trying the validity and genuineness of the kubooleut.

In a suit for possession of a portion of land on the allegation that it had belonged to plaintiff as his ancestral property up to the date of his being ousted, where defendant, admitting the alleged possession, contended that it had been not that of an owner, but only permissive possession as that of a tenant: HELD that the burden of proof lay on the defendant.

Mookerjee, J.—PLAINTIFF in this case sues for possession of three pieces of land from which he alleges he has been dispossessed in execution of a decree obtained by the defendants, under Section 78 of Act X of 1859, on the ground that the properties belong to him as his ancestral properties, and were in his possession up to date of the ouster.

The defendants admit that the disputed land was the property of the plaintiff, but that they purchased it by a kobalah dated in 1196 Mughee; that the plaintiff executed a kubooleut in their favor in the above year, and another in 1214, M., ; and that the possession of the plaintiff was not the possession of the malik since the alienation of 1196, but was that of a tenant on payment of rent.

The Court of first instance gave plaintiff a decree only for dâg 991, one of the 3 dâgs which he had claimed, holding that the kobalah as well as the two kubooleuts set up by the defendant are forged and fabricated.

Both parties appealed against this decision to the Subordinate Judge, who, concurring with the Moonsiff in his view of the documents produced and relied upon by the defendants, gave plaintiff a decree for all the 3 plots.

Against this decree of the Subordinate Judge one of the defendants appeals, specially urging a point of law never urged by him in any of the Courts below, *viz.*, that the defendants having obtained a decree against the plaintiff for arrears of rent and ejectment in the Revenue Court, under Section 78 of Act X of 1859, the Civil Court has no jurisdiction to entertain a suit having for its object a declaration that the properties belong to the plaintiff as the proprietor thereof, which in effect nullifies the decree obtained by him in the Collector's Court.

The former suit in the Collector's Court was simply a suit for arrears of rent and for ejectment on account of such arrears. The Revenue Court, in order to the ascertainment of such arrears and for the purposes of that suit, found that the kubooleut propounded by the plaintiffs in that suit was a genuine document. The present suit is instituted to have it declared that the properties, for the rent of which the suit in the Collectorate was brought, do not belong to the defendant, but are the ancestral properties of the plaintiff and were in his possession down to 1869.

Now, the Court of the Deputy Collector was neither a Court of concurrent jurisdiction with the Civil Court, nor one possessing any jurisdiction to try questions of civil right between the parties. We also find that the question which is to be decided in this civil suit was never decided by the Collector's Court, namely, whether the property belongs to the plaintiff, or has been purchased by the defendant from plaintiff in 1196. The only point which seems to have been tried, and which the Deputy Collector as a Court of exclusive jurisdiction in cases of rent could only try

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finally was, whether the arrears claimed by the plaintiff (the defendant in this cause) was actually due.

It cannot be said that because, for the purposes of the rent-case, the kubooleut was held to be a genuine document, that therefore the question of the right between the parties, *viz.*, whether plaintiff is still in possession on his own right as owner of the property, or whether he has not sold the same to the defendant by the kobalah of 1196, cannot be tried by the Civil Court. If it be contended that it constitutes a *res judicata* between the parties to the suit, the simple answer is that the Collector did not even profess to decide the question of the purchase of the property by the defendant from the plaintiff, nor could he decide that question finally.

It is next contended that the kubooleut having been pronounced by the Deputy Collector as a genuine document, the Civil Court is not at liberty to declare the same is not proved or spurious. The main question which the Civil Court had to try was, whether plaintiff is the owner of the properties, or has divested himself of that ownership by a sale to the defendant. This the Courts have decided by declaring that the deed of sale filed by the defendant to prove his purchase is a spurious document, and therefore that no transfer of the property was made in favor of defendant. Then when the admitted possession of the plaintiff was sought by the defendant to be made to appear as the possession of a tenant under a lease, the Civil Court was at liberty to judge for itself whether plaintiff has at any time consented to waive his superior possession as proprietor and accepted the far inferior one, namely, to remain in possession as the tenant of the defendant. The fact of the Collector having for the purposes of the rent-suit decided the kubooleut to be genuine, would not, we apprehend, debar the Civil Court from inquiring whether the possession of the plaintiff was the possession of a ryot or of an owner, and for that purpose trying the genuineness and validity of the kubooleut.

We therefore agreeing with the decision passed by the late Chief Justice, Sir Barnes Peacock, in the case reported in VIII Weekly Reporter, page 175, hold that the Court of the Collector and that of the Judge are not Courts of concurrent jurisdiction, and that consequently the decision of the Collector, even if there be any on the question of title, was not conclusive except on the question of rent over which the Collector had exclusive jurisdiction, under Section 23 of Act X of 1859.

The next contention of Baboo Chunder Madhub was that the Lower Appellate Court was wrong in throwing the onus of proof on the defendant, and in giving a decree to plaintiff on the weakness of the defendant's case. We do not, however, consider that this contention is sound. The defendant admits that the land, the subject of this litigation, belonged to plaintiff. He then states that the plaintiff sold the property to him, and that he was since his purchase in possession of the land. Actual possession of the property is also admitted to be in the plaintiff, but it was contended that that possession was not the possession of an owner, which actual possession may *primâ facie* import, but was a permissive possession as that of a tenant. We think that from the nature of the pleadings in this case and its peculiar circumstances, the Subordinate Judge was right in throwing the burden of proof on the defendant, and on the failure of the defendant to make out his case adjudging a decree to the plaintiff.

It is next argued that the measurement of two of the dâgs as well as a sunnud of 1855 were made in the name of the defendant, and that the Subordinate Judge has not given due weight to the circumstance, which weighed so heavily with the first Court as to induce it to refuse a decree to the plaintiff for those lands. We find, however, that the Judge has taken that matter into his consideration, and was of opinion that "when it has been proved that "the defendant's title-deeds, namely, the "kobalah and the kubooleut, are false and "untrustworthy, and it is the plaintiff, not "the defendant, who was all along in pos-"session of the land as its proprietor, the "mere insertion of the defendant's name in "the measurement paper or sunnud being "drawn up in their names, are not sufficient "to warrant the belief that the defendants "are the rightful owners or were possess"sors of the disputed property." This contention, therefore, is untenable. The Subordinate Judge comes to a conclusion of fact from the whole evidence in the case which cannot be disturbed in special appeal.

This appeal is, therefore, dismissed with costs.

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The 16th January 1871.

Present :

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Attachment of decree—Sections 205 and 237, Civil Procedure Code.

Case No. 93 of 1870.

Regular Appeal from a decision passed by the First Subordinate Judge of the 24-Pergunnahs. dated the 31st January 1870.

Prince Golam Mahomed (Defendant) *Appellant,*

versus

Indro Chand Johuree (Plaintiff) *Respondent.*

Baboos Romesh Chunder Mitter and *Hem Chunder Banerjee* for Appellant.

Baboos Bhyrub Chunder Banerjee and *Umbika Churn Bose* for Respondent

A decree is property within the description of "other property" in Section 205 Act VIII of 1859, and is therefore liable to attachment and sale in execution. For the purpose of attaching the decree itself and the money due thereunder after it has come into Court, the form laid down in Section 237 is the most appropriate.

Norman, C. J.—I AM of opinion that the decree of the Subordinate Judge is quite correct. Prince Mahomed Rohimooddeen purchased a moiety of a decree in a suit pending in the Court of the Judge of the 24-Pergunnahs by Shumsoonnissur Begum against Moonshee Buzloor Roheem. Prince Mahomed Rohimooddeen's name was not entered in the record as a co-plaintiff, or as being jointly interested in the decree with Shumsoonnissur; but by two several orders in the suit, he was treated as being jointly interested with her in the decree and standing in the position of a decree-holder. By the latest of these, dated the 26th of May 1868, it was ordered that he should be at liberty to bid as such, and that a certificate of receipt signed by him should be taken in part-payment of his (8 annas) share of the decree.

On the 17th of August, Indro Chand Johuree, the plaintiff in the present suit, having applied for an attachment of the rights and interests of Prince Mahomed Rohimooddeen in the decree, an order was passed by the Subordinate Judge, who sent a roobakaree to the Judge of the 24-Pergunnahs, directing that the right, title, and interest of Rohimooddeen in the decree should be attached.

The Judge on receipt of the roobakaree passed an order that the decree should be attached according to practice.

On the 24th of August, Prince Golam Mahomed purchased from Prince Mahomed Rohimooddeen his interests under the decree. After this date the sum of rupees 1,64,339-1-9 was paid into Court by the defendant Moonshee Buzloor Roheem, the judgment-debtor, on account of the share of Prince Mahomed Rohimoodden. The whole of this amount, less certain sums to which he admitted the right of the Agra Bank, and Mr. Wilkinson, as Administrator-General, was subsequently taken out of Court by Prince Golam Mahomed.

The present suit is brought by Indro Chand Johuree against Prince Golam Mahomed to recover the amount to which the plaintiff would have been entitled under his attachment out of the sum paid into Court to the credit of Prince Rohimooddeen; and the point argued before us is that the attachment of the decree of the 17th of August operated nothing, inasmuch as it was not an attachment in accordance with any one of the Sections from 233 to 238 of the Civil Procedure Code.

Now, we may observe that the 205th Section declares what are the several species of property liable to attachment and sale under decree, namely,—"lands, houses, goods, money, bank-notes, Government securities, "bonds, or other securities for money, debts, "shares in the capital or joint stock of any "railway, banking, or other public company "or corporation, and all other property what-"soever, moveable or immoveable, belonging "to the defendant, and whether the same be "held in his own name, or by another person "in trust for him or on his behalf."

Now, we have no doubt but that a decree is property which falls within the description of "*other property*" in Section 205, and is therefore declared to be liable to attachment and sale in execution of a decree. But when the Sections from 233 to 238 are read through carefully, it will be found that not one of these Sections appears to be exactly applicable to such property as a decree.

We think, however, that assuming that none of these Sections contain any provision appropriate for the attachment of a decree, it must not be taken that a decree which

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falls within the class of subjects declared liable to attachment by Section 205 is therefore not so liable. Of the several species of property for the attachment of which provision is made by the several Sections above-mentioned, that which is most nearly analogous to the right of a decree-holder in a decree which is being executed in a Court of justice, is a security in deposit in a Court of justice or money in a Court of justice or in the hands of any officer of Government which is or may become payable to the defendant. The attachment of such property is provided for by Section 237.

The attachment in the present case has been made in the manner prescribed by Section 237; and we think that for the purpose of attaching the decree itself, and the money when it came into Court, the form of attachment under Section 237 is perhaps the most appropriate. A decree for money may be considered as consisting of two things;—first, the debt due from the judgment-debtor to the decree-holder; and secondly, the security for that debt by a decree which renders it capable of being enforced. The one being capable of separation from the other, the two things are distinct—one being a debt, the other being the security for that debt.

Now, if a decree were to be treated merely as a debt, and if the only mode of attaching it is by an order for attachment under Section 236, namely, by a "written order prohibiting the creditor from receiving the debts, and the debtor from making payment thereof," the security of a creditor attaching a decree will be very imperfect, because the attachment would not stay execution of the decree; and if the execution proceeds and the money is realized and paid into Court under the decree, if the decree-holder disregards the order of the Court and applies to take out the money in contempt of the order of attachment served on him, he can do so, unless there is some order recorded in the Court executing the decree prohibiting the decree-holder from receiving the money out of Court. There must, therefore, be some means of attaching the decree itself more effectual than the ordinary attachment under Section 236. No doubt it would be prudent and proper in case of attachment of a decree to serve the judgment-debtor with an order under Section 236 in order to attach the debt due from him. But the want of such order will not affect the attachment of the decree.

In my opinion the attachment in the present case was valid and effectual. Prince Golam Mahomed has taken out of Court money which was subject to the lien and attachment of the plaintiff Indro Chand Johuree. I think he is, therefore, liable to refund to Indro Chand the money so taken, to the extent of his lien, and the Subordidate Judge was right in decreeing the plaintiff's case.

This appeal must, therefore, be dismissed with costs.

Bayley, J.—I concur.

Mitter, J.—I am of the same opinion.

I think that the objection now taken before us was never pressed by the defendant in the Court below, and as it is not pretended by him that he took the assignment from Prince Rohimooddeen without being aware of the attachment, I think he ought not to be permitted to take that objection now.

I would also dismiss the appeal with costs.

The 16th January 1871.

Present:

The Hon'ble L. S. Jackson and W. Ainslie, *Judges.*

Lessee—Boundary dispute—Survey.

Case No. 127 of 1870.

Regular Appeal from a decision passed by the Officiating Judge of Gya, dated the 21st March 1870.

Ameeree Begum and others (Some of the Defendants) *Appellants,*

versus

Gobind Pandey and another (Plaintiffs) *Respondents.*

Mr. R. T. Allan for Appellants.

Messrs R. E. Twidale and *C. Gregory* and *Baboos Unnoda Pershad Banerjee* and *Mohesh Chunder Chowdhry* for Respondents.

In a suit by the lessee of a mouzah to recover possession of a piece of land from a lessee of an adjoining mouzah, both making title under one zemindar, where a survey had taken place at a time when both mouzahs to which respectively the land was claimed as belonging were in his possession, and when neither of the leases was in existence:

HELD that the suit involved simply a question of boundary, and what was to be ascertained was, to which mouzah the land in dispute was found to belong at the time of the survey.

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Jackson, J.—It seems to me unnecessary to call upon the respondents in this case.

The question was a pure boundary question between these parties, who were, that is to say, so far as Gobind Pandey, plaintiff in the one suit is concerned, lessees under the same zemindar. The defendants have a perpetual lease—a mokururree—of mouzah Khyrah, and the plaintiffs have the ticca of mouzah Paloobund, which was for a term of 15 years. That term had something to run at the time when the suit was commenced, but has since expired. It seems that very shortly after the commencement of the plaintiff Gobind Pandey's lease, a dispute arose between him and the defendants in regard to some 80 beegahs of land lying on the border of the two mouzahs. Application was made to Ali Kureem, who was then Dewan of the common zemindar; and he deputed a person named Waizooddeen, who was the Nazir of his serishta, to enquire into the dispute. The result of that person's enquiry and report was that the Dewan considered the lessee of Khyrah to be entitled to the land, and made a sort of decision accordingly and issued a notice upon the ryots to pay their rents to him. The plaintiffs, however, have given evidence to show that, notwithstanding that notice, they continued to receive rent from the ryots of the disputed land until the year 1267, and then the defendants by force turned their ryots and them out of possession, and have since been in enjoyment of the rents.

At the first hearing of this suit, the Zillah Judge was of opinion that possession within 12 years on part of the plaintiff had not been made out, and considered the suit to be barred and dismissed it accordingly.

Upon appeal, a Division Bench of this Court considered, upon the evidence and upon the defendant's own showing, that there had been possession by the plaintiff about the commencement of 12 years just before the suit, and that they had not given evidence; in short that there was no evidence on either side, as to subsequent dispossession, except that given by the plaintiff, and that related to a period about 6 or 7 years before the commencement of the suit. Therefore, the judgment of the Zillah Judge was reversed and the suit went back for trial on the merits.

Upon this the Judge issued a Commission, first, to a Civil Court Ameen, and afterwards to a person named Gopal Chunder Mookerjee, Assistant Engineer, presumably possessing a scientific and professional education and qualification, and therefore well fitted to determine a boundary dispute. He went to the ground and seems to have made a careful enquiry and map, the result of which was that his conclusions agreed, substantially, with the maps of the Revenue Survey by which the land in dispute was shown as being a portion of Paloobund. The Judge considered this evidence, supported as it was by evidence as to possession, to establish the title of the plaintiffs, and gave the plaintiffs a decree. Against that decree the defendants appeal again.

It is objected that the evidence on the plaintiffs' side as to possession is of a vague and unsatisfactory character. Probably, if we had to decide the case upon that evidence alone, we might be inclined to think that plaintiffs had not made out a strong case; but coupled as it is with the survey map and the enquiry of the officer deputed as Commissioner, it seems to me to be quite sufficient to entitle the plaintiffs to a decree.

The distinction between these cases, and the sort of case to which the ruling of the Privy Council to be found in* VIII Moore's Indian Appeals, page 200, applies, is this—that both parties, that is to say, the lessees, make title under one zemindar, and that at a time when both mouzahs to which respectively this land is claimed as belonging were in possession of that zemindar, and when neither of the two leases under which these parties claim was in existence, the survey took place by which the land in question was indisputably demarcated as belonging to mouzah Paloobund. In that state of things, it seems to me that the survey was of the greatest importance. It was simply a boundary question; and what we have to ascertain is, to which mouzah the land in dispute was at that time found to belong.

Something has been said about the delay in bringing this suit. So far as the zemindar is concerned, it is quite clear he had no particular interest in bringing the suit at all. So long as both mouzahs were under lease the lessees were bound to pay their rent to him, and whether one or other of them was dispossessed of a portion of the

* 1 W. R., P. C., p., 51.

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land, it concerned the lessees rather than the zemindar. The zemindar's suit has been brought at a time when it was of importance to him to bring it, namely, at the conclusion of one of the leases.

As to the suit of the lessee, that undoubtedly is open to remark as having been brought at a late period; but as we have nothing to do now with the question of limitation, the suit having been already decided to have been brought in time, I do not think anything remains for us to say upon that point.

The plaintiff has made out his title to the land and he has made out his dispossession. I think, therefore, he is entitled to recover possession.

It is said, but we have no means of knowing, that the plaintiff has got a renewal of the lease. If that is so, he will profit by the decree If not, the zemindar will profit by it. The plaintiff is also entitled to wassilat from the date of dispossession until the expiry of his lease.

Ainslie, J.—I concur.

The 16th January 1871.

Present:

The Hon'ble L. S. Jackson and W. Ainslie, *Judges.*

Minors—Bond—Set-off.

Case No. 182 of 1870.

Regular Appeal from a decision passed by the Subordinate Judge of Gya, dated the 11th July 1870.

Futteh Narain (Defendant) *Appellant,*

versus

Deen Dyal Lall and another (Plaintiffs) *Respondents.*

Baboo Khettro Nath Bose for Appellant.

Mr. R. E. Twidale and *Baboo Nil Madhub Sein* for Respondents.

Case:—Defendant (F N) took a loan under a bond pledging his own share of an estate and the shares of his minor brother and cousin, and covenanting that a portion of the interest should be credited to the rent of the hypothecated share held by plaintiff under a farming lease. In a suit by F N and the minors for arrears of farm-rent, defendant claimed a set-off. The Revenue Court found the bond proved against F. N., allowed the set off as against him, but decreed the rent so far as it involved the interest of the minors on proof of their non-liability by the absence of necessity for the loan. The lender of the money then sued F. N. to recover the rent paid on account of the share of the minors, as if the bond had been executed by him alone, and obtained a decree.

HELD that the suit was properly framed and the decree given correct.

Jackson, J.—I think the decision of the Court below is quite right upon the facts of the case as stated. The defendant Futteh Narain appears to have exceeded his authority by executing the bond on behalf of himself and his minor brother and cousin, and also pledging their shares in the immoveable property as well as his own.

This question of his want of authority to do these acts has been already once tried between the parties in a rent-suit; and the Collector finding that he was not authorized to bind his minor co-sharers, obliged the lender of the money to pay rent to the extent of his interest in the mehal. The lender therefore was, in my opinion, entitled to sue Futteh Narain as if the bond had been executed by him and him alone. If Futteh Narain were able to show that he applied the money which he thus borrowed to the use and benefit of his minor co-sharers, no doubt he will be able to recover the money; but I think this suit was properly framed, and the decree given below was quite correct.

The appeal must be dismissed with costs.

Ainslie, J.—I concur.

The 18th January 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge.*

Arbitrator—Resignation of office.

Case No. 63 of 1870.

Regular Appeal from a decision passed by the Judge of Bhaugulpore, dated the 1st February 1870.

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Maharajah Joy Mungul Singh (Defendant) *Appellant,*

versus

Mohun Ram Marwaree (Plaintiff) *Respondent.*

Mr. R. T. Allan and *Baboos Nil Madhub Sein* and *Boodh Sein Singh* for Appellant.

Baboo Romesh Chunder Mitter for Respondent.

An arbitrator has full power to retract his resignation of office before it is accepted.

Norman, C. J.—We think that there is not the smallest doubt in this case.

The appeal is an appeal against a judgment passed in pursuance of an award made by Mr. Teignmouth Sandys and Moulvie Wahidooddeen, as arbitrators. The judgment being in accordance with the award is final.

Mr. Allan, however, has attempted to make one point—and only one—which has the least semblance of substance in it; namely, that before signing the award Mr. Sandys had resigned the office of arbitrator to which he had been appointed in the course of a judicial proceeding by the Judge of Bhaugulpore. A paper which had been irregularly signed as an award having been sent back to Mr. Sandys and Moulvie Wahidooddeen in order that they should sign it at the same time, Mr. Sandys wrote a letter to the Judge expressly his desire and intention to resign the office of arbitrator, and as far as he could, at the same time, resigning such office.

The Judge wrote to Mr. Sandys dissuading him from persisting in his refusal to act; upon which Mr. Sandys withdrew his resignation and proceeded to make the award.

It appears to us that as he did so before his resignation was accepted by the Court by which he had been appointed, he had full power to retract his resignation; and his award is a good and perfectly legal award.

The appeal is dismissed with costs.

The 18th January 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice,* and the Hon'ble G. Loch and W. Ainslie, *Judges.*

Possessory suit—Section 15 Act XIV of 1859—Ghatwals—Leases.

Cases Nos. 73 and 125 of 1870.

Regular Appeal from a decision passed by the Subordinate Judge of Beerbhoom, dated the 24th March 1870.

Mr. G. Grant and the Court of Wards (Defendants) *Appellants,*

versus

Bungshee Deo (Plaintiff) *Respondent.*

Messrs. J. Graham and *R. E. Twidale* and *Baboos Unnoda Pershad Banerjee* and *Juggadanund Mookerjee* for Appellants.

Mr. R. T. Allan and *Baboo Sreenath Dass* for Respondent.

A suit for restoration to possession on the ground of having been dispossessed otherwise than by due process of law, where the plaintiff seeks to exclude the question of title, must be brought within six months after the time of dispossession.

A ghatwal is not competent to grant a lease in perpetuity, and his successors are not bound to recognize such an incumbrance.

Norman, C. J.—The plaintiff, the younger of two sons of Junglee Deo, who was the great-grandson of one Roop Narain Deo, the proprietor of a ghatwalee estate called Talooka Rohinee in the district of Beerbhoom, sued for the recovery of possession of five villages, part of this ghatwalee talook, which he claimed as having been assigned to his ancestors for their maintenance in hereditary right.

The title set up in the plaint is under an alleged lease said to have been granted by Bissen Narain, the brother of his ancestor Kishen Narain Deo, to his grandfather Beharee Deo, son of Kishen Narain, out of the ghatwalee estate of Rohinee of which Bissen Narain was then the owner, at a fixed rent of rupees 31-12.

He values his suit at rupees 29.224, rupees 18,945 being the value of the land, and rupees 10,279 the amount of the mesne profits for the period of dispossession.

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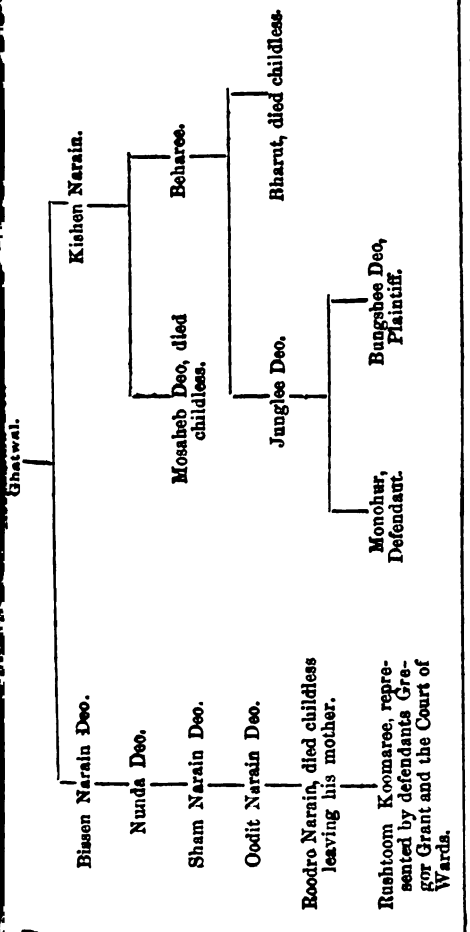
The defendants, Mr. Grant, lessee under the Court of Wards, and the Deputy Commissioner of the Sonthal Pergunnahs representing the Court of Wards on behalf of Rushtoom Koomaree, the mother of Roodro Narain Deo, in whom the ghatwalee estate now vested, by their written statements raised several defences.

The principal defence—that which was mainly argued before us in appeal—was that as regards ghatwalee tenures in Beerbhoom, the ghatwal has no authority to grant a lease in perpetuity.

In order to the better understanding of the facts, it is convenient to refer to the pedigree of the parties, which is as follows:—



The plaintiff did not prove a lease by Bissen Narain to Kishen Narain as alleged, but a lease granted in 1240 by Sham Narain to Junglee Deo to hold generation after generation at an annual rent of 11 rupees. The ghatwalee estate having been attached in execution of a decree, the Sezawul dispossessed the lessee, on which Moshaheb Deo, the uncle of Junglee Deo, made an application to the Collector, who, by order dated 12th July 1838, *i. e.*, 1245, directed that he, Moshaheb Deo, should be restored to possession paying an enhanced rent of thirty rupees Sicca, or Company's rupees thirty-two.

Oodit Narain, who was the ghatwal prior to 1857, became insane. On his death the Court of Wards, on the 13th of April 1857, caused a proclamation to be made requiring the tenants of the ghatwalee estate to pay their rents to the Court of Wards on behalf of his infant son Roodro Narain, and from that time it is not disputed that the plaintiff and his family have been out of possession. But prior to this date, namely, on the 3rd April 1854, the rights and interests of the plaintiff's father, Junglee Deo, were sold in execution of a decree against him, and were bought by one Gireedharee who has come forward as a witness in the present suit, and stated that he had no real interest, and that he bought benamee for Junglee Deo. Strange to say, the Subordinate Judge stopped the defendant's vakeels, who were cross-examining the witness as to the nature of his dealings with Junglee Deo who appeared to have been indebted to him, saying that the questions were not relevant, and this though it appeared from his own statement that he had been collecting rents—he says as tehsildar—from 1260 to 1263, that is, from 1853 to 1857.

The Subordinate Judge decides all the issues in favour of the plaintiff. He disposes of the question relating to the power of a ghatwal to grant a lease in perpetuity, by saying that if a ghatwal *bonâ fide* grants a lease in perpetuity it remains good and valid, not only during the life of the ghatwal, but also after his death, so long as his heirs continue to hold the ghatwalee. He says also—"The lease granted by a former ghatwal can be set aside by a regular suit. The Court of Wards or surburakar under them cannot of their own authority oust any persons in possession of lands under a lease granted by the ancestor of the present ghatwal."

From that decision the defendants have appealed.

It is necessary first to notice the point, which might arise if it be true, as supposed

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by the Subordinate Judge, that Mr. Grant, the lessee under the Court of Wards, wrongfully dispossessed the plaintiff or his father without suit. If the plaintiff had sued for restoration to possession on the ground that he had been dispossessed otherwise than by due process of law, and sought to exclude the question of title, as appears to have been the case in Marshall's Reports, page 117, the suit should have been brought within six months after the time of the dispossession—see Section 15 of Act XIV of 1859.

In the suit now brought it is incumbent on the plaintiff to show that he had a right to possession subsisting at the time of the commencement of the suit. He must, therefore, show that the lease under which he claims is valid and binding against the present ghatwal.

A point very closely resembling that with which we have to deal was considered by the late Sudder Court in the case of Hur Lall Singh *versus* Jorawun Singh, VI Select Reports, pp. 169 to 171. In that case, a ghatwalee estate had been divided by a previous ghatwal amongst his family, and one of the family, who was in fact the eldest son of the ghatwal, sued for partition and separate possession of the one-third share which had been assigned to him. After full consideration the Court dismissed the suit, deciding that ghatwalee lands are grants for particular purposes, especially of police, and to divide them into small portions amongst heirs of the ghatwals would be to defeat the very end for which the grants were made. Mr. Rattray says—"The lands "are held conditionally on the due performance of certain defined duties. They belong to the office, and should not be frittered away into portions inadequate to the "remuneration of the duty demandable from "the occupants of the whole as a whole. I "would not allow the division even with "the sanction of an entire family or clan."

In the case already referred to in Marshall's Reports, the Court say that they think that the ghatwals of Beerbhoom are, under Section 2 Regulation XXIX of 1814, possessed of estates of inheritance without the power of alienation.

The late Sudder Court, S. D. A., 1853, page 900, held that "ghatwalee tenures "of Beerbhoom, being not the private property of the ghatwals but lands assigned "by the State in remuneration for specific "police services, are not alienable or attachable for personal debts."

The language of the judgment is quite general, but the case before the Court was of an attachment of the ghatwalee estate in the hands of Bharut Chunder Singh, ghatwal, under a decree against the former ghatwal Digbijoy Singh. This case came under the consideration of the High Court,—Sir Barnes Peacock and Mr. Justice L. S. Jackson, in the case of Binode Ram Sein *versus* the Deputy Commissioner of the Sonthal Pergunnahs, VII Weekly Reporter, 178. The Court in holding that the rents of a ghatwalee tenure are not liable in the hands of the heir in possession to attachment for debts of his ancestor, the former holder of the tenure say that "under the Regulation "the holder of the tenure is to enjoy the "whole income of the tenure," and that "it must have been intended that each "ghatwal should be entitled to the whole "income of the estate, and that such income "should not be charged or incumbered by a "previous ghatwal."

With this opinion we entirely agree. We think that the supposed lease by Sham Narain was an incumbrance which, as a ghatwal, he was incompetent to make, and that the succeeding ghatwals were not bound to recognize such lease.

Mr. Graham was content to take our judgment on this point, and therefore we did not go into the many other objections to the judgment of the Court below.

We reverse the decision of the Subordinate Judge, and dismiss the suit with costs in both the Courts.

The 18th January 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Application for Probate—Stamps—Article 1 Schedule II Act VII. 1870.

In the matter of

Judoonath Shadhookhan and others, *Petitioners.*

Baboo Bungshee Dhur Sein for Petitioners.

The stamp requisite for an application for a probate of a will, or letters of administration, is not required to be proportionate to the value of the property involved, as such applications come under the provision made in Article 1 Schedule II Act VII of 1870 for common applications and petitions.

THE petitioners presented an application to the High Court, representing that the

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Judge of 24-Pergunnahs returned an application for probate made to him on a stamp of the value of 8 annas, on the ground that the stamp was insufficient, and that such applications should be engrossed on a stamp of the value provided for plaints, and prayed for the Court's interference for its admission.

The Judge was called upon to explain the grounds upon which he based his order in respect of the stamp, and those also upon which he considered the stamp to be insufficient, and was referred to Act VII of 1870 as repealing the Schedule of Act X of 1865.

In his letter No. 651, dated the 16th December 1870, the Judge explained as follows:—"In reply to your letter No. 3757 of the 13th instant, I have the honor to observe that since the repeal of the Schedule of Act X. 1865, there is apparently no specific rule fixing the stamp requisite for applications for probate of wills. Cases instituted under Act X. 1865, and therefore cases under Act XXI. 1870, are declared to be in the nature of suits; and therefore I held that the stamp requisite for the application must be proportionate to the value of the property covered by the will. If the application be considered as coming under the rule of Clause 6 Article 1 of the 2nd Schedule of the Court Fees' Act, the stamp for a common petition would suffice; but it seems to me that cases of applications for probate or letters of administration, and also certificate cases under Act XXVII. 1860, and any other case which is to be tried as a regular suit, ought, according to strict interpretation of the law, to be covered by the stamps required for plaints. This appears to me to involve considerable hardship, and I shall be glad if the High Court can put a different interpretation on the law."

Note by the Deputy Registrar.—Act VII of 1870 (Schedule 1 Article 11) fixes *ad valorem* fees for a probate of a will or letters of administration, and (Article 12) for a certificate granted under Act XXVII of 1860.

It does not expressly provide for *an application* for probate, &c., which is evidently intended to be treated as an ordinary application for which provision is made in Schedule 2 Article 1, Note c.

Judgment of the High Court:—

Mookerjee, J.—We are of opinion that the view of the law taken by the Judge is incorrect. Section 329 of Act X of 1865, and the Schedule appended to that enactment, having been repealed by the Court Fees' Act (VII of 1870), and no separate or special provision having been made by Act XXI of 1870, or any other subsequent enactment, for stamps for applications for probate &c, those applications appear to us to come under the provision made by law for common applications and petitions in Schedule 2 Article 1 of Act VII of 1870.

The case will go back to the Judge who will admit the application as made on a proper stamp.

The 19th January 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Breach of contract—Damages.

Case No. 123 of 1870.

Regular Appeal from a decision passed by the Additional Judge of Backergunge, dated the 24th March 1870.

Raj Coomar Roy Chowdhry and another (Defendants) *Appellants*,

versus

Rajah Debendro Narain Roy (Plaintiff) *Respondent*.

Baboos Kallee Mohun Doss, Romesh Chunder Mitter and *Dourga Mohun Doss* for Appellants.

Baboo Amerendro Nauth Chatterjee for Respondent.

D contracted to sell to P a piece of land for Rs. 4,500, of which he received 700 as earnest-money. A contract was drawn up by which D agreed to execute and register a bill of sale and deposit a part (Rs. 1,800) of the price, and P was to execute a bond for Rs. 2,000, to bear interest conditioned for the payment of that sum by a fixed date, the transaction to be completed within a specified period. D was ready and willing to perform his part of the contract by the time named but finding that P would not complete the purchase but demanded back the earnest money, he sold the property to a third party for Rs. 3,800. P then sued to recover the earnest money and damages.

HELD that P was bound to show that the circumstances were such as to give him an equitable right to have back the earnest-money, and that had it not been deposited D could have justly sued for damages to the extent of the loss incurred by the second sale, and therefore P was not entitled to recover the 700 rupees.

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Norman, C. J.—THIS is a suit brought by Debendro Narain Roy to recover a sum of rupees 700 paid, as a deposit on a contract for the purchase of three lots of land, and rupees 25 and 8 annas for stamp paper, and also damages which the plaintiff alleges he has sustained in consequence of the defendants not having carried out a contract to the sell land to the plaintiff.

The facts, so far as they are material, are shortly these :—

The defendant contracted to sell to the plaintiff the land in question for rupees 4,500, and received as earnest-money rupees 300 on the 2nd, and rupees 400 on the 16th of Assin 1276, making up the rupees 700 for the recovery of which the present action is brought.

A contract was drawn up by which the defendant agreed to execute and duly register a bill of sale of the property for rupees 4,500, of which a part, *viz.*, rupees 1,800 was to be deposited, and the said sum was in fact deposited with one Kala Chand Poddar, a resident of Burrisaul, and the plaintiff was to execute to the defendants a bond for rupees 2,000 to bear interest at 3 per cent. per month conditioned for the payment of rupees 2,000 by the 30th Maugh 1276. The transaction was to be completed within 10 days from the time of the opening of the Registry Office after the Dusserah vacation, which would bring the time for the completion of the sale to the 22nd Kartick 1276.

The defendants have proved that they were ready to execute the kobalah by the time named, and that on the 19th or 20th of Kartick, Jogendro Narain Roy, the younger of the two defendants, the son of Raj Coomar, the elder, came to Burrisaul for the purpose of having the kobalah registered, and that he sent a message to the plaintiff to inform him of his arrival for that purpose. The plaintiff received that notice and said he was coming, but did not come. He did not offer to execute the bond for rupees 2,000 until after the 29th Aughran ; and in fact on that day when he put his seal to that which was afterwards filled in as a bond for rupees 2,000, it was in the condition of a piece of blank paper.

It is proved by the evidence on the record that the defendants were ready and willing to perform their part of the contract ; so much so that they were willing to take the sum of rupees 4,400 instead of rupees 4,500 seven or eight days after the 22nd of Kartick. This appears from the statement of the plaintiff himself, who was examined on oath on the 22nd March 1870, and also from the evidence of Jogendro Narain who was examined on the 23rd March of that year.

It is clear, therefore, that the defendants not only down to the 22nd of Kartick at which time the kobalah was to have been executed, but even subsequently to that date, were quite willing and ready to carry out the contract.

It is further proved by the witness Tarucknath Ghose, that he was sent to ask the plaintiff if he would complete the purchase ; that the plaintiff told him he would not, and demanded back the money paid by way of earnest. It is also proved by the evidence of Gopal Shaha, to whom the property has now been sold, that the plaintiff came to him and wanted him to come into an arrangement by which they should get the property from the defendants at a less price than the plaintiff had contracted to pay, the plaintiff offering to give him (Gopal) a share in the property if he would assist him.

On the 26th of Aughran, the defendants finding that the plaintiff would not complete the purchase sold the property to Gopal Kisto for rupees 3,800, that is to say, for a sum less by 700 than the defendants would have got if the plaintiff had carried out his contract.

I do not think it necessary in this case to rely on the special condition for forfeiture of the deposit contained in the 8th paragraph of the contract. If, independently of the actual loss sustained by reason of the plaintiff's failure to carry out his contract, the defendants were insisting on retaining the 700 rupees by way of penalty, we might have been obliged to rest our judgment on the condition contained in the 8th paragraph. But in the present case, the plaintiff is bound to show that the contract having been broken by him, the circumstances are such as to give him an equitable right to have back the 700 rupees deposited by him. Now, it is clear that if he gets back any portion of that money, the defendants would be in a worse position than if the plaintiff had carried out his contract like an honest man.

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It is clear that if there had been no deposit, and the defendants had sued the plaintiff for damages for breach of contract in having failed to complete the purchase and to pay the sum originally stipulated to be paid, they would have been entitled in that suit to damages to the extent of the whole sum of rupees 700.

For these reasons, I am of opinion that the judgment of the lower Court, which awarded the plaintiff rupees 700 on some notion that the contract had not been broken by the plaintiff, is erroneous and must be reversed, and the plaintiff's suit must be dismissed with costs.

Loch, J.—I concur.

The 19th January 1871.

Present :

The Hon'ble L. S. Jackson and W. Ainslie, *Judges.*

Limitation—Statutory bar—Onus probandi.

Case No. 1455 of 1870.

Special Appeal from a decision passed by the Officiating Judge of Gya, dated the 2nd May 1870, *affirming a decision of the Subordinate Judge of that District, dated the 29th September* 1869.

Syud Ameer Ali (Defendant) *Appellant,*

versus

Maharanee Indurjeet Kooer (Plaintiff) *Respondent.*

Mr. R. E. Twidale for Appellant.

Mr. R. T. Allan for Respondent.

In a suit to recover land of which defendant had admittedly held adverse possession for upwards of 11 years, where plaintiff's cause of action was alleged to have arisen at the close of a contest between him and the Government which had claimed to resume the land, when the Collector recorded a proceeding that the plaintiff should recover possession of his land, defendant's case was that he knew nothing of that contest and had held possession for 27 years:

HELD that it lay upon the plaintiff to remove the statutory bar which defendant had set up, by shewing that he, or some one under whom he claimed, had been in possession within 12 years next before the commencement of the suit.

Jackson, J.—I THINK it clear that the decision of the Court below cannot be supported. This was a case in which the plaintiff sued to recover from the defendants possession of some 146 beegahs of land, which the defendant had admittedly held adversely to the plaintiff for upwards of 11 years. It appears that between the plaintiff and the Government the question had previously been raised, the Government claiming to resume a considerably larger tract of land, namely, 1,200 beegahs, but eventually giving up all claim except to a much smaller area.

Upon the claim being given up, the Collector seems to have recorded a proceeding in which he declared the plaintiff should recover possession of his land; and it is contended by the plaintiff, special respondent, that the plaintiff's cause of action arose at that period; and this is the view which has been taken by the Lower Appellate Court as well as by the Court of first instance.

The defendant's case was that he knew nothing whatever of the contest between the plaintiff and Government, but that he had acquired the land in dispute by purchase from certain lakherajdars some 27 years before suit, and that, consequently, the plaintiff, if he had any title whatever, was barred by limitation in consequence of lapse of time.

This, it appears to me, is a case in which the ruling of the Privy Council reported in VIII Moore's Indian Appeals* precisely applies. The plaintiff by her own admission came into Court 11½ years after the cause of action arose; the defendant had set up a statutory bar to the suit; and it therefore clearly lay upon the plaintiff to remove that bar, to use the words of the Judicial Committee of the Privy Council, by showing that she or some one under whom she claimed had been in possession of the land in dispute within 12 years next before the suit wascommenced.

Now, it seems to me that the words of the plaintiff's allegation do very strongly support this plea. The plaintiff does not allege that she was put out of possession of this land at the period mentioned, but at that period she obtained an order from the Collector entitling her to possession, and that on going to take possession of those lands she was obstructed by the defendant. That clearly seems to show that at that time the defendant was in possession of that land.

That being so it was manifestly, I think, the business of the plaintiff to show at what period that adverse possession commenced.

* 1 W. R., P. C., p. 51.

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It seems there was no evidence whatever to show that. All the plaintiff had to rely upon was the evidence as to his being dispossessed by Government in a certain sense of 1,200 beegahs, and of those lands being comprised within the boundaries of the mouzah in which these 1,200 beegahs were contained. Both the Courts below, therefore, placed the defendant in considerable difficulty, both as to pleading and as to proof, by calling upon him in effect to make out both title and possession in regard to these lands.

It seems to me that the Courts below were not entitled to place the defendant in this position. His case was a simple one. He set up the bar of limitation, and he asked the Courts to call upon the plaintiff to remove that bar. It seems the plaintiff failed to do so, and the suit ought therefore to have been dismissed.

I think, therefore, that the decision of both the Courts below must be set aside and this appeal allowed with costs.

Ainslie, J.—I concur.

The 19th January 1871.

Present:

The Hon'ble L. S. Jackson and W. Ainslie, *Judges.*

Contract—Specific performance—Purchase-money.

Case No. 797 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Gya, dated the 31st January 1870, *reversing a decision of the Moonsiff of that District, dated the 16th April* 1869.

Mahadoo Begum (Defendant) *Appellant,*

versus

Syud Hubeebool Hossein and others (Plaintiffs) *Respondents.*

Mr. C. Piffard for Appellant.

Mr. R. E. Twidale for Respondents.

Plaintiff had entered into a contract with one of the defendants for the purchase of certain immoveable property, and after he made a small advance the contract was written out and registered. The purchaser refusing to pay up the purchase-money unless the vendor paid the costs, or half the costs, of registration, the latter re-sold the property to a third person. The present suit was to compel the completion of the contract and delivery of the property.

HELD that as the parties had entered into a written contract, the Court was bound to see whether it was, or was not, their intention that a complete and binding sale should take place, although the purchase-money was not paid.

HELD that in bringing such a suit plaintiff was bound, if he had not previously tendered the money to the defendant, to pay it into Court.

Jackson, J.—THE plaintiff in this case had entered into a contract with one of the defendants, who was owner of certain immoveable property, for the sale of that property, the purchase money being fixed at 174 rupees. The purchaser made an advance of 7 rupees, after which the contract was written out and registered. The vendor, it seems, did not part with the deed but retained possession of it for some time, and then, the purchaser being absent, complained to the purchaser's brother that the contract was not carried out. That brother wrote to the purchaser, who, in reply, sent a letter to the effect that if the vendor would pay the costs, or half the costs, incurred in registration, he would pay up the purchase-money. The vendor declined to pay any part of costs of registration, and after a delay of nearly a year re-sold the property to a third person. The plaintiff, who was the first purchaser, now sues to compel the completion of the contract and delivery of the property to him.

The Moonsiff who tried the suit considered that the plaintiff, by refusing to pay up the purchase-money which he had paid in part, had entitled the defendant to resile from the contract and to re-sell the property. The Subordinate Judge was of a different opinion: he came to the conclusion that the 7 rupees advanced was for part of the consideration-money, and that, according to the principles of the Mahomedan Law of Contract, a complete and binding sale had taken place, and therefore ordered that the sale should be carried out; but, singularly enough, he appears to have allowed the plaintiff three months time from the date of the decree within which to pay the purchase money.

Against this decision, the defendant, who is the second purchaser, appeals specially. The objections taken are shortly these—that, in the first place, the Lower Appellate Court erroneously applied the general principles of Mahomedan Law to a case in which the parties had respectively entered into a written contract containing certain stipula-

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tions, one of which was that the payment of the full amount of purchase-money should be a condition precedent to the extinction of the vendor's title. The other ground is that the Lower Appellate Court has altogether misconceived and mis-stated the evidence as to payment of part of the consideration-money.

It appears to me that both these objections are to some extent well founded. The parties had entered into a written contract; the Court was, therefore, bound to see whether it was, or was not, the intention of the parties that a complete and binding sale should take place, although the purchase-money was not paid. There are words in the contract which justify doubt on the subject, and that question is one which ought to be considered.

Secondly, I think there is no doubt that the evidence would point to quite a different conclusion from that to which the Subordinate Judge has come as to the payment of consideration-money. So far as we can see, that payment undoubtedly was a payment on account of the expenses of preparation and registration, and those expenses are usually borne by the purchaser. But independently of that, it seems to me that the Subordinate Judge was not justified in saying that the evidence of the witnesses set up that which he states they set up. It appears that only one of the witnesses spoke to some declaration on the part of the vendor, whereas another of the witnesses, possessing much better means of knowledge, spoke distinctly to the contrary effect. And besides that, there was the letter of the purchaser himself which appears to be almost conclusive upon the point, which clearly shows that he looked upon the payment which he had made as a payment made on account of registration. It would also seem that at that time he had no precise conception in his mind of what he was entitled to, because he insisted that the vendor should pay either the whole or half of that amount, whereas if he had really paid any part of the purchase-money, he would have been clearly entitled to take credit for the whole of such payment.

It is quite clear, therefore, that the evidence was not properly considered and the effect of it mis-stated, and that upon this point, at any rate, it should be re-considered. The case will, therefore, be remanded for a new trial, regard being had to the observations which I have made.

I must also observe that it was quite improper on the part of the Subordinate Judge to allow the plaintiff a period of three months after decree to pay the money of the decree. The plaintiff, it seems to me, was bound in bringing such a suit as the present, if he had not previously tendered it to the defendant, at all events to have paid the money into Court when he brought the suit.

Ainslie, J.—I concur.

The 19th January 1871.

Present:

The Hon'ble E. Jackson and Onookool Chunder Mookerjee, *Judges.*

Possession—Title.

Case No. 1228 of 1870.

Special Appeal from a decision passed by the Officiating Deputy Commissioner of Cachar, dated the 30*th March* 1870, *reversing a decision of the Moonsiff of that District, dated the* 28*th August* 1869.

Golam Reza Chowdhry and another (Defendants) *Appellants,*

versus.

Chandoo Meah Lushkur (Plaintiff) *Respondent.*

Baboo Romesh Chunder Mitter for Appellant.

Baboo Tarucknath Sein for Respondent.

In a suit to recover possession of land which both plaintiff and defendant claimed to have reclaimed from jungle and to have possessed many years, and for which both claimed to have obtained pottahs from Government, the mere fact that the land was included in plaintiff's pottah was held to be insufficient to entitle him to a decree.

Jackson, J.—It seems to me that the decision of the Officiating Deputy Commissioner of Cachar cannot stand.

The plaintiff in this case brought the suit to recover possession of a certain plot of land from the defendant. He alleged that the land in question had been 15 or 16 years ago in the possession of himself and a co-sharer; that subsequently in 1857 he had obtained a pottah of it from Government, the land having fallen to his share under a

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private partition with his co-sharer; that he, plaintiff, held possession of the land until within the last two or three years, when the defendant without any right or title forcibly dispossessed him from it. The defendant, on the other hand, stated that he had reclaimed the land from jungle 16 or 17 years ago; that it was contained in his pottah; and that he had all along been in possession and had never dispossessed the plaintiff, whose story was an utter fabrication.

The first Court went minutely into the evidence, and disbelieving that of the plaintiff, and considering that the defendant had always been in possession, dismissed the plaintiff's suit as barred by limitation.

The Deputy Commissioner, on appeal, has held that as plaintiff obtained a pottah of the land from Government in 1857, the suit is not barred by limitation, and for the same reason that plaintiff is entitled to possession, whether the defendant has or has not been in possession for the last 16 years.

On special appeal it is urged before us that this is no real trial of the case, and we think that it is not. It will be observed that both parties lay claim to the land as having been in their possession for some 15 years, and in fact as having been reclaimed from jungle by them, and both parties claim it as being included in their pottahs from Government.

In a former case, it was held that the date of the pottah which the plaintiff obtained from Government was the date on which the plaintiff's cause of action arose. This may be the case where the plaintiff obtains a pottah of jungle land. But in this case neither party allege that their rights commenced under their respective pottahs. Both state that they have been in possession some 15 years; both state that they reclaimed the land from jungle; and both state that they subsequently obtained a confirmation of their rights by a pottah from Government. In such a case, the pottah of the plaintiff conferred no new rights to the land, and the mere fact that the land is contained in that pottah is not sufficient ground for deciding in favor of the plaintiff. If it was, the Government might give a pottah to the defendant one year, to the plaintiff the next year, and again to the defendant the third year, and no person's rights or interests would be safe. The whole of the facts of the case must first be tried, and the dispute as to which of the two parties has all along been in possession decided. If the plaintiff has held the land for the last 15 years until he was dispossessed by the defendant, he will be entitled to a decree. If, on the other hand, the defendant has held possession during all that time, the plaintiff would not, on the false allegations made by him, be entitled to dispossess him, whether he had obtained a pottah of the land or not. In the case to which the Deputy Commissioner alludes, there was a remand by this Court to try the question of the effect of such settlements as that claimed by the plaintiff; and it was then found by the then Deputy Commissioner, in a long and careful judgment, that where land has been reclaimed from jungle by one person that person is entitled to the settlement pottah, and that it must be offered to him before it is granted to any one else. The effect of the present Deputy Commissioner's judgment is completely to set aside that of his predecessor.

We reverse the decision of the Deputy Commissioner and remand the case for trial. The costs will await the final judgment.

Mookerjee, J.—I concur.

The 19th January 1871.

Presen :

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Right of way—Marriage processions.

Case No. 1561 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 3rd May 1870, *modifying a decision of the Moonsiff of Bohur, dated the 21st December* 1869.

Raj Manick Singh (Plaintiff) ***Appellant,***

versus

Ruttun Manick Bose and others (Defendants) *Respondents.*

Baboo Luckhee Churn Bose for Appellant.

Baboos Kalee Mohun Doss and *Huree Mohun Chuckerbutty* for Respondents.

A general right of thoroughfare includes a right of way for marriage or other processions of the like

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nature, unless, at the time of the first inception of the right, it was restricted to a right of passage and such processions were interdicted.

Mookerjee, J.—This is a suit to re-open a pathway across which the defendants have thrown a fence, and thus prevented the plaintiff from passing through. The plaintiff therefore sues to have this pathway opened, and for a declaration that this pathway is also a way by which his marriage processions pass. The defendants deny the assertion of the plaintiff that it was ever used as pathway, plead limitation, and allege that no marriage procession ever passed by it. The Court of first instance held a local inquiry in person, and on the evidence adduced by the plaintiff was satisfied that "the disputed place was occupied by a "pathway leading to the house of the plaint-"iff, which has lately been stopped by the "principal defendant." The first Court also states that this fact is "further corro-"borated by the evidence of Byrub Churn, "Tarinee Churn, and Ram Nidhee Chucker-"butty; as also by the testimony of Ram "Churn Kurmokar and Wooma Kant Chuc-"kerbutty, witnesses cited by both parties; "and that besides being a pathway, it was "used by the plaintiff for marriage and "other processions." That Court, therefore, gave a full decree to the plaintiff.

Against this decision, the defendants appealed to the Subordinate Judge, who, concurring with the Moonsiff in his view that the disputed place was a pathway, held that "as, with the exception of the two wit-"nesses Kassee Chunder Bose and Chunder "Koomar Chuckerbutty, the remaining 7 "witnesses and the aforesaid 3 priests, as "well as the witnesses named by the defend-"ants, have deposed that they never saw "any marriage procession pass through that "pathway; that therefore it is not proved "that, except as a public thoroughfare, there "was any pathway over the disputed place "which was used for marriage processions." The Subordinate Judge gave a modified decree to the plaintiff, dissatisfied with which the plaintiff appeals specially urging:—firstly, that when the Subordinate Judge has held that a public right of way exists over the lands in dispute, he was wrong in prohibiting marriage processions to pass along it; secondly, that the Lower Appellate Court has misread and misconstrued the depositions of the witnesses examined by the plaintiff, inasmuch as besides the two witnesses mentioned by the Court, Juggobundhoo, Rujonee Kant, and Goluck have clearly deposed that marriage processions do pass by this thoroughfare, and that they actually witnessed the processions and saw them pass.

With regard to the first objection, we have to observe that, as we understand the Subordinate Judge to mean that he was satisfied that there was a public pathway or thoroughfare over the disputed land for general purposes (সাধারণ চলাচলের রাস্তা), it does not appear why that right should not include a right to pass along with marriage processions. It may be objected that processions on occasions of marriage generally consist of carriages, horses, or elephants; and it may be that the owner of the land had excluded the right of taking wheeled carriages or beasts of burden, when the original grant was made to the public to pass through this way. But it is difficult to understand how and why the right to take a marriage or other procession, which consists of foot passengers, is not included in the general right of thoroughfare which the Subordinate Judge finds the plaintiff, along with the public, enjoy over this disputed pathway. The Subordinate Judge has excluded marraige procession altogether without any finding as to whether, by the custom prevalent in that part of the country, it is usual when making grants to the public of a thoroughfare, or pathway over one's field, to make the grant in such restricted and limited a form as to exclude all processions whether on foot or not; and whether in this particular case there is evidence to show that the original grant when made was of this nature or not. The mere fact of processions not having passed for a number of years would not, we apprehend, of itself be sufficient or conclusive to prove that the original grant contained a restriction that no processions even on foot should pass over this way. For it may be that for some years past, there were no marriages in the houses to which this pathway leads, and consequently there was no occasion to pass through it. We think that where a right of the nature found in this case by the Subordinate Judge is proved against the manifestly false contention of the defendant, that there was no right of way at all over this place and that it was a portion of his field, that in that right is included the right to take marriage and other processions of the like nature; unless the defendants are able to prove that at the time of the first inception of that right, it is restricted simply to a

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right of passage, and that marriage or *shadee* processions were interdicted.

Moreover, the Court of first instance, who had been to the spot and before whom all the witnesses were examined, finds that "it "has been satisfactorily proved that the "disputed place was occupied by a public "thoroughfare, which was used by the plaint "iff for marriage and other processions to "pass through it, but which has subse-"quently been stopped by the defendants;" and that "it appears that there is no other "pathway than the one in question for "marriage processions to pass from the "plaintiff's house." The Subordinate Judge, we regret to find, reverses this finding of the Court below, by holding that as some of the witnesses "deposed that they never "saw any marriage procession pass through "that pathway," and that "consequently it "has not been proved that there was any "road over the disputed place which was "used by the plaintiff for the purposes of "marriage processions." We are not at all satisfied with this finding, and would therefore send the case back to him to re-try the case with reference to the remarks made above.

In regard to the next contention of the appellant, we find on reference to the record that, besides the two witnesses named by the Lower Appellate Court as witnesses, who testify to the fact of marriage processions having, ere this, passed through this pathway, there are no less than three witnesses, Jugobundhoo, Rujonee Kant, and Goluck, who have sworn to the fact of marriage processions of the plaintiff and others having passed through the disputed place; no less than four or five instances have been recited by these witnesses, one of which is so recent as six or seven years ago, and another so far back as 30 or 35 years, and the rest intervening between this period. These witnesses are not at all disbelieved by the second Court, for we find one of them, Jugobundhoo, is specially named by him in his judgment: the other two are included in his judg-"ment as the remaining witnesses cited by "the plaintiff," whom he also believes, but whose evidence according to his view of them proves a different state of facts. We are of opinion that on this ground likewise the special appeal may be allowed, and the Subordinate Judge should be directed to re-consider the evidence of these witnesses as witnesses for the plaintiff supporting his allegation.

The 19th January 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Jurisdiction—Transfer of proceedings—Act XVI of 1868—Costs—Section 5 Regulation XXVII of 1793

Case No. 377 of 1870.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Tipperah, dated the 18th July 1870.

Moonshee Aftabooddeen Ahmed (Decree-holder) *Appellant,*

versus

Mohinee Mohun Doss (Judgment-debtor) *Respondent.*

Baboos Romesh Chunder Mitter and *Doorga Mohun Dass* for Appellant.

Baboos Kalee Mohun Dass and *Chunder Madhub Ghose* for Respondent.

A Judge has no authority under Act XVI of 1868 to order a Subordinate Judge to try proceedings in execution of a decree which are a portion of the original civil suit tried by himself.

Where a decree-holder carries on such proceedings so referred to a Subordinate Judge, until the result is unfavorable to himself and then objects in appeal on the score of non-jurisdiction, he should be required to pay all the costs incurred by the judgment-debtor in such proceedings before proceedings are instituted *de novo.*

Section 5 Regulation XXVII of 1793 has no application to bazaars which did not exist in 1793.

Jackson, J.—MOONSHEE Aftabooddeen Ahmed, the decree-holder, has put forward these proceedings in execution of his decree against Mohinee Mohun Doss, the judgment-debtor. He seeks to recover mesne profits for a period of six years from July 1857 to April 1862 under his decree of the 19th September 1860.

The application for execution was made to the Judge of the district. He referred the execution to the Subordinate Judge. The Subordinate Judge has taken evidence on the point of mesne profits, and has awarded to the decree-holder a sum of rupees 553-12-6. Against this decision this appeal is preferred. The decree-holder is the appellant. At the first hearing of the appeal, he took objection to the jurisdiction of the Subordinate Judge to carry on these execution proceedings under the order of the Judge. On the other hand, it was contended for the respondent that the Judge had jurisdiction

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under Act XVI of 1868, to refer these proceedings for the decision of the Subordinate Judge; and that the appeal from that Subordinate Judge's decision, under those circumstances, did not lie to this Court but to the Judge.

We think that the Judge had no authority under that Act to refer this case for the decision of the Subordinate Judge. That Act especially alludes to civil proceedings other than civil suits. These proceedings in this case in execution of the decree are a portion of the original civil suit. There is, therefore, no warrant for the contention that the Judge had authority under that Act to order these execution proceedings to be tried by the Subordinate Judge.

For the respondent also it was contended that, under the provisions of Act VIII of 1859, the Judge had authority to refer these proceedings to the Subordinate Judge. It appeared that these proceedings in execution had been carried on in the Court of the Subordinate Judge from the 22nd June 1867, the date of the application for execution to the Judge, and of its reference by him to the Subordinate Judge. There had been long enquiries as to mesne profits by more than one Court Ameen, and probably large expenditure had been incurred on both sides. We, therefore, intimated to the decree-holder that as he carried on these proceedings in a Court without jurisdiction without any objection until he reached the appellate Court, and then raised his present objection apparently only because the result of the enquiry was unfavorable to him, we should require him to pay all the costs of the judgment-debtor incurred by him in such proceedings before ordering them to be instituted *de novo*. The decree-holder, thereupon, through his vakeel stated that he would not press those objections. It is, therefore, unnecessary to go on to decide that point, and we accordingly directed the vakeel to state any other objections which he might desire to urge against the enquiry before the Subordinate Judge. This has opened out the whole case upon the merits.

The contention of the decree-holder is that he is entitled to a much larger sum than has been decreed to him by the Subordinate Judge; that the Subordinate Judge has left out according to his own showing from the calculation the collections from a large bazaar which was held on the disputed land. The Subordinate Judge states it to be his opinion that the profits from this bazaar cannot be lawfully countenanced, as they are derived by means of illegal cesses contrary to Section 5 Regulation XXVII of 1793. He, therefore, refuses to give the plaintiff such collections. We have referred to the Section of the Regulation which the Subordinate Judge has quoted, and we find that that Section applies to certain hauts and bazaars in existence in the year 1793. There seems to have been no allegation before the Subordinate Judge that this bazaar was in existence in that year; and there is no evidence whatever upon the record of any such fact. The Regulation in question is, therefore, inapplicable to the present case.

But it is urged by the vakeel for the respondent that although there may be no direct law upon the point, still as his client made all such collections forcibly and by means of extortion, and that he was therefore so far a wrong-doer, the decree-holder cannot require him to refund whatever money he may have obtained by such means. This argument might be good if there was any satisfactory evidence that these collections were made by wrong-doings. The custom of making such collections from the vendors who attend the bazaar is nothing new in this country. It is recognized as one of the ordinary sources of profit derivable from the lands where such hauts and bazaars are, as is proved by the evidence in the case; and we see no reason why the decree-holder should not be indemnified for the loss which he has suffered by such profits having been kept away from him.

It remains, then, for us to consider what amount of mesne profits should be awarded to the decree-holder on account of this bazaar. There is evidence upon the record, and it is therefore unnecessary to send the case back to the Subordinate Judge for his opinion or for his decision on the point. We have heard both sides upon that evidence. On the one hand, we have the report of an Ameen who had been twice upon the spot. He has come to the conclusion that the profits from the different mehals into which this bazaar is divided, for the six years for which wassilat is due to the decree-holder, amount to rupees 4,293-8 annas. On the other hand, we have the statement of the defendant that he derived no profits whatever from this bazaar. He has put in certain jumma-bundee papers, but they omit altogether any profits from this bazaar. From the evidence it seems very certain that this is a very

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large bazaar, in which every description of articles of food, such as *turkaree*, rice, fish, as well as salt and cattle are sold. Evidence has been given as regards the profits arising from the sale of these different articles, and we see no reason whatever to distrust the evidence which has been given on the point, in the absence of any satisfactory evidence on the other side, as to the actual amount of profits derived by him. I need not say that I cannot believe that no profits have been derived. We think we ought to adopt the finding of the Ameen which is supported by evidence, and we accordingly award rupees 4,190 for mesne profits, with interest from this date to the date of payment. The respondent will pay the costs of this appeal, pleader's fees being assessed at 50 rupees.

Mookerjee, J.—I am also of opinion that the decision of the Subordinate Judge should be set aside. The objection to the hearing of the appeal having been waived by the pleader for the appellant and the record being complete, the whole case was gone into.

It appears that the question before us is the amount of wassilat which should be adjudged to the decree-holder for the years 1264 to 1269 on account of this bazaar. The Civil Court Ameen was twice deputed to ascertain the amount. In his first enquiry, he found a sum of 3,800 rupees as due to the decree-holder; but when the decree-holder objected to that amount on the ground that the Ameen has refused to examine certain witnesses who had leases of portions of this bazaar, the Ameen was again deputed to complete his inquiry—the result of which was that a sum of rupees 4,190 was found due to the decree-holder for the six years. The Subordinate Judge, it appears, would have awarded this sum to the appellant; but being of opinion that the income from bazaars was an illegal income under Section 5 Regulation XXVII of 1793, he refused to award to the decree-holder the sums found by the Ameen to have been collected from the several mehals of this bazaar, *viz.*, *turkaree*, fish, cattle and salt &c. On referring to the law quoted above, I find that it refers to bazaars existing at the time of the enactment, for which compensation for collections thitherto made by the owners of the haut, &c., were allowed by Government. The Section in question expressly states :—"As the land-holders are "to receive a compensation for those collec- "tions, they can have no right whilst such "compensation is continued to them, either "to appropriate the goods for the temporary "use of which such collections were made "to any other purpose, or to levy any other "exactions whatever from the persons who "may in future expose their goods thereon "for sale as heretofore, &c." Now, there is no suggestion that this bazaar was a bazaar which existed in 1790, or that the holder of it, by receiving any compensation for his collections from Government, was precluded from making collections from the vendors of the articles exposed for sale on his land. The Section of the law, therefore, appears to me to have no reference to bazaars of the kind for which wassilat is claimed in this suit; consequently, no objection was raised by the judgment-debtor on this head. The Subordinate Judge was wrong in refusing to the decree-holder the amount of collections that the judgment-debtor had made during the period that he was in wrongful possession of the bazaar.

It was then objected by the pleader for the respondent, that the Ameen was wrong in finding the amount of wassilat solely from the oral testimony of witnesses without any documentary evidence showing the exact amount of the collections made by him for the years in question. Now, we find that the decree-holder has done what he could in this case, by examining persons who had taken leases of the several mehals of the bazaar, some of whom have produced their kubooleuts, hokumnamahs, and dakhilahs, while the judgment-debtor has done nothing to assist the Court. He has, it is true, produced some papers after the first inquiry made by the Ameen, but these papers are manifestly untrue and were properly rejected by the Ameen and the Court below. If parties who had the best means in their hands of showing exactly the amount of collections made by them, by production of the genuine records of collections, and examining the parties who either collected the rent or paid them for the years for which they are held accountable, will withhold that evidence or produce false accounts in lieu thereof, they have themselves only to blame when the Court is obliged to go on the evidence adduced by the decree-holder to find what was the amount of the collections made. This evidence may not be very satisfactory; but in the absence of any proof given by the judgment-debtor to assist the Court in coming to a correct conclusion which was undoubtedly in his power to do, the Court is obliged to rely on the evidence of

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the decree-holder and the inquiry made by the Ameen. I am also convinced on the evidence on the record, that the mode of inquiry adopted by the Ameen is a correct mode of enquiry, and as such ought to be upheld. I would decree this appeal, and fix the wassilat at the sum stated by the Ameen in his second inquiry, namely, 4,190 rupees.

The 19th January 1871.

Present :

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Execution—Sale.—Limitation.

Case No. 317 of 1870.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Beerbhoom, dated the 30th March 1870.

Brojungona Dassee (Petitioner) *Appellant,*

versus

Shona Mookhee Dassee (Opposite party) *Respondent.*

Baboo Huree Mohun Chuckerbutty for Appellant.

Baboo Debendro Narain Bose for Respondent.

Until the order is passed confirming a sale in execution, the decree-holder must be considered to be executing his decree, and limitation begins to run against him only from the date of such order.

Jackson, J.—This is an appeal from the decision of the Subordinate Judge of Beerbhoom, holding that further proceedings in execution of a decree of the 21st July 1858 are barred under the law of limitation. It appears execution of this decree was taken out in 1863, and property belonging to the judgment-debtor was sold by auction on the 27th July 1863 The sale was confirmed on the 15th September, and the sale proceeds taken out by the decree-holder on the 18th September. No further proceedings were taken until the 29th August 1866. A question of limitation was then raised by the judgment-debtor, but it was decided against him on the 18th September 1867, and excution went on. Further proceedings are now being carried on, and the same objection is taken again which was taken previously on the subject of limitation; and the Subordinate Judge has ruled that he was in error in his former decision and that limitation does bar any further execution, because the judgment creditor did not apply for execution in 1866 within three years of the date on which the sale took place, the order confirming the sale being merely a *pro formâ* order, no objection having been urged to the sale. In support of this view, the Subordinate Judge refers to a decision of this Court, Bengal Law Reports, * Volume IV, part 20, page 115.

On appeal, it is said that the former decision is final on the point between the parties, and that the proceedings in 1863 must be held to have been carried on until the sale was confirmed.

Even admitting that the question can be re-tried, I think that the decree-holder is within time. The decision alluded to by the Subordinate Judge supports his view of the law; but the late judgment of the Lords of Her Majesty's Privy Council, page 22, Volume XIV, Weekly Reporter, rules that proceedings in execution shall be considered as being *bonâ fide* carried on every day of the time and every hour of every day, until a final decision is passed upon any pending point. Here the question as to whether the sale would be confirmed or not was in doubt until the order upon it was passed. At any time until the month had elapsed an objection might have been raised, the result of which might have been to set aside the sale as irregularly held, and this might have required the decree-holder to take fresh steps to have a regular sale. Until the order was passed confirming the sale, we hold, upon the judgment of Her Majesty's Privy Council, that the decree-holder was executing his decree. In this view we think that the decree-holder is not barred by limitation. We, therefore, roverse the Subordinate Judge's decision, and remand the case to his Court for execution of the decree.

We think that the judgment-debtor should pay the costs of this Court (2 gold mohurs) as well as the costs of the lower Court.

* 13 Weekly Reporter, page 38.

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The 19th January 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Contribution — Jurisdiction — Co-sharers—Joint decree—Specific liability.

Case No. 1700 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Hooghly, dated the 16th May 1870, modifying a decision of the Moonsiff of Pundooah, dated the 17th February 1870.

Pitambur Chuckerbutty (Defendant) *Appellant,*

versus

Bhyrubnath Paleet and others (Plaintiffs) *Respondents.*

Baboos Hem Chunder Banerjee and *Romesh Chunder Mitter* for Appellant.

Baboos Khettronath Bose and *Kedarnath Chatterjee* for Respondents.

A suit to recover money alleged to have been paid in excess of plaintiff's share of rent on account of his co-tenant was held to be a suit for contribution, and as such not cognizable by the Small Cause Court.

Such excess payment having once been pleaded as a set-off in a suit for rent, and urged under the authority of a letter of assignment which the defendant (present plaintiff) failed to prove, it was held that on that ground his suit to recover the payment in question should have been dismissed.

In a suit for contribution, where a joint decree cannot be passed, the specific liability of each co-sharer must be not only alleged but clearly established.

Kemp, J.—This was a suit to recover certain monies alleged to have been paid to the zemindar by the plaintiff in excess of the share of plaintiff, and on account of defendant No. 2, Pitambur, who is the special appellant to this Court.

The alleged payments were made on account of the rents for the years from 1273 to 1275. The putnee lot "Chacheetarra" is owned by the following sharers :—

	Annas
Plaintiff	... 2
Defendant No. 2, special appellant, ...	... 4
Defendant No. 6 ...	... 4
Defendants 3, 4 and 5	... 6
	16

The plaintiff based his demand for contribution as against the defendant No. 2 upon a barrat or assignment by which, he alleges, he was authorized by the defendant No. 2 to pay the sum claimed. It is further alleged that in a suit for the rent of the dur-putnee held by the plaintiff, which was brought by the defendant No. 2 as against the plaintiff, the latter demanded to set-off the alleged payments made by him on account of the defendant No. 2's share in the putnee as against the rent claimed ; but the revenue authorities holding that the plaintiff had not established the set-off disallowed the claim.

The first Court found that the barrat or assignment was proved, and gave the plaintiff a decree in full.

The Subordinate Judge of Hooghly, in a decision which is not very intelligible, first remarks that the suit "was of the Small "Cause Court class ; but as it was for a sum "above 500 rupees, it was capable of "going on to special appeal ;"—we quote the very words of the Subordinate Judge.

The main pleas taken by the defendant No. 2 before the Subordinate Judge were :—1*st.*—That the Civil Court had no jurisdiction to try a claim for rent ; and that as the plaintiff's plea of payment had been rejected in the Revenue Court, the suit could not proceed. 2*nd.*—The defendant denied the assignment empowering the plaintiff to pay the rents for him to the zemindar. 3*rd.*—That the defendant had paid rent in excess of his share in the putnee.

The Subordinate Judge says :—"The case is one for adjustment of accounts, and therefore the Civil Court has jurisdiction." The Subordinate Judge, after setting out the shares of the various defendants in the putnee, finds "that the plaintiff and the defendant Kalee Pershad had paid the rent due on account of their shares ; but that the defendant No. 2, Pitambur, and the other 6 annas share-holders paid alternately ; that is to say, Pitambur defendant had paid the "shushmai" kist, while the 6 annas share-holders paid the "douzdummai" kist. The Subordinate Judge finds "that the 10 annas sharers,—*i. e.*, Pitambur "who owns 4 annas and the other defendants "who own 6 annas, or together 10 annas, "—instead of paying the rent for which the "10 annas share is liable, had paid the rent "for an 8 annas 13 gundahs 1 cowrie 1

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"krant share, only, and that the plaintiff "had paid the rent to the zemindar for the "difference between 10 annas and 8 annas, "13 gundahs 1 cowrie 1 krant, or for "1 anna 6 gundahs 2 cowries 2 krant; "that it was therefore but fair and just in "a Court of equity and good conscience "that the plaintiff should get back the sum "on account of the 1 anna 6 gundahs 2 "cowries 2 krants paid on defendant's ac- "count to the zemindar, since he, the plaint- "iff, has been made liable to the defendant "Pitambur, for the rents of the dur-putnee "under the decree of the Revenue Court." We have again quoted the words of the Subordinate Judge. The Subordinate observes further that "he regrets he cannot "concur with the first Court in considering "the deed of assignment, said to have been "given by the defendant Pitambur, to be "a legal document, it not bearing a stamp "and not having been satisfactorily proved;" further "that this plea had been already "set up with regard to the rents of 1271 "and had been rejected."

Further, the Subordinate Judge remarks "that the wording of the barrat brings "doubt on it." The Subordinate Judge concludes his judgment by saying that although "he cannot concur with the Moon- "siff in the opinion that the barrat has "been proved, still he feels fully con- "vinced and satisfied in mind that plaint- "iff paid the dur-putnee rents to the zemindar "for the benefit of the defendant No. 2, "Pitambur, and that the other defendants "i. e., the 6 annas sharers, had been correct- "ly brought under the head of defendants "owing to the understanding, as seen from "the defendant's dakhillas, that Pitambur "should pay the 'shushmai' kist and the other "defendants the 'doazdummai' kist, and both "are in laches with regard to 1 anna 6 gun- "dahs 1 cowrie 1 krant;" he, the Subordinate Judge, therefore, saw no reason to interfere with the Moonsiff's decision against Pitambur, defendant No. 2; the other defendants to pay their own costs.

Several grounds have been taken in special appeal, but before deciding them we may observe that the Subordinate Judge is wrong in saying that this is a suit of the "Small "Cause Court class." It is clearly a suit for contribution, and it has been held by the late Chief Justice, Sir Barnes Peacock, that such a suit is not cognizable by the Small Cause Court.

The 1st ground is that as the suit of the plaintiff is based upon a letter of assignment, which the Lower Appellate Court held to be not proved, the suit ought to have been dismissed.

The 2nd ground is that the payments, if admitted, were voluntary or officious payments; that the plaintiff has failed to show that there was any pressure upon him or any risk to his share which would justify such payments.

The 3rd ground is that as the question of whether the plaintiff had made these payments on account of the share of the defendant, special appellant, was determined by the Collector in the rent-suit adversely to the plaintiff, such question cannot be re-opened.

The 4th ground is that there is no proof or evidence that the plaintiff made any payment on account of the defendant's share.

The 5th ground is that the defendant has proved that he paid more than he is liable to pay on account of his 4 annas share.

We think that the 1st, 2nd, and 5th grounds are good grounds, and that the decision of the Subordinate Judge must be reversed.

It is clear that the plaintiff based his suit on the letter of assignment empowering him, as he alleges, to pay to the zemindar a portion of the rent due by the appellant. The Lower Appellate Court holds that this deed has not been proved. We may also observe that this plea of payment on account of the rents, or a portion of the rents, of defendant's share by the plaintiff was rejected by the Revenue Court in the suit for rent brought by the defendant No. 2 against the plaintiff, in which suit the plaintiff pleaded a set-off under this very deed and failed to prove it. We think that the plaintiff's suit ought to have been dismissed on this ground, but we proceed to dispose of the other points.

On the second ground, we are of opinion that these payments, even admitting they were made, were voluntary officious payments. There is no evidence, nor has the special respondent's pleader been able to show us, that there was any pressure upon the plaintiff to pay on account of any share but his own.

There was no decree, no sale impending, nothing which would justify his paying on

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the score, that unless he did so his own share might be jeopardised.—Volume XII, Weekly Reporter, page 468.

On the third ground, though we do not think the plaintiff in this suit is concluded by the decision of the revenue authorities, there can be no doubt that the adverse finding of the Revenue Court is a strong piece of evidence against the truth of the plaintiff's claim.

We take the fourth and fifth grounds together. It is clear from the dakhillas which Baboo Hem Chunder Banerjee in the course of the argument submitted to our consideration and which are not disputed, that the defendant has paid more than the rent due on account of his 4 annas share. The plaintiff has failed to prove the barrat, or assignment, authorizing him, as he alleges, to make payments to the zemindar on account of defendant's share in the putnee and in excess of plaintiff's own share; and it is further established that the defendant has paid, if any thing, more than what he was liable for as a 4 anna sharer of the putnee. It is worthy of remark that the defendants 3, 4, and 5, the 6 anna sharers, admit in their written statement that defendant No. 2 has paid all that he is liable to pay as a 4 anna sharer: they further state that plaintiff may possibly have made payments on account of their 6 anna share, but that they are entitled to set-off payments made by them on account of the plaintiff. However, the defendants 3, 4 and 5 have not been held liable to the plaintiff, and they are not before the Court. In a suit of this description in which a joint decree cannot be passed, the specific liability of each co-sharer must not only be alleged but must be clearly established.

We reverse the decision of the Subordinate Judge, and dismiss the plaintiff's suit with costs in both Courts bearing interes.

The 19th January 1871.

Present:

The Hon'ble Louis S. Jackson and W. Ainslie, *Judges.*

Procedure—Evidence—Appellate Court.

Case No. 1470 of 1870.

Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 31st March 1870, affirming a decision of the Subordinate Judge of that District, dated the 2nd March 1867.

Lalla Juggessur Sahoy (Plaintiff) *Appellant,*

versus

Gopal Lall (one of the Defendants) *Respondent.*

Mr. W. A. Montriou for Appellant.

The Advocate General for Respondent.

In a suit to recover possession of a share of an estate on the ground of purchase at a sale in execution, which share was alleged to have been knocked down by the Collector to another party in an execution-sale under Act XI of 1859, where it was found that the plaintiff's purchase had not been *bonâ fide*, the right, title, and interest of the decree-holder having been previously purchased *benamee* by the judgment-debtor himself:

HELD, that the real purchaser was the judgment-debtor, and that the holder of the rent-decree could properly sell either the estate or the said right, title, and interest.

It is the duty of the Judge of an appellate Court to allow the parties or their pleaders to submit the evidence to him at the hearing in open Court, and to make upon the evidence so submitted every comment, and found upon it every argument they may think necessary.

Where the decision of a case involves issues of fact, and the first Court has gone fully into the evidence and recorded its finding and decision, if the appellate Court agrees with the conclusions of the Court below, the appellate Court is not obliged by law to state in detail the reasons previously recited in which it concurs.

Jackson, J.—THE plaintiff in this case sued to recover possession of a share in a certain estate, alleging that he had purchased that share at a sale in execution of a decree obtained by one Oodit Narain against the owner Sooambur Singh; that he had entered into possession under his purchase, but that under a sale held by the Collector in execution of a decree under Act X of 1859 (such sale being held under the provisions of Act XI of the same year), the same estate had been knocked down to another party, and thereupon the Collector on the application of that party, one Gopal Lall, had violently and illegally dispossessed the plaintiff, and he thereupon brought his suit.

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The trial of this suit appears to me to have been unnecessarily complicated, and I regret to say that the parties have been put to great inconvenience and expense, by the obstinacy and disobedience of orders exhibited by the Additional Judge to whom the case has been twice remanded on special appeal by orders of this Court. On the third trial, however, the Judge has gone into the merits of the case, and has affirmed the decision of the Subordinate Judge dismissing the suit of the plaintiff.

Putting aside various questions which have been raised in the trial of this suit, as I think unnecessarily, the ground on which the suit has been dismissed appears to be shortly this,—that in consequence of the nature of the transaction in execution of the decree in which Oodit Narain was originally plaintiff and Sooambur Singh defendant, the sale in execution and the consequent purchase by this plaintiff appear to have been merely colorable, unreal transactions, and that the plaintiff never acquired any title whatever to any estate.

This decision has been impugned on, it may be said, three grounds. One, that the *ratio decidendi* on which the Judge has proceeded does not sufficiently dispose of the case and the plaintiff is really entitled to recover; second, that there has been no proper decision by the Judge on the merits, as he has simply adopted the opinion of the Court below without stating his own; and thirdly, that the Judge has committed an irregularity in the trial of the appeal by refusing to hear the evidence and the comments of the pleaders upon that evidence in the usual and proper way.

It will be most convenient to dispose of the latter ground first. This ground of appeal is based upon an affidavit on the part of the agent, or so-called agent of the appellant, who deposes that he was present in Court on the day on which this appeal was called on for hearing, and that in his presence the Judge refused to allow the evidence to be read, and the vakeels of both parties to comment upon it after the general argument of the case was heard. Against this there is the counter-affidavit on the part of a person who is said to be the son of the respondent, and he positively swears that so far from refusing to hear the evidence read, as alleged, the Judge did hear the evidence discussed and commented upon in the usual way.

Now, without going into the question of the credibility of these two statements, respectively, it seems sufficient to say that an affidavit upon which we should come to the conclusion that the Judge had so far neglected or misconceived his duty in the way stated ought to be perfectly clear and exhaustive should leave no doubt upon the subject, and should exclude the possibility of the Judge having done that which it was his duty to do; but the affidavit of the agent is not so. It only states that on a particular day the Judge stopped the reading of the evidence. But that is not the day on which the Judge gave his judgment; and, consequently, it is quite possible that the statements made in it may be all true, and yet that the Judge did afterwards hear the evidence and pronounce his judgment upon it. I should be extremely sorry to believe that the Judge of an appellate Court should take the course which he is alleged in the statement to be in the habit of taking in hearing appeal cases, namely, to refuse to allow evidence to be read before him in open Court and made the subject of comment by the parties or their pleaders, but instead of that merely to read the evidence in private. No doubt there are cases, especially complicated cases, in which it is desirable that the Judge should have an opportunity of considering the evidence at leisure before giving judgment; but there can be no doubt whatever that it is the duty of the appellate Court to allow the parties or their pleaders to submit the evidence to him at the hearing in open Court, and to make upon the evidence so submitted every comment and found upon it every argument they might think necessary. This ground, in my opinion, is not made out.

Then as to the other ground, that the Judge has simply adopted the observation of the first Court, that is equally unfounded. Where the decision of the case involves the determination of issues of fact, and the determination of those issues is based upon evidence, if the Court of first instance has gone fully into that evidence and has recorded its finding and decision upon it, I think that when the appellate Court agrees with the conclusions of the Court below upon those facts, for the reasons stated by that Court, it is not the intention of the law that the Judge of the appellate Court should be obliged to state in detail the very same reasons which had previously been recited and in which he concurs. I do not mean

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to say that there is any general rule, nor do I mean to say that in this case it would not have been well, under the particular circumstances (namely, of two previous remands), if the Judge had stated carefully and clearly the reasons upon which his decision was based; but I do mean to say that the decision which he has now recorded is one legally sufficient and one on which no ground of special appeal can lie.

We now come to the consideration of the reasons on which the Judge has thrown the plaintiff out of Court. The Judge in effect I understand to have found, as the Subordinate Judge in effect also finds, that the alleged purchase by the plaintiff in execution of a decree against Sooambur Singh was not in fact a purchase by the plaintiff at all; that the execution against Sooambur Singh was not a *bonâ fide* genuine execution, but that previously the right, title, and interest of the decree-holder in that decree had been purchased *benamee* on behalf and for the benefit of Sooambur Singh himself; and that the sale which took place in pursuance thereof was a sham sale, the person furnishing the funds and acting throughout being Sooambur Singh himself. Probably it would be held in such a case that, by the purchase on behalf of Sooambur Singh and with his money, the decree had in fact been extinguished; but it is sufficient to say that by the findings the plaintiff did not acquire any thing, did not buy the title to this property. The person who really purchased was Sooambur Singh himself; and consequently the person who obtained the decree in the rent-suit could properly sell either the estate, or the right, title, and interest of Sooambur Singh in that estate. That being so, I think the Courts below were quite right in dismissing his suit.

And I should say that the finding has not been impugned on the ground that there was no evidence to support it. There was evidence, and the Court below found upon that evidence in favor of the defendant. I do not think we are in a position to say that it was not justified in coming to that conclusion upon that evidence. What our own conclusion would have been if we heard the case as a regular appeal is another question. I think the special appeal must be dismissed with costs.

It was remarked, and with some plausibility, by the learned Counsel who appeared for the appellant, that the plaintiff had been, by the wrongful act of the Collector, unfairly placed in the disadvantageous position of plaintiff, whereas, but for that violent and improper proceeding, his client would have been in the position of a defendant. On that it seems to me sufficient to say, that if the case was so the plaintiff had only to avail himself of the remedy provided by Section 15 Act XIV of 1859, and to bring his suit as a simple possessory suit. But he thought fit to come into Court with a civil suit in the usual way, and therefore undertook to prove the title which he advanced, and must take the consequences.

Ainslie, J.—I concur.

The 9th December 1870.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Notice of enhancement—Ryots—Middlemen.

Case No. 1412 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Judge of the 24-*Pergunnahs, dated the* 14*th April* 1870, *affirming a decision of the Deputy Collector of Busseerhaut, dated the* 18*th October* 1869.

Kalee Prosunno Ghose and another (Defendants) *Appellant,*

versus

Hurish Chunder Dutt and others (Plaintiffs) *Respondents.*

Baboo Oopendro Chunder Bose for Appellants.

Baboos Kalee Prosunno Dutt and *Khettur Mohun Mookerjee* for Respondents.

Where a party who was not personally a cultivator of the land but held a large jumma with a number of ryots below him, was treated in a notice of enhancement under Clause 1 Section 17 Act X of 1859 as an ordinary ryot having a right of occupancy, it was held that the notice was not on that account illegal or informal.

Jackson, J.—This is a suit for enhancement of rent and for arrears of rent at an enhanced rate. Both the lower Courts have decree the enhanced rate, and a special appeal has been preferred from the decision of the Lower Appellate Court.

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A great many points are taken in special appeal. In the first place it is said that the notice is bad in law, because it does not distinctly describe the status of the ryot; and also because every word of the first clause of Section 17 Act X of 1859 is not included in it. On this point we find the facts of the case are these:—The defendant admittedly is a tenant holding without any written engagement. The notice was served upon him treating him as an ordinary ryot having a right of occupancy, and called upon him to pay the rent at a rate paid by the neighbouring ryots, under Clause 1 Section 17 of Act X of 1859. On the trial it appeared that he was not exactly of the class of ordinary ryots having rights of occupancy, but that he held a very large *jumma* with a number of ryots below him, and that he was not a personal cultivator of the land. The Court, therefore, treated him as a *gauteedar*, and required him to pay the same rate of rent which the *gauteedars* in the village pay, namely, rupees 1-4 annas per beegah. It is now attempted to be made out upon this that the defendant is a *gauteedar*. But because he has been allowed to pay *gauteedaree* rate, it does not by any means follow that he comes under the denomination of *gauteedar*. There seems to be nothing informal or illegal in the notice which has been served upon him.

Then it is said that there is no evidence to show that the *gauteedars* of the village pay rupees 1-4 per beegah. We have had all the evidence read out to us, and we find that there is certainly evidence to show that that is the rate generally paid by the ganteedars. The plaintiff certainly claimed very much larger rate, but the Courts have acted very properly under the circumstances, looking to the manner of the holding of the defendant, to make him pay the *gauteedaree jumma*.

It is also said on special appeal that the witnesses do not mention the number of beegahs of each description of plots of land in the possession of the defendant. It is true that the witnesses do not do so. But I think that it is impossible to obtain any person to depose that there are so many *beegahs* of each class of land in the possession of his neighbour. It is a matter which may possibly be known to the defendant himself, and it is for him to show the number of beegahs in each plot. But it does not follow that there is no evidence upon this point. In the first place, there is the allegation of the plaintiff which is not denied by the defendant; and in the second place, this allegation has been enquired into by an Ameen who went to the spot and measured the land.

Another objection taken on special appeal is that the Court below ought to have decided the point, whether the petitioner, defendant, was holding the excess area as a tenant or as a trespasser. Reading this sentence as put down in the grounds of special appeal, it seems to me quite unintelligible. But it is said here that it was intended thereby to allege that the defendant had claimed certain lands as belonging to other jummas and to his lakheraj land, and that that question had not been enquired into. We find, however, that it has been thoroughly looked into, and that that land has been released and no rent has been fixed for it.

An objection was also taken in the matter that no decision has been passed with regard to the uniform payment of rent. But it appears that in a former appeal before the Judge, a decision was passed upon the point of uniform payment of rent, and the present Judge therefore very properly considered it unnecessary to enquire into the point any further. There seems to be, therefore, no ground for interfering with the judgment of the Lower Appellate Court, either in the matter of rate or in the matter of notice.

But there still remains one question, *viz.*, as to the exact quantity of land in the possession of the defendant. An issue was raised on this question through the whole of this litigation, the plaintiff claiming that the land should be measured with a rod of 80 cubits, the defendant alleging that it ought to be measured with a rod of 90 cubits. The Judge says that it is not necessary to enquire into this point, because as he says no rent is claimed for any excess area. It seems to us, however, that it is impossible to decide this case without determining this point, because it is impossible to determine the number of *beegahs* in the defendant's possession without first determining it. There is evidence on both sides, not only oral but also documentary, as to the size of the rod prevalent in this part of the country. All that evidence must be considered in coming to the conclusion as to what size of beegah must pay rent at the rate of rupees 1-4 annas. This point ought to have been tried by the lower Court, but as the plaintiff is willing to take the enhanced rate decreed at the larger beegah, it is not necessary to remand the case. A decree will be drawn up in this office calculating the number of beegahs in the possession of the defendant by a rod of 90 cubits; and also

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deducting the *puteet* lands for which the plaintiff seems to have claimed no rent.

The decree of the lower Courts will be modified to that extent.

Parties will bear their own costs in this suit.

Mookerjee, J.—I concur.

The 19th December 1870.

Present:

Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Death of appellant—Representation—Letters of administration.

Case No. 54 of 1870.

Regular Appeal from a decision passed by the Judge of Sarun, dated the 28th December 1869.

Munnoo Lall (one of the Defendants) *Appellant,*

versus

Saheb Perhlad Sein (Plaintiff) and others (Defendants) *Respondents.*

Baboo Kalee Prosunno Dutt for Appellant.

Baboo Mohesh Chunder Chowdhry for Respondents.

An appeal having come on for hearing, the death of the appellant was intimated to the Court and the case allowed to stand over. It was again set down for hearing nearly six months after, and an order made that it should be brought up a fortnight later. On its being called up again, a petition was presented on the part of the Administrator General for a month's postponement on the ground that, although letters of administration had been granted, the requisite funds had not been raised:

HELD that the appeal having been filed and the vakeel instructed and paid, the Administrator General would have been allowed to appear, although regular letters had not been taken out; but as the application had not been made within reasonable time the appeal was dismissed.

Jackson, J.—THE decision of the Zillah Judge in this case was passed on the 28th December 1869. The appeal was preferred on the 4th April of the present year. The case, it seems, came on for hearing on the 18th July last, when it stood over for this, amongst other reasons, that the death of the appellant was then intimated to the Court. The case was again set down for hearing on the 5th of this month, and an order was made—"Let this case be brought up on the "19th instant, and by that time if no one ap- "pears to represent the appellant the ap- "peal will be dismissed." Now, the case being called up again to-day, a petition is presented on the part of the Administrator General, who applies that the case may stand over again for one month on the ground that, although the Court has granted letters of administration upon the application of the parties made so long ago as the month of August last, the requisite funds have not been raised, and the Administrator General does not find himself in a position to act. The regular letters of administration have not been taken out, but an order has beengranted.

Now, in this case, the appeal has been actually filed, and the vakeel, I understand, has received his instruction and also his fee; and we should have had no hesitation in permitting the Administrator General to appear in this case, although regular letters of administration have not been taken out; but as it appears to me that the application has not been made within reasonable time, by any person claiming to be the legal representative of the deceased appellant, I think the appeal ought to be dismissed with costs chargeable to the estate of the deceased.

Glover, J.—I concur.

The 20th December 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Act X of 1859—Execution sale—Revenue Courts—Jurisdiction.

Case No. 119 of 1870.

Regular Appeal from a decision passed by the Subordinate Judge of Gya, dated the 22nd March 1870.

Tekaet Bhao Narain Deo (Defendant) Appellant,

versus

The Court of Wards on behalf of the estate of the late Maharajah Ram Narain Deo (Defendant) *Respondent.*

Mr. R. E. Twidale for Appellant.

Baboos Unnoda Pershad Banerjee and *Juggadanund Mookerjee* for Respondent.

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Calls into question the doctrine laid down by a Division Bench at page 147 of the Special Number of the Weekly Reporter, *viz.*, that when a sale has taken place by order of the Collector in execution of a decree under Act X of 1859, a Civil suit for the purpose of questioning the regularity and propriety of the proceeding is taken away, as well as anything in the shape of an appeal.

Where circumstances indicate not merely irregularity, but irregularity brought about by the contrivance of the decree-holder, the Civil Court has jurisdiction to set the sale aside and is right in doing so.

In making a decree to set aside such an execution-sale, the Court is bound to make provision for the decree-holder's claim being satisfied.

Jackson, J.—In our opinion the decision of the lower Court ought, upon the main part of it, to be affirmed.

The property to which the suit relates, which is a mokururee granted to Maharajah Ram Bahadoor Narain Deo who is now a lunatic, may be broadly stated to have been put to sale and sold by the Collector in execution of a decree against these Maharanees, as the committees of the person of the lunatic, for arrears of rent. The defendant, Teknet Bino Narain Deo, was the purchaser of that decree, and he sued out execution making the application against the Maharanees and also against the Court of Wards as manager of the estate; but the property which the Court was moved to sell was described as a mokururee tenure belonging to the Maharanees as custodians of the lunatic Rajah.

The property so described was ordered to be sold on the 14th September 1868. On the 7th of the month, a week before the date specified, a petition was put in on part of the Court of Wards, objecting, amongst other things, that the Maharanees had no right, title, or interest in the mokururee in question, and praying, therefore, that the property might not be sold.

This objection, it seems, was overruled, and the property was brought to sale on the 14th September; but on that date it seems that not a single bidder for the property appeared, and on a verbal representation from the mooktear of the decree-holder that his agent who had been in attendance up to that time had gone to another place and would attend afterwards, the Collector appears to have ordered that the sale should be postponed until the 21st September, and of that postponed sale no notification was issued, but on that day the property was put up for sale again. The decree-holder and his mooktear, and one other person named Tikum Lall, appear to have bid for the property, and it was knocked down for the sum of 6,100 rupees.

It appears that the mokururee was originally granted upon a bonus or consideration of 14,500 rupees; and the superior landlord, who was a witness in this case, Sham Lall Mitter, deposed that to the best of his knowledge and belief the value of the under-tenure in question was 70 or 80 or 90 thousand rupees.

Two questions have been raised before us on this appeal. The first is whether the suit was cognizable by the Civil Court, as the defendant maintains it was not; and the second, whether any ground for setting aside the sale has been made out: and we have been referred to Sutherland's Full Bench Rulings, otherwise called the Special Number of the Weekly Reporter, page 147, and to a Ruling of the Full Bench of this Court in V Weekly Reporter, page 20, Act X Rulings.

The first mentioned of the cases goes the length of laying down that when a sale has taken place by order of the Collector in execution of a decree under Act X of 1859, by the terms of Section 150, a Civil suit for the purpose of questioning the regularity and propriety of the proceedings in such sale is expressly taken away; and the Judges also point out that by the terms of Act X any thing in the shape of an appeal is also taken away in such a case. So that if by mistake or inadvertence a Collector should have improperly sold property of the very highest value in execution of a decree of the smallest amount, the person whose property is so sold is without remedy of any kind whatever, unless he should be able to establish that there has been such fraud in obtaining the decree or carrying out process of execution that the Civil Court would be entitled to set aside the sale on that ground.

The Full Bench decision, which we have referred to in V Weekly Reporter, confirmed generally the view taken in that other case; but it expressly ruled that in case of fraud the Civil Court is competent to interfere.

We confess that if it were necessary to the decision of this case, we should be disposed to invite further consideration by the Full Bench of the doctrine laid down in the case reported in the Special Number of the Weekly Reporter. It appears to us little short of monstrous to hold that in such circumstances as we have stated, the order of the Collector bringing to sale perhaps a most valuable immoveable property should be absolutely final beyond the reach of

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revision or appeal, and beyond being questioned in the Civil Courts. But we do not think it necessary to raise that question, because it seems to us that the circumstances of this case bring the matter fully within the ruling of the Full Bench.

We may assume that the decree in this case was obtained correctly. The parties we have now to do with were not the parties in that suit; but the circumstances under which this property was brought to sale indicate what may be called fraud such as would entitle the Court to set aside the proceedings. This property was put up for sale under the description of a mokururee tenure belonging to the Maharanees. The blot in this description was pointed out by the Court of Wards. It was open to the parties then, and it was open to the Collector, to set this right by amending the notification and giving this property its correct description. That they omitted to do, and the result of that is, we think, pretty plainly evidenced by what took place on the 14th September, on which day no bidder attended at the sale. It cannot be believed that if the property had been fairly described, not a single person would have attended to purchase what appears to be a most valuable estate. And when we look to the sequel of what took place on that date, we find that a mooktear of the decree-holder went to the Collector and obtained an order, which was not proclaimed and notified, postponing the sale for a week, and on that day the decree-holder himself, the mooktear of the decree-holder, and a third person of whose entity, solvency, and position we have no information whatever attended before the Collector, and the decree-holder bought this property for what seems to be most inadequate price. Under these circumstances, it seems quite clear that there had been contrivance, and what we may call fraud, practised in order to have this property sold below its real value.

A question has been raised as to whether the plaintiff had given evidence as to what the value of the property was. It was objected that the witness Sham Lall Mitter, who stated his belief as to the value of the property, did not disclose what his means of knowledge were, and did not appear to be exactly informed regarding the returns or the profits of the mokururee. But it seems to us very unnecessary to ask a witness, who is speaking of a portion of his own property, how he comes to know what the value of his property is or about what it is; and it is also quite conceivable he may not know precisely what profit the tenant may be making nor does he in his deposition in this case pretend to describe the exact value of the property. He gives a wide margin and states it to be somewhere between 70 and 90 thousand rupees.

Finally, it was suggested that the low price at which the property was sold did not appear to be the result of the irregularity. We think it was fairly the result. The circumstances which we have already stated appear to be so clear on that point that it is unnecessary to refer to them again. But it seems to us that not merely was there irregularity, but irregularity brought about by the contrivance of the decree-holder. Therefore, we think it clear that the Civil Court had jurisdiction, and was right in ordering the sale to be set aside. Then there are other circumstances which we ought not to lose sight of. It is clear that the Court of Wards have been very ill served, and have acted in a mistaken manner throughout. There can be no doubt, we think, that, on the rights of the case and in the interest of the lunatic, the Court of Wards ought, on receiving intimation that the decree was outstanding and that the party was proceeding to execute, to have put in the amount due under the decree. That would have put a stop to all these proceedings, would have saved the parties much unnecessary expense, and avoided this litigation.

We think the objections taken by the Court of Wards under the advice of the person who acted for them were not the real objections which ought to have been taken, but were of a technical, and we may say frivolous, character. We also think that the Court of Wards ought in bringing this suit to have stated their willingness to do equity towards the purchaser, by way of repaying the amount which he had paid as purchase-money, and also to have satisfied the decree. Further, we think that the Court below in making a decree in favor of the plaintiff was bound to have made provision for the decree-holder's claim being satisfied.

Under these circumstances, although the decree of the Court below was in the main right, it cannot be denied that the defendant was justified in bringing the present appeal;

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For these reasons, we think, we must affirm the judgment of the Court below, but each party must bear their own costs.

The purchase-money must be repaid with interest at 12 per cent. per annum, that being the rate of interest allowed in the decree; and the plaintiff may satisfy the decree for rent before the estate is released from attachment.

The 4th January 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Review—Limitation.

Poresh Nath Roy, *Petitioner,*

versus

Gopal Kristo Deb and others, *Opposite Party.*

Baboo Woomesh Chunder Banerjee for Petitioner.

Baboos Romanath Bose and *Grish Chunder Ghose* for Opposite Party.

The time during which an application for review is pending, is not to be taken into account within the 90 days allowed for appeal.

Jackson, J.—We think the decision of the Judge of Sylhet on the appeal of Poresh Nath Roy, refusing to admit the appeal, is contrary to law and must be set aside. The decision against which Poresh Nath Roy appealed is dated the 28th December 1869. For a review of that decision Poresh Nath Roy filed an application on the 6th January 1870. An order was passed rejecting that application on the 4th April 1870. Poresh Nath Roy, thereupon, appealed to the Judge on the 21st April 1870. The ground upon which the Judge has rejected the application is not clearly stated in his order. He states that if the application had been made on the 14th he might have admitted it, but as it was made on the 21st he rejected it.

We do not understand in what way the petitioner would have been benefitted by making an application on the 14th instead of on the 21st. In either case, if the time during which the application for review was pending be deducted, Poresh Nath Roy was within time. If, on the other hand, that time is to be taken into account, Poresh Nath Roy is beyond time.

It has been decided by a Full Bench of 14 Judges (to be found in II Weekly Reporter, page 36), and which was afterwards followed by another Full Bench of this Court* (to be found at page 23 of the Revenue, Civil and Criminal Reporter of the 31st May 1867), that the time during which the application for a review is pending, is not to be taken into account within the 90 days allowed for appeal. Following these decisions Poresh Nath Roy was within time in presenting his appeal to the Judge. The Judge must, therefore, admit the appeal and pass orders upon it. The order rejecting it is set aside.

The 10th January 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch and W. Ainslie, *Judges.*

Mesne profits—Valuation of claim—Execution.

Case No. 227 of 1870.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Jessore, dated the 4th June 1870.

Gooroo Doss Roy and another (Judgment-debtors) *Appellants,*

versus

Bungshee Dhur Sein and others (Decree-holders) *Respondents.*

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* 7 W. R., Civil, p. 529.

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Baboos Ashootosh Dhur and *Hem Chunder Banerjee* for Appellants.

Mr. J. W. B. Money and *Baboo Sreenath Doss* for Respondents.

Where a plaintiff includes a suit for mesne profits in a suit for possession, he is bound to value his claim at what he knows to be its real amount, and cannot be allowed, in the course of a mere inquiry into the amount of damages after decree, to depart from the claim made by his plaint, and set up what is substantially a new and distinct claim.

Norman, C. J.— * * * * * * * * * * * * * * * *

Now, the claim in the plaint rupees 8,000 for the mesne profits of ten years and eight months is at the rate of rupees 750 a year. The Subordinate Judge allows to the plaintiff for wassilat for 10 years rupees 44,684, or, in other words, wassilat at the rate of rupees 4,450 a year.

The disproportion is the more striking when we find that the whole difference is in respect of the profits of a part only of the land, *viz.*, 240 beegahs out of 445, for which an estimate has been made and allowed by the Subordinate Judge at the rate of rupees 4,000 a year or nearly 17 rupees a beegah.

We have no doubt but that *the general rule* is that a plaintiff is not entitled to greater damages than he has claimed in his plaint. To that an exception has been allowed in the case of suits for possession with mesne profits, where the plaintiff has some times no means of knowing accurately what has been realized by the defendant during the period of his dispossession and prior to the suit. Instances of this will be found VI Weekly Reporter, Miscellaneous page 28; IX Weekly Reporter 218; XIV Weekly Reporter 82. Again, a plaintiff has no means of judging how long the suit may be protracted, or what will be realized by the plaintiff while the suit is so pending. The 11th Section of the Court Fees' Act VII of 1870 provides for such cases. But Mr. Money contended that where a plaintiff includes a claim for mesne profits in his suit for possession, he is not bound to value his claim at what he knows to be its real amount, but may fix it as low as he pleases—say at ten or fifty rupees; and at the trial or in execution of the decree, if the mesne profits are shewn to amount to a very much larger sum, even to lakhs of rupees, he would be entitled to claim a decree for that large amount on paying the stamp-duty as provided by that Section.

It appears to us that Mr. Money's argument is not tenable. The plaintiff's claim which the defendants were called on to answer in the suit, with respect to which the issues were fixed and the contest took place, is that set forth in his plaint. By the 7th Section of the Court Fees' Act Clause 1, he is bound to pay a stamp fee on the amount claimed by him.

We think that a plaintiff cannot be allowed, in that which is a mere enquiry into the amount of damages after decree, to depart from the claim made by his plaint and set up what is substantially a new and distinct claim.

In the present case, it is in evidence that the ten khadas were used by the plaintiffs as khâmâr land at the period of their dispossession. The plaintiffs must have known very well what were the profits of the land at that time. The plaintiffs for some reason or other in their plaint chose to state the mesne profits of the whole land at rupees 8,002 for ten years, and in making that claim they knew very well what they were about. The claim now made of rupees 22,541 for rather more than half of the land for seven years before the suit, to say the least, savours of extravagance. No explanation has been given of the reasons which induced the plaintiffs to fix the estimate of mesne profits at 750 rupees a year in their plaint. No suggestion is made that the plaintiffs have discovered any facts not previously known to them, or acquired any additional knowledge of the value of the property after the filing of their plaint, which should have induced them to put forward the larger claim at a late stage of the case. It has been suggested that the plaintiffs' object probably was to prevent an appeal to the Privy Council. If that be so, if with that object they deliberately put forward their claim as a claim for rupees 8,002 only, we think they ought not to be allowed to enlarge their claim after they have gained their object, as they have done by procuring the High Court to refuse to admit an appeal.

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The 17th January, 1871.

Present:

The Hon'ble L. S. Jackson and W. Ainslie, *Judges.*

Hindoo widow—Ancestral property—Reversioners—Alienation—Maintenance.

Case No. 156 of 1870.

Regular Appeal from a decision passed by the Subordinate Judge of Tirhoot, dated the 21st April 1870.

Mussamut Bhugobutty Dayee (Defendant) *Appellant,*

versus

Chowdhry Bholanath Thakoor and others (Plaintiffs) *Respondents.*

Mr. R. T. Allan for Appellant.

Baboos Unnoda Pershad Banerjee and *Mohesh Chunder Chowdhry* for Respondents.

Also the cross-appeal, No. 169 *of* 1870.

O had, by the *Kirtima* form, adopted his nephew G, and then, shortly before his death, executed an ekrarnamah whereby he directed that, excepting a portion which he bestowed in absolute gift upon his daughter S, the remainder of his property, moveable and immoveable, was to be enjoyed for her life-time by his wife C, and after her death to become the absolute property of the adopted son. As the parties lived in the Mithila country, the adopted son concurred in the devise and executed an instrument of corresponding tenor, with this difference that it allowed the widow to make necessary and reasonable expenses. The adopted son predeceased the widow, who had also been pre-deceased by her daughter S, who left a daughter B. On the death of the widow (C), the heirs of the adopted son (G) sued B for the property which had been left to G:

HELD that, under the discretion vested in the widow, she was at liberty to invest for the benefit of her daughter and grand-daughter sums of money in the purchase of immoveable property for their maintenance.

HELD that the title to the property did not by the death of G become absolutely vested in C; but that the claim of G's heirs to inherit in succession to G was postponed (as G's rights had been by the agreement) until the time of C's death, when it came into force in the same manner as if the ekrarnamahs had never been executed.

A widow enjoying the immoveable property of her deceased husband, is not entitled to alienate either immoveable property or any property which she may have purchased out of the profits of such estate.

Jackson. J.—THESE two appeals, No. 156 and No. 169, arise out of the same decision of the Court of the Subordinate Judge of Tirhoot in the suit brought by Chowdhry Bholanath Thakoor and others against Mussamut Bhugobutty Dayee and others.

That which the plaintiff sought in this suit was to recover from the hands of the defendant, Mussamut Bhugobutty Dayee, and other defendants who are her lessees as to some of the property in dispute certain property, moveable and immoveable, which had been for many years in the hands of and enjoyed by one Chunderbutty, who was the widow of Oodun Thakoor, who died on the 23rd Falgoon 1234 Fuslee.

It seems that Oodun Thakoor (how long before his death does not appear) had adopted, by the Kirtima form, Chowdhry Greedharee Thakoor, the son of his own brother, Chowdhry Goonakur Thakoor; and then Oodun Thakoor, in the month of Magh, or a few weeks before his death, executed an instrument called an ekrarnamah, by which he directed that excepting a certain portion of his property which he bestowed in absolute gift upon Mussamut Suttobutty, the remainder of his property, moveable and immoveable, was to be enjoyed for her life time by his wife Mussamut Chunderbutty, who was to expend the proceeds thereof but was not to alienate any portion of it, and upon her death it was to become the absolute property of the adopted son.

These parties living in the Mithela country, and the adopted son having a vested interest in the property, it was necessary, in order to give validity to the instrument, that he should concur in the devise so made, and accordingly the adopted son appears to have executed an instrument of corresponding tenor, by which he also on his part concurred in making over this property for her lifetime to the adopting mother,—the only noticeable difference as to expression in the two deeds being that in the deed of the son the widow is allowed to make what are called *laboodee* or necessary and reasonable expenses.

The adopted son, Gireedharee Thakoor, died on the 27th Assin 1260, and the widow Chunderbutty Dayee died in the month of Pous 1274, thus surviving the adopted son by about 14 years and her husband somewhere about 40 years. The daughter Suttobutty also pre-deceased her mother and died in the year 1259, leaving one daughter, the defendant Bhugobutty, against whom this suit has been brought.

The plaintiffs set forth the whole of these facts in their plaint, and they allege Gireedharee Thakoor to have died leaving them as his heirs, though for some reason or other

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their pleader, in answer to a question of the Subordinate Judge, appears to have stated that his clients did not claim as heirs of Gireedharee, but merely mentioned his death incidentally. The plaintiffs, however, claim manifestly as heirs both of Oodun Thakoor and Gireedharee Thakoor. It seems to me, therefore, that the answer made by the pleader to a question of the Court upon what clearly was a point of law, ought not to prejudice the plaintiffs, who have set out the whole of the facts of their case and have left it to the Court, as it certainly was the Court's business, to apply the law which may be applicable to them.

The defendant Bhugobutty Dayee contends that she is the heiress of her mother's mother, that the property was in fact the grand-mother's *streedhun*, that the grandmother did not take as an ordinary Hindoo widow, but that the effect of the deed under which she held was, taken in connection with the death of Gireedharee before the mother to vest the property in the mother absolutely, so as to defeat all claim of the heirs of Gireedharee or others.

The Subordinate Judge has given the plaintiffs a decree in respect of the immoveable property which admittedly came from Oodun Thakoor, but has allowed the defendant to retain possession of all the other property in suit, which I shall presently state as being divided for the purposes of argument into four classes.

In respect of that portion of the Subordinate Judge's decision which is in favor of the plaintiffs, I think the decision was right, although not for the reasons stated by the Court below. Shortly, the effect of the two ekrarnamahs, which have been read to us appears to me to be this, that by an understanding between Oodun Thakoor and his adopted son, carried out in these instruments, it was agreed that notwithstanding the adoption Chunderbutty should take and enjoy the estate of her husband, whose death was then apprehended and which did shortly afterwards occur, in the same mode as she would have taken and enjoyed it if no adoption had taken place.

In this point of view, it appears to me that the succession and rights of Gireedharee were by agreement postponed until after the death of Chunderbutty, and consequently, Gireedharee having pre-deceased her, the rights of the reversionary heirs were in like manner postponed until the time of her death; and as they could not, at any rate, have claimed if Gireedharee had pre-deceased the adoptive father, until the death of Chunderbutty, it seems to me their claim to inherit in succession to Gireedharee comes into force at the time of the death of Chunderbutty just in the same manner as if those deeds had never been executed. There seems to be no ground for the contention that by the death of Gireedharee an absolute title to this property vested in Chunderbutty, and it seems quite clear that the terms of the instruments in no sense support that argument.

For these reasons, I consider that the Court below was right in giving the plaintiff a decree for the property numbered 1 to 12, and that the defendants appeal in respect of that property ought to be dismissed with costs.

Then follows the appeal of the plaintiffs in regard to the rest of the property. That property has been classified in this way. It consists, firstly, of the properties numbered 13, 14, 18, and 19, in the Schedule annexed to the plaint, which are properties acquired by Chunderbutty in her own name out of the funds derived from the income of the estate which she took; secondly, the properties numbered 15, 16, and 17, which are properties acquired from the same sources, but acquired in the names of Chunderbutty's daughter and grand-daughter and for their benefit; thirdly, the properties numbered from 21 to 30, which are moveable properties acquired from the same sources; and fourthly, those numbered 20, and 31 to 34, which are the family premises and gardens standing on the site of the land, which by the decree we have given, goes to the plaintiff.

And as regards the first of these classes of property, namely, those which appear in the form of immoveable property purchased from the accumulations made by Chunderbutty from the profits of the estate which she received, there are several decisions, of which I may refer to that reported in IX, Weekly Reporter, page 584, and another to be found in I, Agra High Court Reports, page 219, by which it has been distinctly held that in cases of a widow enjoying the property of her deceased husband, she is not entitled to alienate immoveable property or any property that she has purchased out of the profits of such estate any more than she can alienate the immoveable property itself of which that estate

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consists. No authority, whatever, has been shown to us on the other side; and it seems to me that those decisions are substantially in conformity with the Hindoo law. I think, therefore, that in regard to those properties the plaintiffs were clearly entitled to a decree.

In regard to the second class, namely, the property which Chunderbutty purchased from the profits of her husband's estate and which she appears to have bestowed upon her daughter and daughter's daughter, the case is otherwise. The widow was allowed, under the deeds which conveyed the property to her, to enjoy it for her lifetime and incur all needful expenses. Now, it seems to me that, under the discretion so vested in her, she would be quite at liberty to invest, for the benefit of her daughter and grand-daughter, sums of money in the purchase of property for their maintenance; and in that way she seems to me to have clearly understood and to have acknowledged the distinction between money so expended and money which really remained in her hands, although the form of it was changed by its being invested in immoveable property. As regards the properties numbered 15, 16 and 17, therefore, the decision of the Court below should, I think, be affirmed.

As regards the properties numbered from 21 to 30, these appear to follow the same principle as that laid down in regard to the first class of property, and the plaintiff will, therefore, be entitled to a decree for the moveable property; but as no evidence has been laid before us as to the value of this property, we feel unable to come to any conclusion as to what award should be made in respect of that property. All we can do is to declare that the plaintiffs are entitled to recover the moveable property left by Chunderbutty, which she acquired directly from Oodun Thakoor or purchased out of the proceeds of his estate.

Then as to the fourth class of properties numbered 20 and 31 to 34, these also appear to follow the same rule, that is to say, the rule applicable to property representing either ancestral property or improvement of such property, or alteration or improvement made out of the ancestral funds, which must go to the heirs of Gireedharee, and not to the defendant, who is the daughter's daughter of Chunderbutty.

It appears that no evidence was given to show that these properties stand in the name of the defendant or her mother, and I understand also that no evidence was given to show from what sources these properties were acquired. That, therefore, is an additional reason for allowing the plaintiff's claim in respect of them. Our order, therefore, in this appeal will be that the order of the lower Court, except as to the properties numbered 15, 16 and 17, will be reversed, and that the parties will pay and receive costs in the lower Court in proportion to the value of the properties decreed and disallowed; and in this Court the plaintiffs, appellants, will recover the costs of the appeal from the defendants, excepting only the costs of that portion of the property in respect of which no specific decree has been given, the respondents paying their own costs of this Court.

Ainslie, J.—I concur.

The 20th January 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Bond-suit—Decree for land—Section 27 Act XXIII of 1861.

Case No. 326 of 1870.

Miscellaneous Appeal from an order passed by the Officiating Judge of East Burdwan, dated the 12th July 1870, reversing an order of the Moonsiff of Pothna, dated the 10th January 1870.

Talun Bibee (Judgment-debtor) *Appellant,*

versus

Tenoo Bibee (Decree-holder) *Respondent.*

Baboo Romanath Bose for Appellant.

Baboo Kishen Succa Mookerjee for Respondent.

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Where the original suit was for money on a bond under 500 rupees, it was held that the fact of its having been decided on a solehnamah (which was embodied in the decree) whereby the judgment-debtor gave to his creditor land in lieu of money, did not change the nature of the suit with reference to Section 27 Act XXIII of 1861, or make it open to special appeal.

Glover, J.—THE decree-holder sued the judgment-debtor for money due on a bond, and the case was decided on a solehnamah executed between the parties, whereby the judgment-debtor gave to his creditor 1½ beegahs of land in lieu of the money due. The decree-holder afterwards took proceedings to recover, when the judgment-debtor contended that the decree could not be executed for money because the money claim had been by consent altered into one for land.

The Judge in appeal held that the solehnamah could be executed for recovery of the money inasmuch as it was embodied in a decree of Court, and he referred in support of his decision to the case of Chunder Narain Ghose *versus* Gouree Nath Bose, reported in Volume IV, Weekly Reporter, Small Cause Court References, page 7. The judgment-debtor appeals specially against this decision. A preliminary objection, however, is taken by the decree-holder to the effect that this suit was originally one of a nature cognizable by the Small Cause Courts, and that therefore no special appeal lies. Against this view it is contended that although the original suit was for money on a bond under 500 rupees, the decree gave the creditor authority to take possession of 1½ beegahs of land, that the nature of the suit was thereby changed and was no longer one cognizable by a Small Cause Court. The original suit was one for money on a bond for a less sum than 500 rupees; and the mere fact of the decree giving certain lands instead of that money did not change the *nature* of the suit.

Section 27 Act XXIII of 1861 lays down that no special appeal will lie in any suit of a nature cognizable by the Small Cause Courts, and in this instance the nature of the suit remained from first to last the same. We, therefore, think that the preliminary objection is good, and that the special appeal must be dismissed with costs.

The 20th January 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Execution—Payments out of Court—Section 266 Act VIII. 1859.

Case No. 345 of 1870.

Miscellaneous Appeal from an order passed by the Officiating Judge of East Burdwan, dated the 29th July 1870, *reversing an order of the Moonsiff of that District, dated the 30th April* 1870.

Juggut Mohinee Dossee (Decree-holder) *Appellant,*

versus

Madhub Chunder Kur (Judgment-debtor) *Respondent.*

Baboos Chunder Madhub Ghose and *Mahendro Lall Seal* for Appellant.

Baboo Nuleet Chunder Sein for Respondent.

Payments out of Court may be certified to the Court and proved by the decree-holder in order to avoid the action of the law of limitation, notwithstanding the provisions of Section 206 Act VIII of 1859.

Kemp, J.—IN this case, the decree-holder is the special appellant. He sues to execute his decree, but in the application to execute the Column which ought to contain the date of the decree is left blank. We are, however, informed that this was a decree in a suit for arrears of rent in a Moonsiff's Court, and it therefore must have been a suit which was pending before Act X of 1859 came into operation. The decree-holder alleged that in Falgoon 1270, the judgment-debtor, after receiving credit for certain deductions on the amount due by him, executed an instalment bond for the balance due payable by yearly instalments ranging from the year 1270 to the year 1280; that the judgment-debtor continued to pay the instalments as they fell due up to the year 1273; that the last payment was made on the 24th Bysack 1274, and as the application for execution is within three years from that date, or in Magh 1276, it is therefore in time.

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The judgment-debtor denies the payment of any sum under this kistbundee.

The first Court found on the evidence and on the jumma-khuruch filed by the decree-holder and on all the probabilities of the case that the plea set up by the judgment-debtor was false and that it was set up merely to avoid payment of the amount due under the decree. On appeal to the Judge, the Judge in his judgment refers us to his decision in cases Nos. 74 and 75 as governing the present case, and on referring to that judgment we find that he has applied to these cases the ruling of the Full Bench in the case reported in Volume IV, Bengal Law Reports, page 105, Full Bench Rulings.*

In special appeal, it is contended that the Lower Appellate Court is wrong in holding that the application to execute the decree is barred by limitation, and that the Lower Appellate Court should have held that part payment within the last three years took the case out of the statute of limitation, and lastly that the Full Bench Ruling cited by the Lower Appellate Court does not apply to the facts and circumstances of the present case; and in support of his arguments the pleader for the special appellant called our attention to the Full Bench Ruling reported in Volume XIII, Weekly Reporter.

We think that the Full Bench Ruling referred to by the Judge has no application to this case. In this case, the question which the Judge had to try was whether at the time the kistbundee was executed by the judgment-debtor, there was then a subsisting decree, and whether any steps sufficient to keep that decree alive had been taken within three years from the date of that decree before the kistbundee was executed in Falgoon 1270. The next question he will have to try is whether the allegation of the judgment-debtor that there has been no payments at all under this kistbundee is correct, or whether, as found by the first Court, the allegation of the decree-holder that payments have been made from 1270 to 1273 as certified on the back of the kistbundee is true. We may inform the Judge that it has been held that payments out of Court may be certified to the Court and proved by the decree-holder in order to avoid the action of the law of limitation, the provisions of Section 206 Act VIII of 1859 notwithstanding. The Judge, therefore, will have to try these points and find whether the suit is barred or not.

* 13 W. R., F. B., p. 44.

The 20th January 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Jurisdiction—Execution—Limitation.

Case No. 386 of 1870.

Miscellaneous Appeal from an order passed by the Officiating Judge of East Burdwan, dated the 29th July 1870.

Maharajah Dheraj Mahtab Chand Bahadoor (Decree-holder) *Appellant,*

versus

Moorleedhur Ghose and others (Judgment-debtors) *Respondents.*

Baboo Chunder Madhub Ghose for Appellant.

No one for Respondents.

Where a Judge finds that an application for execution is within time and there is no appeal from his finding, his successor is not justified in going behind his order.

An application for execution cannot be thrown out summarily as barred by limitation, because the decree-holder has failed to find any of his judgment-debtor's property or been baffled in his endeavours to satisfy his decree.

Kemp, J.—THE decree-holder is the appellant. He applies to execute a decree, dated in March 1827. The present application was made on the 6th April 1870. On a previous application made by the decree-holder, the former Judge of East Burdwan, Mr. Russell, held, on the 1st July 1867, that the application then made was within three years of the last step taken to execute the decree, and the objection then raised that the suit was barred was overruled and rejected with costs, the Judge, Mr. Russell, observing the proceedings on the last occasion, had gone as far as an attachment of the property of the judgment-debtor, and it was, therefore, certain that the judgment-debtor must have known of the execution having been taken against him. But however that may be, the Judge then found clearly that the application was within time and there was no appeal from that decision. The present application is therefore within time,

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being dated less than three years since the above application was made. The present Judge, Mr. Birch, begins his decision by saying :—"The claim must be allowed with costs," but he does not inform us as to what claim must be allowed, and why it must be allowed ; then he goes on to say :—"I cannot allow this case to go any further," but he says—"as the plea of limitation has been raised by the claimant's pleader," which we may observe was then raised for the first time as it had not been taken in the claimant's written statement of objections, he holds himself bound to go into the question of limitation. He then states that the original decree was passed in March 1827, more than 43 years ago, that the original decree was for a sum of rupees 1,945-1-6 and execution had now been taken out for rupees 11,200-6-5 ; that in 1830 all that could be found of the judgment-debtor's property was sold, and subsequent to that merely colorable proceedings were taken ; that in 1867 the case was before his predecessor and a claim which was preferred was by him allowed, but no notice was taken of the facts of the case as regards limitation. In this Mr. Birch is clearly wrong : the former Judge did take notice of this plea and held distinctly that the case was not affected by the statute of limitation. This no doubt is an old decree, but it does not follow that because the decree-holder has failed to find any of his judgment-debtor's property or has been baffled in his endeavours to satisfy his decree, that his suit must be thrown out in this summary manner.

The judgment-debtors have also raised an objection which would fall under Sections 203 and 211 of the Code. Under Section 203 they had to satisfy the Court that they had duly applied such property of the deceased proved to have come into their possession, and on their failing to do so the decree might be executed against them to the extent of the property not duly applied by them in the same manner as if the decree had been against them personally. The Judge has not gone into this point at all, and he must now try it.

We therefore reverse his decision and hold that he was not justified in going behind the order of his predecessor which had not been appealed against, and as the case is not barred by limitation he must try the point raised by the heirs of the original judgment-debtor under Sections 203 and 211 and pass a fresh decision.

The 20th January 1871.

Present :

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Jurisdiction—Re-arrest of judgment-debtor.

Case No. 415 of 1870.

Miscellaneous Appeal from an order passed by the Officiating Judge of Purneah, dated the 8th August 1870, affirming an order of the Subordinate Judge of that District, dated the 8th March 1870.

Shib Ram Mundul (Judgment-debtor) *Appellant,*

versus

Ruhmutoollah (Decree-holder) *Respondent.*

Baboo Tarucknath Sein for Appellant.

Mr. C. Gregory for Respondent.

It is not within the competence of a Judge to direct the re-arrest of a judgment-debtor without any petition or motion of the decree-holder to that effect.

Bayley, J.—We think the judgment of the Lower Appellate Court in this case must be reversed. It was not within the competency of the Judge to direct the re-arrest of the judgment-debtor without any petition or motion of the decree-holder to that effect. Possibly the decree-holder might be a loser by this proceeding of the Court taken without his consent. The Judge could of course order the judgment-debtor's re-arrest at the motion or application of the decree-holder, but no such application is on the record or shown to us.

The judgment of the Lower Appellate Court is therefore reversed, but without costs, as the decree-holder Ruhmutoollah does not oppose the present appeal, but on the contrary has filed a petition praying to be allowed to withdraw from the record.

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The 20th January 1871.

Present :

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble Onoocool Chunder Mookerjee, *Judge*.

Limitation — Section 14 Act XIV. 1859—Parties—Issues.

Case No. 1641 of 1870.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 12th May 1870, *affirming a decision of the Moonsiff of that District, dated the 17th August* 1869.

Banee Madhub Lahoree (Defendant) *Appellant,*

versus

Bipro Dass Dey (Plaintiff) *Respondent.*

Mr. M. L. Sandel and *Baboos Umerendro Nath Chatterjee* and *Jogendro Nath Bose* for Appellant.

Baboo Mohendro Lall Shome for Respondent.

Where a plaintiff relying upon the defendant's representation as to the latter's place of residence brought his suit in a Court which had not jurisdiction, the time of the pendency of the suit in such Court was held to be properly excluded under Section 80, Act XIV of 1859, in computing limitation.

When a suit is brought against two persons it is competent to the Court to raise an issue whether one of them is solely liable, and on finding that one only is liable, to pass a separate decree against that person.

Norman, C. J.—This is a suit on a bond brought against two persons, brothers, Banee Madhub Lahoree and Tara Chand Lahoree. The bond was due at the end of Bysack 1273, and a suit was brought on it in the Court of the Moonsiff of Sulkea on the 29th Bysack 1276.

The cause of action arose in Calcutta. The defendants are described in the bond as residents of Satragachee within the Sulkea district.

It turned out, however, on the trial before the Moonsiff that the defendants resided in Alipore in the 24-Pergunnahs. The Moonsiff of Sulkea, therefore, returned the plaint to the plaintiff on the 15th of June 1859, and on the same day the plaint was presented in the Court of the Moonsiff of Alipore.

At the trial it was proved to the satisfaction of the Moonsiff, and on appeal to the satisfaction of the Judge, that the bond was executed by the defendant Banee Madhub Lahoree; but the execution by the other defendant Tara Chand Lahoree was not proved. A witness, however, stated that Banee Madhub Lahoree had produced a person whom he described as his younger brother Tara Chand, and that the bond was executed by that person.

The Moonsiff dismissed the suit as against Tara Chand and gave the plaintiff a decree against Banee Madhub alone, and that decree was upheld by the Judge.

Two objections are taken before us on special appeal. The first is that the suit is barred by limitation, because it was brought in the Alipore Court out of time. But the answer to that is, that the suit in the Moonsiff's Court at Sulkea was brought within time, and that in computing the period of limitation the time during which the suit was pending in the Moonsiff's Court at Sulkea must, under the provisions of Section 14 of Act XIV of 1859, be excluded from the calculation.

There can be no doubt that the plaintiff in seeking a remedy against persons, who described themselves as of Satragachee in the Sulkea district, relied on the defendants' representation as to the place of their residence, and acted *bonâ fide* in suing them in the Court of the Moonsiff of that district. He could not be expected to sue the maker of this bond for rupees 444 in the Court within the jurisdiction of which the cause of action arose, namely, in the High Court of Calcutta. Had he done that, he would have unnecessarily multiplied costs against the defendants. The deduction above referred to brings the suit within time, and the appellant's first objection therefore fails.

The second objection is that the execution of the bond by the co-defendant is not proved. As to that there are two alternatives. Either the person who executed the bond was Tara Chand Lahoree, in which case, although the execution by him is not proved, there is no possible objection to the maintenance of the suit; or the person who executed the bond was not Tara Chand, but some body who was brought forward by his co-defendant Banee Madhub, and who, with the privity of Banee Madhub, forged the name of Tara Chand Lahoree to the bond. In the latter case, it may be that Banee Madhub ought to be tried criminally for abetting forgery and punished accordingly. Or it may also be that no forgery was committed, but Tara Chand really signed

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the bond and Banee Madhub knows it. In either case, there is no ground for absolving Tara Chand from liability. When a suit is brought against two persons, it is quite competent to the Court to raise an issue whether one of them is solely liable, and on finding that one only is liable to pass a separate decree against that person.

We see no ground for disturbing the decree of the lower Courts in the present case, and we affirm that decree with costs.

It is suggested that there is some mistake in the calculation of interest for one year; if that be so, the parties agree to have that matter set right by the Lower Appellate Court.

Mookerjee, J.—I concur.

The 20th January 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Hindoo Law—Nephews—Succession.

Case No. 1711 of 1870.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 14th June 1870, affirming a decision of the Subordinate Judge of that District, dated the 28th June 1869.

Brojo Mohun Thakoor and another (Plaintiffs) *Appellants,*

versus

Gouree Pershad Chowdhry and others (Defendants) *Respondents.*

The Advocate General (Cowie) and *Mr. R. E. Twidale* for Appellants.

Baboos Romesh Chunder Mitter and *Abinash Chunder Banerjee* for Respondents.

Under the Mitakshara a nephew succeeds, not as the heir of his father, but as the direct heir of his uncle.

Mitter, J.—THERE is no ground for this special appeal. It is admitted on both sides that the property, one-half of which is now in dispute, belonged to Sobhun Singh.

The defendants contend that their vendors, Kirt Narain and Gribur Dharee, who were the brother's sons of Sobhun Singh, were entitled to the whole of the estate left by the latter as his nearest heirs under the Hindoo law.

The plaintiffs, who are the purchasers of a 4 annas share of the property from the grandsons of Oudun Singh, contend that their vendors, *viz.*, the grandsons of Oudun Singh, were entitled to participate in that property to the extent of one-half under the ekrarnamah bearing date the 20th August 1829. This ekrarnamah was executed between Bissonath Singh and Oudun Singh. But it is quite clear that the right of inheritance set up by the defendants was not derived through Bissonath, and therefore no agreement which Bissonath might have entered into with Oudun Singh for the division of the property left by Sobhun Singh after his death can be binding against the defendants, who claim through the sons of Bissonath. A nephew succeeds under the Mitakshara, not as the heir of his father, but as the direct heir of his uncle; and thus the vendors of the defendants are clearly entitled to the entire estate left by Sobhun Singh, notwithstanding the ekrarnamah executed by their father Bissonath in favour of Oudun and his heirs.

We dismiss the special appeal with costs.

The 20th January 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Section 230, Act VIII. 1859—Possession.

Case No 1813 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Purneah, dated the 26th May 1870, affirming a decision of the Moonsiff of that District, dated the 25th February 1870.

Bhyrub Sircar and another (two of the Defendants) *Appellants,*

versus

Sham Manjee (Plaintiff) *Respondent.*

Baboo Anund Gopal Paleet for Appellants.
Mr. C. Gregory for Respondent.

Possession by receipt and enjoyment of rent is as good in law as actual occupation, and Section 230 Act VIII of 1859 is not restricted to cases of personal occupation.

Mitter, J.—THERE is no ground for this special appeal. Both the Courts have concurrently found that the transaction relied upon by the appellant is a collusive one,

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It is urged that the Lower Appellate Court has expressed no opinion on the depositions of the witnesses produced by the appellant. But there is no force in this objection. There is nothing to show that the Lower Appellate Court did not go through all the evidence on the record, or at least through that portion of it on which the appellant intended to rely.

The next objection is that the Lower Appellate Court was wrong in acting under the provisions of Section 230 of the Code of Civil Procedure, inasmuch as the plaintiff was not in actual possession of the property in dispute. But the Courts have found that the person in actual occupation, namely, Boodhie Singh, was a tenant of the plaintiff, and that the plaintiff had been in the receipt and enjoyment of rent through him. Possession by receipt and enjoyment of rent is as good in law as actual occupation, and we do not see any reason why we should hold that the provisions of Section 230 apply to those cases only in which the party seeking for relief under that Section was in personal occupation.

We see no reason to interfere with the judgment of the Lower Appellate Court, and we therefore dismiss this appeal with costs.

The 20th January 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Rent suit—Excess area—Notice—Section 13 Act X. 1859.

Case No. 1591 of 1870, under Act X of 1859.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 7th May 1870, *reversing a decision of the Deputy Collector of Monghyr, dated the 30th November* 1869.

Thekmee Beldar (Defendant) *Appellant,*

versus

Ram Kishen Lall (Plaintiff) *Respondent.*

Moonshee Mahomed Yusoof for Appellant.

Mr. R. E. Twidale for Respondent.

A suit for arrears of rent of a quantity of land alleged to have been held by defendant over and above the quantity covered by his pottah was held to be in substance a suit for rent at an enhanced rate requiring the issue of a notice under Section 13, Act X of 1859.

The objection that no notice had been served, though not taken in the Court below, was allowed in special appeal, inasmuch as the suit had infringed provisions of law which were not mere matters of form, but substantial protection to the ryot for whose benefit Act X was enacted.

Bayley, J.—I am of opinion that the plaintiff's suit in this case must be dismissed, although not for the same reasons upon which the first Court has proceeded.

The plaintiff sued for the rent of 20 beegahs and odd cottahs of land for the years 1274, 1275, and 1276 on the allegation that the defendant obtained from him a pottah for 142 beegahs and 13 cottahs, but that over and above that quantity he actually held and occupied the said 20 beegahs in excess and therefore was liable to pay the increased rent claimed.

The defendant averred that there was no excess of land whatever, and added, apparently by way of challenge and not as an admission or waiver, that if it were proved that he was in occupation of the excess lands stated by plaintiff, he was ready to pay the same rent for them as he did for the other lands.

Now, in the first place, in a suit like this which was in substance a suit for rent at enhanced rate on the ground of excess area, the service of a notice before suit was necessary by Section 13 Act X of 1859. The terms of Section 13 are:—"No ryot or under-tenant, &c., shall be liable to pay any "higher rent than the rent payable for the "previous year, unless a written notice *shall* "have been served," &c. &c.

Now, in this case it is admitted that no notice was served on the defendant. It follows, therefore, that under the law the defendant is not liable to pay the enhanced rate that the plaintiff has claimed. It was

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the duty of the plaintiff, if he wished to enhance the rent on the ground of excess area, to bring his suit in strict conformity to the requirements contained in the provisions of Section 13 for such enhancement.

It is urged, however, that this objection was not taken in any Court below, but at the same time it is admitted, for it cannot be questioned, that this Court has discretion in each particular case to allow any new objection that it thinks fit either at the motion of the party or otherwise, and I think that the present is a case in which that discretion ought to be exercised; for if we are to hold, notwithstanding the absence of notice in this case, that the ryot is liable to pay an enhanced rent, it would be holding in direct opposition to the prohibition contained in Section 13 Act X of 1859. I think, therefore, that in this particular case where the suit is so improperly brought against the provisions of law (and those provisions are not mere matters of form but substantial protection for the ryot for whose benefit the Act was enacted) we should allow the objection to be taken although it was not taken in the Courts below.

Further, the plaintiff's suit was for rent of land alleged to have been held and occupied by the defendant in excess of the 142 beegahs mentioned in the pottah; and for this purpose the evidence of the Patwaree, Mondul, or any of his land agents would have been the best evidence and he should have also proved his case by the *dagwaree* chittahs which are in the hands of every man who is, as plaintiff is shewn on the record to be, the owner or farmer of an entire pergunnah; but nothing of this kind has been done. An Ameen was ordered to investigate as to what was the area of the excess lands held by the defendant. The Ameen found 32 beegahs,—or 12 beegahs lands in the defendant's occupation beyond the 20 beegahs excess for which plaintiff claimed an enhancement of rent. It appears, too, that as to these extra lands two persons, Patur Beldar and Dugree Beldar, advanced claims to the effect that the lands were theirs and not the defendant's, but this point does not seem to have been investigated either by the first Court or by the Lower Appellate Court. The first Court proceeded upon the ground that as the plaintiff could not point out what extra lands were held by the defendant, he could not succeed in this case. On appeal, the lower Appellate Court says:—"As the entire pergunnah "was leased to the plaintiff, unless it can be "shown that the terms of the lease specially "barred the plaintiff from receiving rent for "any land over and above the lands for "which pottahs were granted to the ryots "by the settlement officer, the plaintiff, as "lessee of the entire pergunnah, is legally "and equitably entitled to the rent of any "extra lands cultivated within the precincts "of the estate covered by his lease;" thus wrongly putting the burthen of proof, which ought to have been placed on the plaintiff, upon the defendant.

The legal course which the plaintiff ought to have pursued was that of serving a legal notice on the tenant under Section 13 Act X of 1859 before the institution of the suit, and then furnishing proof of the facts stated in the notice as the ground for seeking enhanced rent, *viz.*, an excess of area. But nothing of this kind has been done. There is no chittah or any other similar evidence adduced to identify the lands claimed as excess lands, and in fact every thing is wanting which ought to have been legally proved in the case. Had the plaintiff given some proof of the justice of his claim, probably this Court would have thought it proper to offer him an opportunity of making up the deficiency in his evidence; but such as it is, his case is in the first illegally brought, and in the next wanting in legal proof. The practice of sending Ameens to take evidence in cases like this, where the evidence ought more properly to have been taken before the Court itself, is, in my opinion, not only erroneous in law, but very likely to tend to mischief and injustice.

Thus, the plaintiff having come into Court without doing a single thing which under the law he was required to do, his suit must be dismissed without prejudice to any further action that he may be advised to bring.

As the objection as to notice was not taken in any Court below, I think each party should bear his own costs throughout.

Mitter, J.—I concur in dismissing the plaintiff's suit. The suit was ostensibly brought as an ordinary suit for arrears of rent, but in substance it was a suit for arrears of rent at enhanced rates. It was, therefore, incumbent on the plaintiff to serve a notice upon the defendant, under the provisions of Section 13 Act X of 1859, before he commenced any proceedings on such a cause of action.

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It is said that this objection was not taken in the Court below, but the objection is one which goes to shew, under the express words of the Section above referred to, that the defendant is not liable to pay any enhanced rent to the plaintiff, because he was not served with the notice required by that Section. It is quite clear that the defendant has been throughout contesting his liability to pay any enhanced rent, and under such circumstances it cannot be for a moment contended that there was any waiver on the part of the defendant. Whether I should have allowed this objection to be taken in special appeal, if the circumstances of this case were different from what they are, it is not necessary for me to say ; but looking to the way in which this suit was brought and managed on the part of the plaintiff in the Courts below, I am clearly of opinion that he is not entitled to harass the defendant by continuing this litigation any further. Instead of coming forward with clear and distinct evidence in support of his allegations, he has left every thing to be proved for him by the Ameen ; and although there is nothing in law which prevents a party from asking for a local investigation, I cannot help remarking that the plaintiff's request for such investigation in this case was nothing but an expedient to do away with those provisions of the Code of Civil Procedure which enjoin that, except under special circumstances, witnesses should be examined in open Court in the presence of the parties, and not by commission. It is true that the Ameen was competent to take the depositions of witnesses, but I see no reason whatever why those witnesses should not have been produced and examined in open Court. No inspection of the land was necessary in this case, and the first thing that the plaintiff ought to have proved was, not merely that the lands in dispute were situated within the geographical limits of the pergunnah leased to him, but that those lands were included in the settlement made with him, and that the defendants were in point of fact in occupation thereof as his tenants. Nothing of this kind has been attempted to be done, and I would, therefore, without going any further into the merits, dismiss this suit on the simple ground that no enhancement of rent can be decreed against the defendants in the absence of the notice prescribed by Section 13 Act X of 1859.

I agree also in the order as to costs.

The 24th January 1871.

Present :

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Certificate of administration—Heirs—Maintenance.

Case No. 21 of 1870.

Application for review of judgment passed by the Hon'ble Justices H. V. Bayley and Dwarkanath Mitter, on the 13th July 1870, in Miscellaneous Appeal No. 88 of 1869.

Dinobundhoo Chowdhry (Objector) *Petitioner,*

versus

Rajmohinee Chowdhrain (Petitioner) *Opposite Party.*

Mr. J. W. B. Money for Petitioner.

Mr. J. Graham and *Baboos Mohendro Lall Shome* and *Grija Sunkur Mojoomdar* for Opposite Party.

Where the will set up by objectors to an application by the natural heir for a certificate of administration is not sufficiently proved, a Court is justified in looking on the natural heir as the party entitled to the certificate.

The question of the adequacy of the maintenance granted to widows and daughters must depend in each case on its own peculiar circumstances.

Bayley, J.—After fully hearing the learned Counsel for the applicant, I am still of opinion that, for the purposes of a certificate, the will propounded by Dino Bundhoo is not sufficiently proved to justify me in holding that he is entitled under it to that certificate in preference to the widow, the next heir of the deceased.

The two main points argued are—*firstly*, that the inadequacy of the grant made to the widow and the daughter in the will must not weigh against the direct evidence in support

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of the will; and *secondly*, that the maintenance allowed is in accordance with the custom of the family, as is proved by certain records in the case of a brother and an uncle in the same family.

When we first heard the case, we considered the evidence very carefully, and weighed, on the one hand, the direct evidence as to the execution of the will, and on the other, the probabilities and surrounding circumstances of the case, and thought it immaterial and improbable that the widow and the daughter should be left without those ordinary provisions generally made to such nearest of kin.

After a full rehearing of the whole case today, I still adhere to the opinion that I formerly entertained. I think that the special title, that is, the will, set forth by Dino Bundhoo is not sufficiently proved, and that thus for the purposes of the certificate we are justified to look to the natural heir as the party entitled to it.

As to the other wills that have been filed to show that rupees 25 was the ordinary maintenance allowed for next heirs, widows and daughters, in other cases in the family of the testator, we have to observe in the first place that those wills are not proved; and secondly, we must not come to any conclusion in this case simply on the acts of the other members of the family in other cases, and each case must depend on its own peculiar circumstances. It may be that some special reasons exist in relation to one member of the family which do not hold good in the case of another. But be that as it may, the result of a careful consideration of the whole evidence and circumstances of this case is that the will propounded by Dino Bundhoo is not sufficiently proved to divest the natural heir of her right to the certificate. The petitioner is, no doubt, entitled to bring a regular suit if he is so advised. This order will not prejudice his so doing if advised.

The application is rejected with costs.

Mitter, J.—I concur in rejecting this application. The new documents ought not to be admitted. The petitioner had ample opportunity to produce them at the first trial, particularly after the order of remand.

Upon the other arguments, I have already expressed my opinion in the judgment formerly delivered by me, and I adhere to that opinion now.

The 24th January 1871.

Present:

The Hon'ble G. Loch and Onoocool Chunder Mookerjee, *Judges.*

Execution—Refund—Interest.

Case No. 389 of 1870.

Miscellaneous Appeal from an order passed by the Judge of Moorshedabad, dated the 30th August 1870, *modifying a decision of the Subordinate Judge of that District, dated the 14th May* 1870.

Wooma Soonduree Burmonia (Judgment-debtor) *Appellant,*

versus

Gooroo Pershad Roy and others (Decree-holders) *Respondents.*

Baboo Mohinee Mohun Roy for Appellant.

Baboos Anund Chunder Ghossal and *Mohendro Lall Seal* for Respondents.

While a special appeal was pending, the decree-holder took out execution and realized a sum in satisfaction of his whole decree. The decree having been modified and the amount decreed reduced, the judgment-debtor applied for a refund of the excess payment, and this was awarded to him with interest.

HELD that interest was rightly awarded.

Loch, J.—IT appears that in this case a decree was passed by the Judge of Moorshedabad in alteration of a decree of the Subordinate Judge. By that decree the Judge awarded to the plaintiff wasilat for five years on account of one mouzah Dhurumpore, and for two years on account of the other two mehals Tehatee and Baboopore, with interest thereon. A special appeal was preferred to this Court when the decree of the Judge was modified on the 14th May 1869, and the plaintiff was declared entitled to mesne profits only for two years on account of mouzah Dhurumpore as well as of the two other villages. It appears also that while the special appeal was pending, the plaintiff took out execution in August 1868, and realized from the defendant the sum of Rupees 1,967-10-9 in satisfaction of the whole of his decree. On that decree being modified by an order of the High Court, the defendant applied for a refund of the excess payment, and the Judge has awarded him the sum of Rupees 1,607-14-4

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being the principal, interest, and costs which he had paid in excess of the amount decreed by the High Court.

Now it is contended before us that the Judge should not have awarded interest on the principal sum which was ordered to be refunded to the debtor. But we do not see that this objection is of any weight. The case is a simple one. In liquidation of the decree which was then outstanding against him, the defendant paid down the sum of rupees 1,967-10-9, and when that decree was modified he asked that so much of the sum which he had paid in excess of the amount decreed by the High Court might be refunded to him with interest; and we think that the Judge was perfectly right in awarding interest. The decree-holder had taken out the money and had made use of it, and when he was obliged to refund the money the debtor was entitled to receive interest upon that money, which properly ought never to have found its way into the hands of the decree-holder.

We think, therefore, that the objection now taken before us must be disallowed, and the appeal dismissed with costs, sixteen rupees being allowed as pleader's fee.

Mookerjee, J.—I concur.

The 23rd January 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Transfer of a decree—Sections 2 and 5 Act III of 1870.

In the matter of

Sreemutty Jugodumba Dossee, *Petitioner*.

Mr. R. T. Allan for Petitioner.

Where by the operation of Act VIII (B. C.) of 1869 and Act III of 1870, a decree is transferred (*e. g.*, from the Court of a Deputy Collector to that of a Subordinate Judge) any application as to a matter prior to, or which may affect, the decree, (*e. g.*, an application for a review) must be made to the Court which passed the decree.

Norman, C. J.—It appears to us that there is no ground for our interference in this case. By the conjoint operation of Act VIII of 1869 and Act III of 1870, B. C., the decree against the applicant, Sreemutty Jugodumba Dossee, was transferred from the Court of the Deputy Collector to that of the Subordinate Judge of 24-Pergunnahs. The Subordinate Judge who was executing that decree made a certain order. The applicant then presented a petition to the Subordinate Judge to review the judgement of the Deputy Collector which was passed so long ago as the 16th June 1869. The Judge refused that application, considering that he had no jurisdiction to entertain; and that if the petitioner desired to have that decree reviewed, her proper course was to apply to the Deputy Collector.

We think that the Judge was perfectly right. Under Section 3 Act III of 1870 the decree alone was transferred, that is, transferred for the purpose of execution. If there had been any doubt as to the transfer of the suit by the transfer of the decree, that doubt would have been set at rest by the 2nd and 5th Sections of Act III of 1870, which show clearly that any application in the suit as to a matter prior to, or which might affect, a decree must be made, not to the Court to which the decree was transferred, but to the Court by which the decree was made. The application is refused.

The 23rd January 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges*.

Endowments (wuqf) —Execution—Attachment—Leases.

Case No. 152 of 1870.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 21st September 1869, *modifying a decision of the Subordinate Judge of that District, dated the 24th June* 1869.

Mr. James Fegredo (Defendant) *Appellant*,

versus

Mahomed Mudessur and others (Plaintiffs) *Respondents*.

Messrs. C. Gregory and *J. S. Rochfort* and *Baboo Taruck Nath Sein* for Appellant.

Baboos Chunder Madhub Ghose and *Romesh Chunder Mitter* for Respondent.

Where property is endowed (made wuqf) by the proprietor, and as such devolves to his widow as trustee (Mutwullee), it cannot be sold in satisfaction of a claim against him.

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A widow claiming to be such trustee cannot be bound by a decision adverse to a claim set up by her husband's grand-father in respect to the property concerned, if she was not a party to the litigation.

Where landed property is attached in execution of a decree, the party attaching is bound by a lease obtained for it prior to his attachment.

Kemp, J.—THIS suit was remanded on the 19th August 1868 by Justices Bayley and Macpherson.* The decision remanding the case is a very elaborate one, and enters most fully into the case both on questions of law and fact.

Mr. Justice Macpherson, who gave the decision, observed that "the case was really "a very difficult one, involving many very "complicated and intricate questions, and "the consideration of various previous de-"crees, the effect of which it was not very "easy to ascertain accurately." Further, that learned Judge remarked that "it was "impossible to discover and declare the true "relative positions of the parties without "going with the utmost precision and ac-"curacy into all the details of what has "occurred, both as to the results of previous "litigation as to the property in dispute, and "in the course of the dealings between the "appellant and the widows in relation to the "giving the lease to the appellant and sub-"sequent thereto."

The case has occupied much of our time, and we cannot without entering into some detail satisfactorily dispose of it.

The case is briefly this:—The plaintiff, special respondent, is an auction-purchaser in execution of a decree of the rights and interests of Dad Ali and Mahomed Ali, two brothers. It has been found, and the point is no longer open to discussion, that Mahomed Ali had no rights and interests such as could pass to the plaintiff under the purchase. Dad Ali, the remaining judgment-debtor, is represented by his two widows Akburoonissa and Nujoomoonissa. The defendant, special appellant, Mr. Fegredo, is the proprietor of the National Hotel at Burdwan. The plaintiff, after his purchase in February 1864 of the rights and interests of Dad Ali, sued Fegredo for the rent of the said house, alleging that on the 14th August 1865 he served a notice on the defendant Fegredo to quit, not the whole house, but a 13 anna share of the house; and that if he did not quit he would be charged with rent at the rate of 100 Rupees per mensem for the 13 annas share of the house in lieu of 40 rupees, the rent hitherto paid by the tenant Fegredo.

The defendant Fegredo's defence was briefly to this effect,—that he held a lease from Akburoonissa and Nujoomoonissa, the two co-wives and widows of Dad Ali, executed on the part of Akburoonissa and confirmed on the part of Nujoomoonissa before the date of the attachment taken out by plaintiff in execution of his decree; that this lease gives him a good title as against the plaintiff. Fegredo further alleged that Khyrat Ali, the grand-father of Dad Ali and Mahomed Ali, made a will by which he endowed the property; that Dad Ali by an exchange with his brother Mahomed Ali obtained this house in lieu of another house at the same station of Burdwan, and that by the exchange the whole house in dispute known as the "Captain Saheb's Kootee" became wuqf; that Dad Ali by his will left the property in dispute as wuqf to his two widows in the proportion of 10 annas to the younger wife Nujoomoonissa, and 6 annas to the elder wife Akburoonissa. Fegredo, therefore, contends that as the house in dispute was wuqf property, it could not be sold in execution of a decree against Dad Ali or his widows as representing him.

Fegredo obtained in the first instance a lease for the whole house from Akburoonnissa alone on the 4th Bhadro 1269. This was admittedly before the attachment and sale in satisfaction of the decree under which the plaintiff purchased. He alleges that on the 12th Aughran 1269, he obtained from the other widow Nujoomoonissa a confirmation of the above lease, which confirmation is also prior in date to plaintiff's attachment; that in Assin 1270, or subsequent to the plaintiff's attachment, Nujoomoonissa executed a formal lease to him of her share in the house. The defendant Fegredo in addition to denying the plaintiff's title pleaded further, that he had expended a large sum of money in repairing the house, and that his lessors had agreed to allow him 2,000 rupees for the repairs with interest at 5 per cent., the said sum to be recovered by deductions from the rent. He, therefore, claimed the benefit of this arrangement as against the plaintiff, if liable at all to the plaintiff.

In the first instance and before the remand, the Principal Sudder Ameen found that the property was not wuqf, and gave

* 10 W. R., p. 267.

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a decree to the plaintiff at 40 rupees per mensem. The Judge held that the lease by Akburoonissa was *bonâ fide*, but that the alleged ratification by Nujoomoonissa by letter prior to attachment had not been proved. He objected to the letter, first, that it was a copy; secondly, because Fegredo had not deposed on oath to the circumstances under which the letter was given to him.

The Judge held that the plaintiff was not bound by the lease of Nujoomoonissa. He, however, was of opinion that Fegredo was entitled to a fair sum for repairs done, as such repairs were requisite. The case was remanded by him for further investigation, as to the extent and amount of repairs done. A decree was given to the plaintiff at the rate of 100 rupees per mensem for the 10 annas share from date of notice to quit, subject to a deduction of what might on enquiry be found due on account of repairs.

Both parties appealed, and this Court remanded the case directing the judge to try the following issues :—1st.—As to the date on which Nujoomoonissa first confirmed the lease to Fegredo.

The Court directed this issue to be properly tried and decided, fresh evidence being gone into for this purpose. It further directed that both Fegredo and Nujoomoonissa should be examined strictly as to the exact date on which, and circumstances under which, the letter of confirmation was given.

2nd Issue.—Whether the house in dispute came to the hands of the widows of Dad Ali as wuqf, and was wuqf at the time the lease was given to Fegredo by Akburoonissa.

With regard to this issue this Court remarked—"that there can be no doubt that "the house was treated by Dad Ali in his will "as wuqf, and was left in the proportions of "6 annas and 10 annas to his widows; that "the Judge had adopted and acted upon the "gift to the widows, but had not recognized "or given effect to so much of the will as "treated the property as wuqf; that it "might be, as the Principal Sudder Ameen "said, that the will of Khyrat Ali had been "declared by a competent Court to be a "forgery and that this house never came "into the hands of Dad Ali as wuqf; but "it was matter for consideration whether "there was any thing which prevented Dad "Ali from himself making the property "wuqf and leaving it as such to his widows." If, observes the learned Judge, the question as to this house being in the hands of the widows as wuqf has been determined by a judicial decision, which is conclusive against *the parties in this suit*, of course there is an end of the matter; but it was not easy to discover whether there was really any binding decision on this point.

The learned Judge in framing issue No. 2 observes further, that it is possible that the property in dispute may be wuqf of the creation of Dad Ali, and directed that this question must be *distinctly* disposed of; that the Judge must consider and state *with precision* what particular decisions, if any, relating to the *matter in issue in this suit* are admissible as evidence and are binding on the parties.

The Judge was also directed to find whether the endowment was *bonâ fide* or merely nominal, for if the latter it would not be valid wuqf as against the plaintiff.

3rd Issue.—What is a fair and reasonable rent for the 10 annas share of the house. In deciding this issue, the Judge was directed to consider the state of the house when Fegredo entered upon the occupation, as also the reasonable and necessary repairs executed by him since his entry.

As regards the cross-appeal of the plaintiff, the learned Judge, Macpherson, remarked that it is clear that the liability of the plaintiff to the deduction claimed for repairs depends entirely on the date of the agreement to allow such repairs entered into by the widows; if it was entered into before the attachment, it is binding on the plaintiff exactly in the same degree as the lease; if after the attachment it cannot in any way bind the plaintiff.

After remand the case was re-tried by the Subordinate Judge, Baboo Russick Lall Bose, who dismissed the plaintiff's suit with costs. The Subordinate Judge held that the property was wuqf, for, observes the Subordinate Judge, it is clear that Dad Ali alone had any title in the property, which would not have been the case if the property was not endowed. He further held that there was nothing in the former decision to show that the act of Dad Ali in making the wuqf was invalid; and with reference to the *bonâ fide* character of the endowment, he found that from the evidence of some of the witnesses produced by the plaintiff, it might be gathered that during the life-time of both Khyrat Ali and Dad Ali the property was

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used as wuqf in their family, and the purposes for which the endowment was made were carried out.

The Subordinate Judge refers to the deed of exchange dated the 14th Bysack 1265, and to the will of Dad Ali dated 22nd Bysack of the same year. This will, he observes, is registered, and was executed and acted upon long before the attachment and auction-purchase of the plaintiff, and that at the time this deed was executed there was no necessity for preparing it fraudulently: hence it cannot be said that the act of making the property wuqf was invalid, or that it was not really made wuqf. Further, that a decree of the late Sudder Court in September 1861 shows that Dad Ali appointed his two wives Mutawullees, and that an objection thereto raised by the co-sharers was rejected and a certificate granted to the widows according to the terms of the will of Dad Ali. The Subordinate Judge ends his judgment by remarking "that as the plea "of the wuqf character of the property "was established and supported by the "evidence, it was needless to adjudicate "upon the other issues framed by the High "Court."

The plaintiff then appealed, and the Judge, Mr. A. E. Russell, on the main question of wuqf or no wuqf, remarks that "the "previous litigation to be found in decisions "Nos. 7 and 8 had disposed of the question "of endowment in as far as the endowment "by Khyrat Ali is concerned, as the plaintiff "in one of those suits, who is one of the "present defendant's lessor, sued to set "aside an auction-sale on the ground of the "property sold by the same being portion "of an endowment, her claim was dismissed; "and seeing that these lessors at that time "declared that they held under the will of "Dad Ali, and did not prove in these cases "that any endowment was created by that "will, I very much doubt whether their "lessee (Fegredo) is now entitled to raise "that question." The Judge, however, in order, as he says, to carry out the directions of this Court, states that "he has given this matter attention also," and having read the will and deed of exchange, he is of opinion that these documents are not of such a nature as to create any endowment. The Judge proceeds to observe that "the testator, *i. e.*, Dad Ali, holding as a Mutawullee could not not do otherwise than hand down the property to other trustees; but when it is proved that Dad Ali did not hold by a valid deed of endowment, because though he declared himself to be a Mutawullee, he was "*de facto* proprietor of the property."

With reference to the issue as to the date of the letter of confirmation by Nujoomoonissa of the lease to defendant, the Judge observes that "he considers that the lady "has most glaringly shirked from answering "any direct question regarding it, while she "is able to speak to any other of the numerous points on which she was examined; "further that beyond the admission by the "lady that the letter bore her seal, she had "not attested it."

With reference to the evidence of Fegredo, the Judge observes that Fegredo failed to fix in any intelligible way the period at which the letter was given. For these reasons, the Judge was of opinion that Nujoomoonissa "has purposely shirked the question as to the time at which the letter was written."

In the matter of the notice to the defendant Fegredo to quit the house unless he agreed to pay the enhanced rate of rent demanded, the Judge was of opinion "that "he was not justified in awarding the rent "demanded in the notice from date of the "notice or even from the date of suit;" the defendant will be liable, says the Judge, "to pay rent according to the rate which "the Court deems to be equitable from the "date of the Judge's decree."

In the matter of the claim made by the defendant for repairs and re-constructions, the Judge was of opinion that "they cannot "be binding upon the plaintiff, for the consent of the defendant's lessor, namely, "Nujoomoonissa, to the bill for repair, &c., "amounting to rupees 2,000, was given after "the date of attachment;" further, as the defendant has been in possession of the house for a number of years at a low rent, the Judge did not think "that it is now necessary to allow the defendant to claim a "lower rent in future on the plea of the "expense he has been put to in the construction of rooms and the repairs of the "house, especially as the amount expended "is excessively badly established." The Judge found that a fair and equitable rent was rupees 100 per mensem; but "as the "suit was one for arrears of rent of a house "and not for a settlement of the rate at "which it can be held in future," the Judge would not pass any opinion "as to the rate "which the defendant will be liable to pay "hereafter on account of the 10 annas

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"share of the property." The Judge decrees the rent at the existing rate, *i. e.*, 40 rupees per mensem up to the date of suit. Each party to pay his own costs of the appeal. Against this decision both parties came up in appeal to this Court.

We take the question of wuqf first, for if this property is wuqf it will be unnecessary to consider the other questions raised by the remand order, inasmuch as if the property in dispute was endowed by Dad Ali and as such devolved to his widows as trustees, it could not be sold in satisfaction of a claim against Dad Ali, and consequently no title has passed to the plaintiff as against Fegredo, the lessee of the widows, by the purchase of the plaintiff in execution.

In disposing of this issue, we have to consider, as the Judge was directed to consider by the order of remand, the effect of the previous litigation with reference to this property, for, as observed by the learned Judges remanding the case, "it is matter "for consideration whether there was any "thing which prevented Dad Ali from him-"self making the property wuqf and "leaving it as such to his widows." Of course, if the question as to the property in dispute had been determined by any judicial decisions which are conclusive and binding upon the parties to this suit, there is, as observed by the remanding Judges, "an end of the matter."

The previous litigation referred to has been submitted to our consideration. It consists of two decisions Nos. 7 and 8. Now, in the first place, the parties to the present suit were not parties to the suits Nos. 7 and 8. The suit No. 7 was a claim made by Akburoonissa, one of the widows of Dad Ali, against Sutto Butee Dossee and others in the summary department. Akburoonissa's lease has been found to be valid as against the plaintiff in the present suit.

In No. 7, the then Principal Sudder Ameen, Mr. J. Reily, held that although Akburoonissa was not a party to the previous litigation with respect to the endowment by Khyrat Ali which had been found to be not proved, yet as she was the wife of Dad Ali, she was bound by the decision holding that the endowment by Khyrat Ali was not proved.

No. 8.—In this case the other widow Nujoomoonissa was the claimant; Sutto Butee and others were the opposite parties. To this proceeding neither the plaintiff in this suit nor the defendant Fegredo was a party. Nujoomoonissa stated in that case that her husband Dad Ali had endowed the property now in dispute after an exchange with another property. The same Principal Sudder Ameen, Mr. J. Reily, relied upon his decision in No. 7 and rejected the claim of Nujoomoonissa. In neither of these proceedings can we find that the question of whether Dad Ali himself endowed the property in dispute and left it as such to his widows was decided. How the widow of Dad Ali was bound by any decision adverse to a claim set up by Khyrat Ali, simply because she is the widow of his grandson Dad Ali, it is not easy to understand. We can, therefore, have no hesitation in saying that there have been no decisions by any competent Courts which, on the question of whether the property was endowed by Dad Ali or not, are binding upon the parties to the present suit; and we concur with the first Court in holding that the former decisions did not dispose of the above question. There is evidence which was believed by the first Court, and which is not rejected or even touched upon by the Judge—that the profits of the endowed property were devoted to the purposes for which the endowment was created, and there is the very important fact noticed by the first Court, but wholly lost sight of by the Judge, that if this property had not been endowed, the two widows of Dad Ali would, under the Mahomedan Law, have inherited equally and not have succeeded as trustees to the property in the proportion of 10 annas and 6 annas respectively.

We, therefore, concur with the first Court in holding that this property was endowed by Dad Ali, and as wuqf came into the hands of his widows as Mutawullees. Here we might well stop, but with reference to the letter of confirmation by Nujoomoonissa, we think that the Judge is clearly wrong. Nujoomoonissa was examined by commission, and she was not cross-examined as to the precise date on which the letter was written. The letter bears date prior to the attachment. Nujoomoonissa deposes as to the circumstances under which the letter was written, and being unable to read and write she attested the letter by saying that the seal affixed to it was her seal, and that the letter was written with her consent.

The Judge is also wrong in saying that the defendant Fegredo does not in any "intelligible way fix the period at which the letter was written," for we find that Fegredo

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does distinctly state the date of the letter, and when and under what circumstances it was written. The letter being in confirmation of the previous lease by Akburoonissa for the whole house, which has been found to be valid, and that lease and the letter confirming it by Nujoomoonissa being of date prior to plaintiff's attachment, plaintiff would be bound by both leases.

Having found, however, that the property was wuqf created by Dad Ali, and that his widows took the same as trustees of the endowment, and there being evidence not discredited or commented upon by the Judge, that the endowment was *bonâ fide* and the profits appropriated according to the terms of the trust, we dismiss the plaintiff's suit, and decree this appeal with costs of both Courts payable by the plaintiff, special respondent.

The cross-appeal of the plaintiff in the matter of the rate of rent is dismissed with costs.

The 23rd January 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Section 347 Act VIII. 1859—Default—Re-admission.

Shomaed Ali Sowdagur, *Petitioner,*

versus

Ensoof Khan Chowdhry, *Opposite Party.*

Baboo Bhugobutty Churn Ghose for Petitioner.

Baboo Debendro Narain Bose for Opposite Party.

An appeal having been struck off for default, application was made for re-admission under Section 347 Act VIII of 1859; but the Judge refused the application, because the appellant had not conformed to a rule which he had passed that two pleaders should be engaged in every appeal:

HELD that the Judge was bound to see whether the reasons set forth for re-admission of the appeal were satisfactory or not.

Mookerjee, J.—IN this case it appears that the petitioner was the appellant in a certain appeal before the Judge of Chittagong. The appeal was called for hearing. But neither he appellant nor his vakeel being present the appeal was struck off. Subsequently the applicant applied to the Court under Section 347 Act VIII of 1859 for re-admission of the appeal, setting forth the reasons which prevented him from appearing when the appeal was called on for hearing.

The Judge disposes of this application by saying that, inasmuch as he had passed a rule that two pleaders should be engaged in every appeal, and the rule of his Court is the same as that existing in the High Court, he would not re-admit the appeal.

We think that the Judge was bound to see whether the reasons set forth in the application for the re-admission of the appeal were satisfactory or not. This he has not done. We send the case back to the Judge to act under the provisions of Section 347, and to consider whether a good ground has been shown for the re-admission of the appeal.

The 24th January 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Wrong-doer—Fraud—Civil Courts—Jurisdiction—Possession—Title.

Case No. 1193 of 1876.

Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 22nd March 1870, *affirming a decision of the Moonsiff of Teghra, dated the 23rd July* 1869.

Ram Sahoy Singh (one of the Defendants) *Appellant,*

versus

Kooldeep Singh (Plaintiff) *Respondent.*

Baboos Romesh Chunder Mitter and *Nil Madhub Sein* for Appellant.

No one for Respondent.

A wrong-doer who has forcibly taken possession of another man's property, is not entitled to withhold it from its lawful owner on the ground of a fraud which has in no way affected his own status or position.

Civil Courts have no power to interfere with the vested rights of parties merely by way of penalty, unless they are authorized to do so by positive legislative enactment.

Adverse possession for more than 12 years is of itself sufficient to create a title.

Mitter, J.—I AM of opinion that there is no ground for this special appeal.

The plea of *bonâ fide* purchaser without notice is not available to the appellant, who is merely the purchaser of the right, title,

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and interests of Gondee Singh at a sale in execution of decree, nor does it appear that this objection was ever urged or attempted to be proved in either of the Courts below.

The second objection appears equally unsound.

Granting that the vendors of the plaintiff had made the benamee for the purpose of depriving their creditors, the position of the appellant would still remain the same, namely, that of a mere trespasser. I have already expressed my opinion on this point, or rather on a point cognate to it, in the case reported in page 136 of the 12th Volume of the Weekly Reporter, and I still adhere to that opinion.

The suit is undoubtedly one of a civil nature, and there is no express law or enactment that I am aware of to bar its cognizance. The Civil Court is, therefore, bound to entertain it under the express provisions of Section 1 Act VIII of 1859, and if this is once conceded the only question we have to try is, whether the plaintiff or the appellant is the lawful owner of the property in dispute.

But the answer to this question seems to be perfectly plain. The right of property was vested in the vendors of the plaintiff, notwithstanding the fraudulent nature of the benamee; for a mere benameedar has no right of any kind whatever, there being no distinction between legal and equitable titles in this country.

Why then are we to dismiss this suit, merely because the vendors of the plaintiff had been guilty of a fraud against their creditors. The appellant has nothing whatever to do with those creditors, nor is the person through whom he derives his title wholly innocent of the fraud upon which he wishes to rely. What principle of justice or equity can he cite to support the contention that a mere wrong-doer like himself, who has forcibly taken possession of another man's property, is entitled to withhold that property from its lawful owner upon the ground of a fraud which has no way affected his own status or position, and which was perpetrated against persons to whom he is an utter stranger, and who would be placed in a much better position by the success of this suit than by its dismissal, if their claims are still alive! As between the plaintiff and the appellant there can be no doubt whatever that law and justice are both on the side of the former, for he is not only the legal owner, but a purchaser for value wholly innocent of the fraud, though he might have come to the knowledge of it at the time of his purchase. The appellant is clearly a trespasser, and I do not see any reason whatever why we should allow him to take shelter under a fraud which was jointly committed by his predecessor in title and the vendors of the plaintiff against persons whose interests are no way involved in this litigation.

It has been said that no one ought to be permitted to take advantage of his own fraud or of that of his predecessor in title. But what is the advantage which the plaintiff is endeavouring to take in this case, and against whom? All that the plaintiff asks for is that the appellant should be compelled to give up a property which is lawfully his, and from which he has been forcibly dispossessed by the appellant without the semblance of a title. Surely, there is nothing unreasonable or unfair in such a prayer, whatever fraud the vendors of the plaintiff might have committed against other parties who cannot be possibly prejudiced by the result of this suit. On the contrary, it is the appellant who is seeking to take advantage of that fraud, after having completely failed to justify the wrongful act of dispossession which has been brought home to him by the plaintiff. The objection that the plaintiff is trying to get rid of a deed executed by his vendors is one more of form than of substance; nor does it appear that that objection can fairly arise in this case. There are no such things as deeds, strictly so called, in this country, and the relief asked for by the plaintiff can be granted to him without the reversal or cancellation of any deed that I am aware of.

It has been further argued that the suppression of fraud is indispensibly necessary for the protection of society, and that the ends of public policy require the dismissal of such suits for the sake of example. But the Civil Courts have no power to interfere with the vested rights of parties merely by way of penalty, unless they are authorized to do so by some positive legislative enactment. No considerations of public policy can justify such a course, more specially when the Legislature has vested the Criminal Courts with full and ample jurisdiction in the matter. Suppose for instance that a just claim is foolishly attempted to be supported by a mass of perjury and forgery. The suppression of perjury and forgery is

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just as much necessary for the protection of society as that of fraud. But the Privy Council have held that the Civil Court has no power to repudiate the civil rights of parties, merely because they have tried to support them by perjury and forgery; and I do not see any reason whatever why the same principle should not be extended to a case of fraud like the present.

But there is another ground also upon which I would dismiss this special appeal. Both the lower Courts have concurrently found that the vendors of the plaintiff were in possession from the date of their purchase down to that of their dispossession by the appellant, that is to say, for a period of more than 12 years. Adverse possession for such a length of time is by itself sufficient to create a title, according to the ruling of the Privy Council in the case of Gunga Gobind Mundul,* and the plaintiff is, therefore, entitled to recover the property irrespective of any question of fraud or benamee.

For the above reasons I would dismiss this special appeal with costs.

Bayley, J.—I concur in dismissing this special appeal. There is the fact found that plaintiff's vendors had possession under an adverse title for more than 12 years, and such possession gives title in such a case as this.

The 24th January 1871.

Present:

The Hon'ble L. S. Jackson and W. Ainslie, *Judges.*

Mahomedan widow—Dower—Possession.

Case No. 1389 of 1870.

Special Appeal from a decision passed by the Officiating Judge of Gya, dated the 27th April 1870, affirming a decision of the Subordinate Judge of that District, dated the 28th September 1870.

Kureem Buksh Khan and others (Plaintiffs) *Appellants,*

versus

Mussamut Doolhin Khoord and others (Defendants) *Respondents.*

Moonshee Mahomed Yusoof for Appellants.

Mr. R. E. Twidale and *Baboo Beodh Sein Singh* for Respondents.

In a suit against a Mahomedan widow by her husband's heir to recover possession of property held by her in virtue of a claim for dower should proof of forcible dispossession fail and no other origin of defendant's possession be alleged, a Court would be justified in finding, as a matter of inference, that the defendant had got into possession on the ground alleged by herself with the consent of the other heirs.

Jackson, J.—THIS was a suit against a Mahomedan widow to recover possession of certain immoveable property, the plaintiff claiming to be the heir of that lady's deceased husband and of the infant daughter of that husband also deceased. The plaint sets forth that the plaintiff had been in possession of the property in question, but had been dispossessed by the act of the widow, who wrongfully gave the shares in question in lease to a different party.

The defendant, the widow, averred that she was in possession of this property by virtue of a claim on the estate of her husband for dower which was then unsatisfied.

The Courts below have both held that plaintiff, although entitled as heir, could not recover possession of the property from the hands of the widow, inasmuch as she was entitled to hold it in virtue of her lien on account of her dower.

Several cases have been cited in argument upon this special appeal, one of them from VIII Weekly Reporter, page 5, which was a decision of Mr. Justice Norman and Mr. Justice Seton-Karr, and the others from XI Weekly Reporter, page 212, XIII Weekly Reporter, page 49, and XIV Weekly Reporter, page 239. In the first of these cases, the view of the Mahomedan Law which has been adopted by the lower Courts is very broadly stated. In the other cases, however, the Judges appear to have taken a somewhat different view, and to have restricted the right of a Mahomedan widow to hold by way of lien to cases in which there has been a contract enabling her to do so, and to cases where she had got into possession with the consent of the heirs.

Now, in this case, the facts are,—that the husband of the defendant died about 8 years before the commencement of the suit. The plaintiff alleged forcible dispossession, but the proof of that forcible dispossession failed, and no other origin of the defendant's possession has been suggested by plaintiff, except that forcible possession the proof of which failed. That being so, I think the Courts below would have been justified in finding, as a matter of inference, that the

* 7 W. R., P. C., p. 21.

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defendant had in fact got into possession of this property as widow, with the consent of the other heirs of the husband, in satisfaction of her claim of dower.

The fact of dower has been admitted throughout, and indeed it appears that plaintiff's counsel, on questions being put to him, did also admit the amount of dower as stated by defendant. This latter admission, however, which is now repudiated, appears to be immaterial. When the plaintiff thinks fit to bring a suit against the defendant for an account of her husband's estate, which she holds in lieu of her claim for dower with interest, that will be the proper time to determine what the dower really was, and how matters stand between the widow and the heirs. At present, all that can be determined is, whether the plaintiff is entitled to recover possession of the estate from the hands of the widow when the claim for dower remains unsatisfied.

It appears to me that, under the circumstances of the case, we ought to hold that the widow's possession was referable to her claim for dower; and that as that claim has undoubtedly, under the Mahomedan Law, precedence over the claim of the heirs, the heirs should not be allowed to succeed in this suit and turn her out of possession without satisfying her claim.

That being so, I think the suit ought to have been dismissed; and therefore, that this appeal ought to be dismissed with costs.

Ainslie, J.—I concur.

The 24th January 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Onus probandi.

Cases Nos. 1810 and 1811 of 1870.

Special Appeals from a decision passed by the Judge of Bhaugulpore, dated the 1st June 1870, affirming a decision of the Subordinate Judge of that District, dated the 29th March 1869.

Mr. P. T. Onraet and others (Defendants) *Appellants,*

versus

Kishen Soonduree Dossee (Plaintiff) *Respondent.*

Mr. R. E. Twidale and *Baboo Nil Madhub Sein* for Appellant.

Baboo Romesh Chunder Mitter for Respondent.

In the suit for the removal of certain outlets made by defendant in an aqueduct, on the ground that plaintiff was entitled to the exclusive use of the water of the aqueduct, where the defence set up was that the portion of the aqueduct to which the dispute related was where water flowed through the lands of the defendant's zemindaree:

HELD that it was for plaintiff to make good the title he alleged.

Mitter, J.—THESE special appeals are admitted to be governed by one and the same decision here.

This suit was instituted by the plaintiff, for the removal of three *singhas* or outlets made by the defendant in a certain aqueduct called the Rajdar, upon the ground that she was entitled to the exclusive use of the waters of that aqueduct.

The defence set up was that the portion of the aqueduct in which the disputed *singhas* have been constructed is where water flows through the lands of the defendant's zemindaree, and that the plaintiff has no right to the exclusive use of the water thereof.

Both the lower Courts gave a decree to the plaintiff upon the ground that the defendant had failed to prove that the *singhas* in question were ancient constructions, as alleged by him in his written statement; and that the plaintiff's title to the exclusive use of the waters of the Rajdar had been established in the case reported in page 218 of the Sudder Dewanny Decisions for 1856.

We are of opinion that the mode in which the lower Courts have dealt with this case is erroneous in law.

The defendant was not a party to the above case of 1856, and it is, therefore, clear that the decision passed in that case cannot be used as evidence against him.

Besides, it is manifest that that decision related to a branch of the Rajdar distinct from the one now in dispute. Both the branches may be called by one and the same name; but this circumstance is by no means sufficient to render a decision passed with reference to one of them necessarily applicable to the other.

Moreover, the said decision was passed upon the ground that the branch of the Rajdar then in dispute flowed through lands

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belonging to the plaintiff's zemindaree; and the learned Judges were, therefore, quite justified in holding that it was upon the defendant to show by what right he claimed to use the waters of an aqueduct constructed by the plaintiff upon her own land and at her own expense. The defendant in the present case has been throughout contending, that the land through which the disputed branch flows does not belong to the plaintiff, and it was therefore for the plaintiff to show that she was entitled to use it exclusively for her own purposes.

The case is, therefore, remanded to the Lower Appellate Court for the determination of the question how and upon what title the plaintiff has proved his claim to an exclusive right to the use of the waters of the disputed portion of the Rajdar. The costs of this appeal and of the lower Courts will abide the ultimate result.

The 27th January 1871.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Rights—Prescription—Issues.

Case No. 1327 of 1870.

Special Appeal from a decision passed by the Judge of 24-Pergunnahs, dated the 26th May 1870, *reversing a decision of the Sudder Moonsiff of that District, dated the 28th December* 1869.

Bhoobun Mohun Mundul and another (Defendants) *Appellants,*

versus

Rash Beharee Paul (Plaintiff) *Respondent.*

Baboos Sreenath Doss and *Hem Chunder Banerjee* for Appellants.

Baboo Romesh Chunder Mitter for Respondent.

In a suit for the removal of a pucca building recently erected by defendant upon land lying between the premises of the two parties to the dispute, where plaintiff's claim to use the land had been put upon his title as owner:

HELD that, having failed to make out the case originally set forth in the plaint, plaintiff had no right to fall back upon a title by prescription.

HELD that plaintiff's claim must stand or fall upon the strength of his own right, not upon any such finding as that defendant was not entitled to the exclusive use of the land.

Mitter, J.—THE dispute in this case relates to a small piece of land lying between the premises of the two contending parties.

The defendant has recently erected a pucca building upon this land, and the plaintiff seeks to have that building demolished upon three distinct grounds, namely; first, that a portion of the land upon which the building has been erected is his own property; secondly, that he has a prescriptive right to use the remainder as a pathway; and thirdly, that the erection of the building has deprived him of the use of light and air in his own house.

The Moonsiff who tried this case in the first instance, after holding a local investigation in person and going carefully through the evidence on the record, came to the conclusion that the action was without any valid foundation whatever. He found that the plaintiff had completely failed to prove that he was entitled to any portion of the land in dispute, that the alleged right of way did not exist, and that the mere obstruction of one out of several openings in the plaintiff's kitchen could not entitle him, in the absence of all proof of legal right, to have the defendant's building pulled down.

This decision has been reversed by the Judge on appeal, and the present special appeal has been accordingly preferred to us by the defendant.

We are of opinion that the decision of the Lower Appellate Court is erroneous and unjust. After giving a short abstract of the Moonsiff's decision, the learned Judge goes on to say:—"The erection of this new building "has deprived the plaintiff necessarily of "air and light, and has subjected him *to* "*other inconvenience*, as for instance in "diminishing his facilities of repairing his "wall; and if the defendant has infringed "on the plaintiff's right, whether of *ease-* "*ment or otherwise*, the plaintiff has a cause "of action and he may claim to exercise "the right which he previously held of "opening doors and windows on the east "side of his house into the lane, if such "lane existed." This is all that the learned Judge has said upon the plaintiff's part of the case, and we are clearly of opinion that it is altogether insufficient to meet the requirements of the suit. The onus of proof was clearly upon the plaintiff, and it was therefore for him to make out, not merely that he has been subjected to some inconvenience by the

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erection of the building, but that he has a legal right to have that building demolished.

With reference to the alleged obstruction of light and air, which has been so much relied upon by the learned Judge, we have simply to remark that the plaintiff has given no evidence of any kind whatever to prove that he is entitled to have that obstruction removed. It is true that the erection of the building has deprived him of the use of one out of several openings in his kitchen ; but he has not been able to adduce a particle of proof, oral or documentary, to establish that he is entitled to the unobstructed use of that opening, either by grant or by prescription.

The other inconvenience relied upon by the learned Judge is the diminution of the plaintiff's "facilities of repairing his wall." On this point, also, the learned Judge seems to have fallen into a very serious error. The case set up by the plaintiff was that a portion of the disputed land was his own property, and that he had reserved it specially for the purpose of enabling himself to repair his wall when necessary. The Moonsiff dismissed this portion of the claim, as we have already observed, upon the ground that the plaintiff had given no evidence of any kind whatever to support it. This is not disputed. On the contrary, it is admitted before us by the pleader for the plaintiff that his client did not prefer any appeal to the learned Judge against that portion of the Moonsiff's decision. Why then, it may be asked, is the plaintiff to have the defendant's building pulled down, merely because "his facilities of repairing his wall have been diminished" as the learned Judge says ? If the disputed land does not belong to him, he has no right to use that land for the purpose of repairing his wall. It has been argued that there is evidence on the record to show that the plaintiff had used the disputed land once or twice for such a purpose, and that the Judge ought to be called upon to state his opinion as to whether that evidence is not sufficient to make out a title by prescription in the plaintiff's favour. We are of opinion that this argument is of no force whatever. The plaintiff's claim to use the land in question for the purpose of repairing his wall was expressly put upon the ground of his title as owner, and we do not think that he has any right to fall back upon a title by prescription after having signally failed to make out the case originally set forth in the plaint. The learned Judge speaks of the plaintiff's right "whether of easement or otherwise;" but he was bound, in our opinion, to state specifically and precisely what that right was. We have gone through the evidence on the record, and we feel no hesitation in saying that the plaintiff has given no proof of right of any kind whatever.

The remaining part of the Judge's decision merely goes to show that the defendant is not entitled to the exclusive use of the land in dispute, but that there are other parties (no way connected with the plaintiff, however) who are also entitled to use it. But neither of these findings, if findings they may be called, can give any right to the plaintiff to have the building demolished, for his claim must stand or fall upon the strength of his own right and not upon the weakness of the defendant's.

For the above reasons, we reverse the decision of the Lower Appellate Court and restore that of the Court of first instance with all the costs incurred by the defendant both in the Lower Appellate Court and in this Court.

The 27th January 1871.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Loss of reputation—Damages.

Case No. 1722 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Beerbhoom, dated the 21st May 1870, affirming a decision of the Moonsiff of Amdahara, dated the 11th February 1870.

Madhub Chunder Sircar (Defendant) *Appellant,*

versus

Banee Madhub Roy (Plaintiff) *Respondent.*

Baboo Umbika Churn Bose for Appellant.

Baboo Khettur Mohun Mookerjee for Respondent.

Where a false charge led to a party's being prevented going to his house until he had furnished bail, he was held to have suffered inconvenience and loss of reputation for which an award of 20 rupees as damages was not unreasonable.

Glover, J.—THERE is no ground for this special appeal. It has been found as a fact that the defendant did bring a false charge

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against the plaintiff, and that in consequence of that false charge the plaintiff was put to considerable inconvenience, and suffered loss of reputation, having been held to bail by the criminal authorities, and prevented from going to his house until he had furnished such bail. There can be no question that this was productive of inconvenience and loss of reputation to the plaintiff, and the award of 20 rupees as damages was by no means an unreasonable one under the circumstances of the case. We, therefore, dismiss the special appeal with costs.

The 27th January 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Special appeal—Contract—Debt—Section 6 Act XI of 1865.

Case No. 1730 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Rajshahye, dated the 24th June 1870, *affirming a decision of the Moonsiff of that District, dated the 22nd March* 1870.

Rash Monee Debia (one of the Defendants) *Appellant,*

versus

Rajah Ram Sircar (Plaintiff) *Respondent.*

Baboos Kalee Mohun Doss and *Mohinee Mohun Roy* for Appellant.

Baboo Bhyrub Chunder Banerjee for Respondent.

A servant borrowed on account of his master a sum of money which was partly spent in satisfaction of his master's debt, and partly taken by the latter and spent for his own private purposes. No re-payment having been made by the master, the lenders took out a decree against the servant who, thereafter, sued the master to recover the money:

HELD that the legal presumption was that the money was advanced on account of defendant on the understanding that it would be repaid; and that the action was one for debt within the meaning of Section 6 of the Small Cause Court Act.

Bayley, J.—I AM clearly of opinion that no special appeal will lie in this case.

The facts are these:—The plaintiff, who was a servant of the defendant, went to some mohajuns and borrowed a certain sum of money which was applied in the following manner, *viz.*, a portion was spent in satisfaction of the debt of the defendant, and the rest was taken and spent for the defendant's own private purposes. No re-payment of the money was made by the defendant to the plaintiff, and a decree was taken out by the lenders of the money against the plaintiff. After this decree the plaintiff brings this suit, and asks for re-payment of the money which he borrowed, and spent, and made over for the defendant's purposes.

The preliminary objection taken by the respondent to the hearing of the special appeal, is to the effect that no special appeal would lie, as the suit is for a debt under 500 rupees. On the other hand, it is contended that there was no implied contract between the parties; that it cannot be shewn when the liability commenced and when it ceases; and that, therefore, the transaction bore no such character as would bring it within the Small Cause Court Act. A case reported at Volume VII, page 377, Weekly Reporter, has been cited in support of this contention.

The facts stated at the commencement of this judgment are admitted on both sides, and it seems to be quite clear that when a party under such a state of facts asks for the re-payment of the money, he sues for a debt within the substantial meaning of Section 6 of the Small Cause Court Act.

The case cited is altogether a case of a different nature. It was a special case of the liability of co-sharers in a joint undivided revenue-paying estate to pay their quota of Government revenue, and the whole question there turned on the position of the co-sharers and the liability of the estate on account of the non-payment of th arrears of Government revenue. It was there held that in the event of such payments by one co-sharer and a suit for contribution thereupon, the case does not come within the purview of Section 6, Act XI of 1865. In this case, however, there is no such speciality. It is a case for money borrowed and paid on account of the defendant, and, it must be legally supposed, upon an understanding that the defendant will repay the money to the plaintiff.

In this view, I think the case is one of a nature cognizable by a Court of Small Causes, and, as such, no special appeal will lie.

The appeal is dismissed with costs.

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Mitter, J.—I think this action was one for debt. Upon the facts stated on the record, it appears that the plaintiff advanced a certain sum of money to the defendant for a particular purpose, and that there was an understanding between them that the money should be repaid by the latter. The value of the suit being below rupees 500, no special appeal lies to this Court under the provisions of Section 27, Act XXIII of 1861.

The 27th January 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Accretions—Section 4 Regulation XI of 1825.

Case No 1738 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Rajshahye, dated the 24th June 1870, *affirming a decision of the Moonsiff of Pubna, dated the 31st December* 1869.

Gobind Monee Debia (Plaintiff) *Appellant,*

versus

Dino Bundhoo Shaha and others (Defendants) *Respondents.*

Baboo Mohinee Mohun Roy for Appellant.

Baboos Sreenath Doss and *Bhugobutty Churn Ghose* for Respondents.

Where lands become annexed to a jote by gradual accretion within the meaning of Section 4, Regulation XI of 1825, the jotedar is entitled to hold them on the same principle, and under the same legal conditions, as he holds the parent estate.

Mitter, J.—The first question which the lower Courts had to determine in this case was, whether the lands in dispute had been annexed to the plaintiff's jote by gradual accretion, within the meaning of Clause 1, Section 4, Regulation XI of 1825. Both the lower Courts, however, have dismissed the suit on the ground that the Government being the owner or proprietor of the chur, the plaintiff has no right to sue for the reversal of the settlement made by Government with the defendant, or for possession of the lands in question.

We are of opinion that this judgment is erroneous. The Government, no doubt, is admitted on all sides to be the proprietor of the lands; but if the lands were annexed to the plaintiff's jote by gradual accretion, the plaintiff would be entitled to hold them precisely on the same principle and under the same legal conditions as he would be entitled to hold the parent estate to which they have accreted. This point has been frequently ruled by the Court, and all that we have now to say is that the words of Clause 1, Section 4, Regulation XI of 1825, are clear and cannot be overlooked.

We, therefore, remand the case to the first Court with directions to make the Government a party to the suit, and then to decide it on the issues arising from the pleadings.

The costs of this appeal will abide the ultimate result.

The 27th January 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Refusal to examine witnesses—Special appeal.

Case No. 1753 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 11th June 1870, *affirming a decision of the Deputy Collector of Monghyr, dated the 7th January* 1870.

Osman Singh and others (Plaintiffs) *Appellants,*

versus

Chummun Mahtoon and others (Defendants) *Respondents.*

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Mr. R. E. Twidale for Appellants.

Baboo Motee Lall Mookerjee for Respondents.

Where any real grievance or other just cause of complaint arises to a plaintiff from the first Court's refusal to examine his witnesses, his first duty is to bring the matter prominently to the notice of the Lower Appellate Court in his grounds of appeal. Failing to do so, he cannot be allowed to urge it as a plea in special appeal.

Bayley, J.—THERE is no ground for this special appeal.

The main objection is that on various occasions it was brought to the notice of the first Court, that the witnesses for the special appellant were present in Court and yet they were not examined.

Now, looking to the record, it no doubt appears that there were most unreasonable adjournments and delays in the examination of the witnesses, and this Court would have taken further notice of the matter had the jurisdiction of the Deputy Collector over such cases remained; but if there were any real grievance or any just cause of complaint, or any obvious injustice caused to the special appellant by the refusal of the Court to examine his witnesses, his first duty would have been to bring the matter prominently to the notice of the Lower Appellate Court in his grounds of appeal; but he totally neglected to do so, and only after the case was decided against him by the Lower Appellate Court on other grounds did he take the objection by way of review, and now urges it before this Court as a point of special appeal. We quite agree with the learned Counsel, Mr. Twidale, that it is the duty of this Court to redress the grievances arising to parties from the neglect of the Courts below in matters of this kind, but at the same time it cannot be denied that in this particular case if any real grievance had been caused to the special appellant by the omission of the first Court to examine his witnesses, he would and should have first urged it as a preliminary and prominent point of appeal before the Judge, and not that point only for a special plea in this Court in the last stage of the special appeal.

In this view, we think this special appeal must be dismissed with costs.

The 30th January 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Witnesses—Notice.

Case No. 420 of 1870.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Bhaugulpore, dated the 9th July 1870.

Mussamut Mussitee Khanum (Claimant) *Appellant,*

versus

Mussamut Hookoom Bibee and another, (Opposite Party) *Respondents.*

Moonshee Mahomed Yusoof for Appellant.

Baboos Debendro Narain Bose and *Kalee Kishen Sein* for Respondents.

After a list of witnesses has been filed and the *tullubana* paid, the Court's officers, not the applicant, are responsible for the service and return of notice.

Bayley, J.—IN this case, we think that justice requires that the order of the Subordinate Judge must be reversed.

On the 15th June 1870, an order was passed that the case be taken up on the 9th July, and that the applicant do in the meantime file his issumnuvisee or list of witnesses.

On the 29th June, the applicant not only put in the list of witnesses, but did also on that day pay in the tullubana and thus completed all that *he* was required to do under the law. This gave a period of 10 days before the day fixed for hearing. For the proceedings that were taken within this

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interval of 10 days, the applicant was not responsible but the Court officers. The service of notice and the return thereof were acts in the hands of the Court and its officers.

We think the order of the Subordinate Judge, must be reversed, and the case remanded to him to hear the witnesses whom the appellant named in his issumnuvisee and for whose appearance he paid tullubana, if produced within a reasonable time to be fixed by the lower Court.

The case is, accordingly, remanded to be tried on its merits.

The 30th January 1871.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Jurisdiction—Debt—Partnership accounts.

Case No. 669 of 1870.

Special Appeal from a decision passed by the Officiating Additional Judye of Backergunge, dated the 19th January 1870, *reversing a decision of the Moonsiff of Burrisaul, dated the 13th January* 1869.

Ram Kanaye Shaha and others (Plaintiffs) *Appellants,*

versus

Bykuntnath Shaha (Defendant) *Respondent.*

Baboo Kalee Mohun Doss for Appellants.

Baboo Grija Sunkur Mojoomdar for Respondent.

Where defendant had been plaintiff's servant in charge of plaintiff's shop on the understanding that he was to be remunerated by a small share of the profits in lieu of fixed wages, a suit to recover the balance after deduction of such remuneration was held to be a suit on a demand cognizable by a Small Cause Court, and not for balance of partnership account.

Mitter, J.—I AM of opinion that there is no special appeal in this case.

The suit was brought for the recovery of a sum of money below 500 rupees, alleged to have been misappropriated by the defendant whilst he was employed as a gomastah in the plaintiff's shop. Such a suit is clearly cognizable by the Court of Small Causes. Whether the accounts between the parties have been adjusted and the balance struck or not, it is evident that those accounts cannot be treated as partnership accounts. The defendant was employed as a servant, and the mere fact that he was to receive a certain portion of the profits of the shop cannot convert this suit into a suit for balance of partnership account. But if this suit was really cognizable by the Court of Small Causes, the lower Courts had no jurisdiction to try it. There is a Court of Small Causes at Nulchitee, and that Court was fully competent to try it. It is much to be regretted that the Judge of the Small Cause Court of Nulchitee had, on a previous occasion, refused to entertain this claim upon the ground that it was a claim for balance of partnership account. But as the question is one of jurisdiction, I feel myself bound to set aside the decisions of both the lower Courts under the powers vested in me by the 15th Section of the Charter Act. I would, therefore, set aside the decisions of both the lower Courts; but under the circumstances stated above, I would order that each party ought to bear his own costs in all the Courts.

Jackson, J.—I agree that this was not a suit on a balance of partnership account, although the plaintiff, misled by the erroneous dictum of the Small Cause Court, did his best to make it so.

The defendant was plaintiff's servant in charge of his shop, and was to be remunerated by a small share of the profits instead of fixed wages. What the plaintiff sought to recover was the amount which he found ought to have been in defendant's hands after deduction of the amount coming to him for his remuneration.

This was a debt or demand really recoverable in the Small Cause Court, and the jurisdiction of the ordinary Civil Courts was accordingly varied.

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I therefore concur in the opinion that we ought to set aside the proceedings in the Courts below.

But in my opinion the plaintiff will in this way suffer cruel injustice, unless we go further and under our general power of superintendence also set aside the improper order of the Small Cause Court declining jurisdiction, and require that Court to receive the plaint and dispose of the suit as originally presented.

This accordingly is the order which I propose to make.

Mitter, J.—I agree with my learned colleague in directing the Small Cause Court to receive the plaint.

The 30th January 1871.

Present:

The Hon'ble G. Loch and Onoocool Chunder Mookerjee, *Judges.*

Jurisdiction—Section 15, Charter Act.

Kalee Hur Doss, *Petitioner,*

versus

Roodressur Chuckerbutty, *Opposite Party.*

Baboo Nuleet Chunder Sein for Petitioner.

Baboo Huree Mohun Chuckerbutty for Opposite Party.

Mere errors of law committed by a Lower Appellate Court in cases in which the High Court has no appellate jurisdiction do not give the latter Court power to interfere under Section 15 of the Charter Act, its interference being restricted to cases in which the lower Court exercises a jurisdiction which it has not, or refuses to exercise a jurisdiction which it has.

Loch, J.—We think that this rule must be discharged with costs.

Objections have been taken to the proceedings of the lower Courts, especially to those of the Subordinate Judge; first of all, that he has exercised a jurisdiction which is not vested in him by law; and next, that he had refused to exercise jurisdiction when he ought to have done so.

With regard to the first point, it is said that he has re-opened and tried a question disposed of by the Judge and by the High Court in execution of a former decree obtained by the opposite party.

As to the second point, it is objected that he has refused to exercise jurisdiction by not ascertaining the amount of mesne profits to which the petitioner before us considers himself to be entitled.

A great deal of confusion has entered into this case, owing to the peculiar nature of the talook in question as it was originally constituted and the shares into which it was subsequently sub-divided, by which the talook was divided into two; one part bearing a jumma of 24 rupees, and the other a jumma of 10 rupees, both known as Doorga Pershad—Kisto Pershad.

With the talook of 10 rupees we have nothing to do at present; it is only with the talook of 24 rupees that we have to deal, and, keeping this in view, the question before us is very simple.

It appears that the opposite party in this case obtained a decree for 10 annas 13 gundahs of this talook against the petitioner; that he wanted to obtain possession of the whole of the talook, having purchased 16 gundahs of it in execution of a decree for costs, so making his share 11⅓ annas; and he contended that under that decree he was entitled to the entire talook.

The Lower Appellate Court and the High Court held that he was only entitled to 11⅓ annas of the talook bearing a jumma of 24 rupees.

The petitioner, who was the defendant in that case, then applied to recover possession of 4⅔ annas of the talook of which he alleged he had been dispossessed by the opposite party in execution of his decree, and, as he states, he obtained an order from the Moonsiff bearing date the 22nd of January 1869 putting him into possession of that share. This having been done, he

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brought an action to recover mesne profits for the time during which he was kept out of possession.

Both the Courts below have dismissed this suit, and the Lower Appellate Court in its judgment said that the talook bearing a jumma of 24 rupees is divided into two parts, namely, 4½ annas in the possession of Tripoora Soonduree and another person, and 11½ annas which belonged to the opposite party in this case under his decree and by auction-purchase; and therefore there was nothing for the petitioner to obtain, and he failed to show that he (petitioner) had obtained possession under the order of the Moonsiff.

Now, as the judgment of the Lower Appellate Court in this case merely declares that the opposite party has a right to 11½ annas in the estate with a jumma of 24 rupees, it has said nothing contrary to what had been said by the High Court and by the Judge when they disposed of the matter in the execution case.

There may perhaps be some mistake with regard to the possession of the remaining 4½ annas. The Judge may be in error in saying that it was in the possession of Tripoora Soonduree and the other lady, and we are told that he *is* in error on this point; but even if his judgment is erroneous, we cannot say that the Subordinate Judge has exercised a jurisdiction which is not vested in him by law. It may be a mistake which can be rectified by an application to him to review his order; but it is not certainly a matter to be brought before us, and regarding which we should be called upon to exercise our extraordinary powers under the Charter.

Then as to the other point, namely, that the Court below had refused to exercise jurisdiction, all that it did do was this; it said to the plaintiff—"you have failed to "prove your case, and failing to do so, you "cannot get a decree for mesne profits." In this we cannot say that the Court has refused to exercise a jurisdiction which it ought to have exercised.

For the above reasons, we think that the rule must be discharged with costs, which we assess at 2 gold mohurs.

Mookerjee, J.—I agree in discharging the rule with costs. The suit being for a sum of money below 500 rupees, it is clear we have no appellate jurisdiction. The petitioner has invoked our special power under Section 15 of the Charter on the grounds stated by my learned colleague. I do not think that mere errors of law committed by a Judge on appeal in such cases give us jurisdiction under the Section quoted. I am of opinion that probably the Judge is wrong, and has confounded the old 4½ annas share of Tripoora Soonduree with the 4½ annas in the jumma of rupees 24. If it is so, the remedy lies in an application to him and not by one in this Court. It is only in cases where the Lower Appellate Court has exercised jurisdiction where it has none by law, or has refused to exercise jurisdiction where it clearly has, that we can interfere. This is not a case of that nature. We are, therefore, unable to interfere with his decision, even if it is wrong in law or has proceeded from a misconception of the facts of the case.

The 30th January 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Special Appeal — Enhancement of rent—Excess lands.

Case No. 1763 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Officiating Judge of Purneah, dated the 23rd June 1870, *affirming a decision of the Assistant Collector of that District, dated the 22nd December* 1869.

Shaikh Ahmed Hossein (Plaintiff) *Appellant,*

versus

Mussamut Bandee and others (Defendants) *Respondents.*

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Mr. R. E. Twidale and *Baboo Chunder Madhub Ghose* for Appellant.

Baboo Grish Chunder Ghose for Respondents.

In a special appeal the general affirmation of a judgment can only refer to the points raised by the appellant, the rejection of the appeal not necessarily affirming the other findings of fact or law incidentally arrived at by the Lower Appellate Court.

In a suit for enhancement of rent on the ground that defendant holds land in excess of what he pays rents for, it is plaintiff's duty to show that the lands in question are all included within the tenure of the defendant, but that the latter has been paying rent for a quantity less than the area of those lands.

Bayley J.—I am of opinion that this special appeal must be dismissed, inasmuch as it is not shown that there is any error in law in the finding of the Lower Appellate Court, that "the plaintiff has entirely failed "to show what specific lands are in excess "of the defendant's tenure, and what the "rates and quantity are of each kind."

It is admitted that the original tenure consisting of 23 beegahs and odd cottahs was a distinct tenure held at a fixed rent, as to which the plaintiff states he has no claim for enhancement; but the plaintiff asserts that there are 30 beegahs beyond those 23 beegahs held and occupied by the defendant, as to which he, plaintiff, is entitled to and sues for enhanced rent.

Now, until the actual fact of the 30 beegahs being in excess of the original tenure is proved by some specific evidence as to what and where they are, I think no such suit for enhancement as brought by the plaintiff in this case can lie.

The special appellant, however, relies on the judgment of the Lower Appellate Court on a former occasion having been generally affirmed on special appeal by this Court. I think that in a special appeal the general affirmation of a judgment below can only be on the points raised by the special appellant. By rejecting a special appeal, it does not follow that this Court necessarily affirms all the other findings of fact or of law which the Lower Appellate Court may incidently come to.

I would dismiss this special appeal with costs.

Mitter, J.—I am of the same opinion.

The argument based on the 3rd Clause of Section 17 Act X of 1859 has no application to this case. If the so-called excess lands are included within the mokururee lease relied upon by the defendant, it is quite clear that the plaintiff cannot enhance the rent payable by the defendant on the ground of those excess lands. If, on the other hand, the said lands are not covered by the mokururee pottah, it is equally clear that there is no relation of landlord and tenant between the plaintiff and the defendant in respect of those lands. Clause 3 Section 17 Act X of 1859 pre-supposes that the original tenure itself is liable to enhancement. In this case, it is admitted that the defendant has got a tenure which is not liable to enhancement; and what the plaintiff is really seeking to do is to assess rent on lands for which no rent has been hitherto paid to him, although he is ostensibly trying to treat this suit as a suit for enhancement of rent.

It is said that this point has been finally determined by the decision of the Judge passed on remand, as well as by the decision of this Court passed on special appeal against the Judge's order. So far as the Judge's order of remand is concerned, I think that the observations of that officer relied upon by the special appellant were altogether premature, and cannot therefore be binding on us now that we are called upon to pass final judgment in the cause. Whether the *excess lands* were liable to enhancement or not was a question on which no opinion could be given before it was determined what those excess lands were, and how, and under what circumstances they were taken possession of by the defendant. The law applicable to those lands could not be laid down without the necessary facts being found; and I am therefore of opinion that the observations in question cannot be treated as conclusive on the particular point now under our consideration.

As to the decision passed by this Court on special appeal, no judgment has been shown to us on the strength of which it can be contended that the respondent is precluded from contesting the plaintiff's claim for

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enhanced rent on the ground of *excess lands*. If the plaintiff chose to come to Court on the ground that the defendant held lands in excess of what he paid rents for, it was his duty to prove that assertion by showing that the lands in question are all included within the tenure of the defendant, but that the defendant has been paying rent for a quantity less than the area of those lands. The plaintiff has, in my opinion, entirely failed to prove this assertion, and I would therefore dismiss this special appeal with costs.

The 31st January 1871.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Joint tenancy—Commensality.

Case No. 1690 of 1870.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 28th April 1870, *affirming a decision of the Moonsiff of Ookrah, dated the 29th November* 1869.

Pearee Monee Bibee (Plaintiff) *Appellant,*

versus

Madhub Singh and another (Defendants) *Respondents.*

Baboo Rash Behuree Ghose for Appellant.

Baboo Romesh Chunder Bose for Respondents.

The word "ijmalee" expresses joint tenancy even where commensality is not implied.

Glover, J.—The plaintiff in this case claimed certain property by purchase from one Tara Soonduree. She states that after having purchased this property, she went to take possession but was prevented by the defendants, and therefore was obliged to bring this suit.

The defence was that the property in dispute did not descend to Tara Soonduree as alleged by the plaintiff, but was the self-acquired property of one Narain Singh, a member of another branch of the family. The first Court found that the plaintiff's vendor had never been in possession of the property, that it was the self-acquired property of Narain Singh, and that Tara Soonduree had no right to sell it. In the second Court, the Judge refused to take into consideration the objection which had been raised before him that the family was a joint family and that the property was joint family property, and decided against the plaintiff on the ground that there was no documentary evidence in her favor and that none of the six witnessess who had been examined on her behalf had deposed that the property was ever in the possession either of Tara Soonduree or of her husband Mutty Singh.

It appears to us that this decision of the Judge by no means touches the question at issue between the parties. The allegation in the plaint undoubtedly was that the family was a joint family, the word used being "ijmalee." The Judge seems to have taken the want of any allegation as to commensality as want of allegation of joint tenency, overlooking, apparently, the fact that a Hindoo family may very well be joint in property though not joint in mess. The points to be decided in this case, therefore, were,—1st, whether this property which Tara Soonduree sold to the plaintiff was part of the ancestral joint family property coming as such to her husband Mutty Singh, and on his decease devolving on his widow Tara Soonduree, or was it, as alleged by the defendant, the separate self-acquired property of Narain Singh, a member of another branch of the family. The first Court decided this point adversely to the plaintiff, and no doubt it was the duty of the Judge to decide that point also. There was no question of limitation involved in this suit, and therefore whether Mutty Singh or Tara Soonduree was or was not in possession of this property at the time of the sale had really nothing to do with the matter.

We observe, moreover, that the Judge is not quite correct when he states that

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none of the witnesses depose to the fact of Mutty Singh's or his wife's possession, for some of the witnesses at least depose that they were in possession. The case must, therefore, be remanded to decide whether or not Tara Soonduree had the rights of a sharer in the joint ancestral property, and as such, power to dispose of these lands to the plaintiff.

Costs to follow the result.

The 1st February 1871.

Present:

The Hon'ble L. S. Jackson and W. Ainslie,

Judges.

Butwarrah—Reserved rights.

Case No. 1463 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Gya, dated the 18th April 1870, *affirming a decision of the Sudder Moonsiff of that District, dated the 1st July* 1869.

Gour Sahoy Singh and another (Defendants) *Appellants,*

versus

Sheo Sahoy Singh (Plaintiff) *Respondent.*

Mr. Mun Mohun Ghose for Appellants.

Baboo Romesh Chunder Mitter for Respondent.

Where parties by agreement in a butwarrah restricted their ights by the condition that one of their number was to have full use of the water in a reservoir, the others were held not to be at liberty to set up, even on their own lands, an embankment round the reservoir so as to diminish materially the flow of water into it.

Jackson, J.—It appears to me that the special appeal in this case cannot be sustained. The learned Counsel who has argued it before us has evidently felt the great difficulty of bringing the case within the limits of special appeals at all; and, in reality, the tendency of the argument has been to show, either that the plaintiff is to get something which he was not entitled to by the terms of the butwarrah, or that he obtained more than he asked for in the plaint.

But it appears to me not to be so. The plaintiff seems merely to desire to get the full advantage which was reserved to him in the butwarrah or partition between the parties. The words of the butwarrah are that the water of the Puchyaree Ahur, which is one of the three great reservoirs which were included in the subject of partition, shall find its way to the land of the plaintiff through the aperture or *kurbee*, as it is called, of another apparently similar reservoir which is the exclusive property of the defendant. I can attach no other meaning to this stipulation than that the water of the larger reservoir should pass through the smaller on its way to the plaintiff's lands. Consequently, the decree made by the Subordinate Judge is in accordance with the reasonable interpretation of the butwarrah.

Then there is another question which relates to the right of the defendant to set up on his own land an embankment running round one or more sides of the reserved *ahur* or reservoir. It is contended by the special appellant that he is entitled to do this on his own land, and we are referred to a case in XIII Weekly Reporter, page 414, where in a case supposed to be similar the learned Chief Justice held that the plaintiff there could not be restrained from doing so.

That case, so far as I can judge from the report, is an entirely different case from the present. There the plaintiff held the land without any reservation; but in this case the parties have by agreement in the butwarrah restricted their rights by the condition that the plaintiff was to have full use of the water in the reservoir. Now if the parties who obtained the lands lying on different sides of that reservoir were to be at liberty to put up an embankment round it, and so to diminish very materially the flow of water into it, the rights reserved to the other co-sharers would become nearly or quite nugatory. Under these circumstances, it appears to me that the injunction against erecting this embankment was properly issued, and that this appeal must be dismissed with costs.

Ainslie, J.—I concur.

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The 1st February 1871.

Present:

The Hon'ble L. S. Jackson and W. Ainslie, *Judges.*

Case No. 428 of 1870.

Judgment-debtor.

Miscellaneous Appeal from an order passed by the Judge of Gya, dated the 13th September 1870.

Syud Nujmooddeen Ahmed (Objector) *Appellant,*

versus

Abdool Azeez (Decree-holder) *Respondent.*

Mr. C. Gregory for Appellant.

Mr. R. E. Twidale for Respondent.

The silence of a judgment-debtor on a previous occasion is no bar to his being heard when he objects alleging material irregularity, provided his allegation is made within the 30 days allowed by law.

Jackson, J.—It appears to us that the Judge was bound in this case to hear the evidence tendered by the judgment-debtor in support of his objection. The circumstances referred to by the Judge may be material as affecting the credit which ought to be given to the evidence when received, but it is a mistake to suppose that the fact of the silence of the petitioner on the previous occasion, is a bar to his being heard when he alleges material irregularity within the 30 days allowed by law for that purpose.

The order of the Judge must be set aside. He will enquire into the facts alleged by the petitioner, and decide whether the objection is made out, and, if so, whether there has been any material irregularity, and whether any injury has been sustained in consequence of the irregularity complained of.

Ainslie, J.—I concur.

The 1st February 1871.

Present:

The Hon'ble L. S. Jackson and W. Ainslie, *Judges.*

Purchase from judgment-debtor—Title—Right of suit.

Case No. 1397 of 1870.

Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 25th March 1870, reversing a decision of the Moonsiff of Tajpore, dated the 30th July 1869.

Goburdhun Doss and another (Defendants) *Appellants,*

versus

Munnoo Lall (Plaintiff) *Respondent.*

Baboo Chunder Madhub Ghose for Appellants.

Mr. R. E. Twidale and *Baboo Hem Chunder Banerjee* for Respondent.

The purchaser of property from a judgment-debtor, whose right, title, and interest have been subsequently sold to another party who desires to take possession, has a right to sue for a declaration of title and confirmation of possession for the purpose of clearing his title from the suspicion of its being founded on a collusive sale.

Jackson, J.—It appears to me that we cannot in special appeal disturb the finding of fact come to by the Lower Appellate Court. I cannot see any ground for supposing that the Additional Judge who heard this appeal did not understand what the true issue between the parties was. Whether he has expressed himself in the decision of that issue with force and accuracy is another question, but it is clear from the whole of his decision that the issue which he was trying was whether there had been a *bonâ fide* sale of this property on the

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part of the judgment-debtor to the brother-in-law, and he finds as a fact upon the evidence that there had been such sale.

That being so, I think that the plaintiff was as a matter of law entitled to a decree. He alleges that the right, title, and interest of his vendor had been put up for sale and sold to another person, and that other person desires to take possession. We cannot say that he is not competent to bring a suit in Court to have his title cleared, and to ask for what he calls a declaration of right and confirmation of possession. That which he must have mainly desired to obtain in this case was a declaration of right free from the suspicion cast upon it of its being a collusive sale, and of there being nothing left in the judgment-debtor to sell afterwards. He has established this fact to the satisfaction of the Lower Appellate Court, and whether or not we should come to the same conclusion upon the evidence, I do not think we are entitled in special appeal to interfere with it. The special appeal must be dismissed with costs.

Ainslie, J.—I concur.

The 1st February 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Reversioners—Declaratory decree—Onus probandi.

Case No. 1717 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Beerbhoom, dated the 7th May 1870, *reversing a decision of the Moonsiff of that District, dated the 2nd February* 1870.

Bykunt Nath Roy and another (Defendants) *Appellants,*

versus

Grish Chunder Mookerjee (Plaintiff) *Respondent.*

Mr. Mendes and *Baboos Nil Madhub Bose* and *Jadub Chunder Seal* for Appellants.

Baboo Rajendro Nath Bose for Respondent.

In a suit for a declaration of plaintiff's reversionary title as heir to his late uncle's property, and for reversal of a deed of sale from that uncle set up by the defendant, the widow not having been made a party to the suit and her consent to, or dissent from, the alleged conveyance not having been ascertained, the issue tried was whether the deed was genuine and whether defendant has possession under it:

HELD that the onus was rightly placed on the defendant.

HELD that there was nothing to prevent plaintiff from suing, during the life-time of the widow, for a declaratory decree to the effect that the alienation would not bind him in the event of his surviving the widow.

Kemp, J.—THE defendants are the special appellants.

The plaintiff sued to have his reversionary title to one-third of the disputed property declared, as heir of his uncle Parbuttee, and for reversal of a deed of sale from Parbuttee set up by the defendant,—the said deed being dated the 22nd Bysack 1251. It is admitted that the widow of Parbuttee is alive and that she has not been made a party to the suit. Her consent to, or dissent from, the alleged deed by her husband, Parbuttee, to the defendants has not been ascertained. The defendants relied solely upon the deed of conveyance by Parbuttee, as extinguishing the plaintiff's reversionary rights.

The issue tried was whether the deed by Parbuttee to the defendants was genuine or not, and whether the defendants had been in possession under it.

The first Court was of opinion that as the deed was *primâ facie* without suspicion and had not been recently written, and further as it has been attested by one of the subscribing witnesses to it, *viz.*, Ram Gopal Hazara, it was a genuine instrument.

On the question of possession, the first Court found that the defendants were in possession under the deed.

The Subordinate Judge in appeal tried the same issue. He observes that the deed is not of a very old date, that the witnesses are low people, and that Ram Gopal had given evidence ten times. He also points out discrepancies in the evidence of the defendant's witnesses.

On the question of possession, he finds that the widow of Parbuttee, the vendor of the defendants, is still in possession of the disputed property. He, therefore, reversed the decision of the first Court and gave the plaintiff a decree.

In special appeal, it is urged:—

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1*st*.—That the onus has been wrongly placed on the defendants, it being for the plaintiff to prove that the deed is not genuine.

2*nd*.—That the Subordinate Judge has not distinctly found who is in possession of the disputed property.

3*rd*.—That the reasons of the Subordinate Judge for holding that the deed is not genuine are not sufficient.

4*th*.—That the plaintiff's suit is barred.

The fourth plea was not raised in the pleadings or taken in the lower Courts.

The onus has not been misplaced. The whole evidence appears to have been weighed and considered by the Subordinate Judge. The Subordinate Judge distinctly finds that the widow of Parbuttee is in possession. The reasons given by the Subordinate Judge for discrediting the deed appear to us to be sufficient, and there are no grounds for a special appeal.

An additional ground was raised for the first time in this Court, that the plaintiff could not sue during the life-time of the widow for a declaration of his reversionary right.

We think that there is no force in this additional ground. The object of the plaintiff's suit is to have it declared that the alleged sale to the defendants by Parbuttee will not be binding upon him when the succession opens out to him, *i. e.*, on the death of the widow. It may be that he may not survive the widow whose life-interest is admitted, and who has been found to be in possession. But there is nothing to prevent plaintiff from suing in the life-time of the widow for a declaratory decree, that the alleged alienation by Parbuttee to the defendants will not bind the plaintiff if he survive the widow.

In this view of the case, we confirm the decision of the Subordinate Judge in as far as it declares that the deed set up by the defendants will not bind the plaintiff when his succession to the estate of his uncle Parbuttee opens out to him.

The special appeal is dismissed with costs.

The 1st February 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover,

Judges.

Third parties—Section 73 Act VIII of 1859—Onus probandi.

Case No. 1724 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of West Burdwan, dated the 21st June 1870, *modifying a decision of the Officiating Moonsiff of Radhanuggur, dated the 18th April* 1870.

Ram Taruck Ghossal and others (Plaintiffs) *Appellants,*

versus

Radha Bullab Sircar and others (Defendants) *Respondents.*

Baboos Mohesh Chunder Chowdhry and *Gopal Lall Mitter* for Appellants.

Baboos Hem Chunder Banerjee and *Romesh Chunder Bose* for Respondents.

In a suit for establishment of title to a portion of land with which defendants repudiated all connection alleging the land to be in the possession of third parties, who were in consequence made defendants by an order of the Court under Section 73, Civil Procedure Code:

HELD that these parties were rightly made defendants as having been interested both in the subject-matter and in the result of the suit, and even if they had been wrongly made defendants the onus would, under the circumstances, remain on the plaintiffs.

Glover, J.—THE points taken in this special appeal are—(1) that the lower Court

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was not justified in making Man Koomaree and others defendants under Section 73 of the Civil Procedure Code, there being no privity between them and the original parties to the suit; and (2) that if they were rightly made parties, the *onus probandi* was on them and not on the plaintiffs.

The dispute is with reference to 4 beegahs of land said to be situate within plot No. 2 claimed by the plaintiffs. The original defendants were Gopeenath and others, and as regards this particular 4 beegahs they denied their liability, alleging the land to be in the possession of Man Koomaree and others. These persons were one after the other made defendants by the Court under Section 73, Civil Procedure Code, and were held by the Moonsiff to have proved their claim.

We have been referred to the case of Jugadanund Misser, *versus* Hamed Russool, X Weekly Reporter, 52, in support of the special appellant's contention that Man Koomaree and the others ought not to have been made parties to the suit, but that being so made, the onus was on them. We have also been referred to the case of Joy Gobind Doss *versus* Gooroo Pershad Shaha, VII Weekly Reporter, 201, to show that the Moonsiff was wrong in allowing Man Koomaree and her fellows to interfere between the plaintiff and the original defendants.

As Man Koomaree and the others were made defendants under Section 73 by the direct order of the Court, an order which we may observe was never objected to by the plaintiffs at any stage of the proceedings in the Courts below, we do not see how we can now displace them from that position: having been admitted as defendants they must remain there; nor do we think that their admission as parties to the suit was improper. The general rule of equity, as quoted by the learned Chief Justice in the case of Joy Gobind Doss quoted above, is that "all "persons are to be made parties who are "either legally or equitably interested in the "subject-matter and result of the suit."

Now as to the "subject matter" there can be no doubt, plaintiffs and defendants both claiming title in the same land. Then as to the "result," a decree in favor of the plaintiffs against Gopeenath would not of course have bound Man Koomaree, but the result of such a decree would have been most disastrous to her. The plaintiff sued to recover possession of certain land lying within certain defined boundaries, and if they had got a decree they would in execution have taken possession of that land, although a portion of it never was and never had been in the possession or ownership of the defendants sued, and regarding which those defendants from the first repudiated all connection. Man Koomaree and her fellows could no doubt have, on being turned out of their lands, applied to the Court under Section 230 of the Procedure Code; but their position would have been very much worse than it would have been had they been allowed to appear as defendants instead of being forced into Court as plaintiffs. Under the circumstances of the present case, it appears impossible to say that Man Koomaree and the others were not distinctly interested both in the subject-matter and in the result of the suit brought by the plaintiffs against Gopeenath.

Then as to the onus, the case reported in the 10th Volume of the Weekly Reporter is one where the defendant under Section 73 thrust himself into the litigation—and that under very suspicious circumstances, and in that case the burthen of proof was held to be upon her. Here, however, the matter is very different. Man Koomaree was brought into the suit by the direct order of the Court, and we do not see why her position should be made worse than that of any other defendant; or that because the Moonsiff chose to make her a party, the plaintiffs should escape the necessity imposed on all plaintiffs of proving their own case. It is not, moreover, as if those defendants had made no attempt to prove their right. On the contrary they produced evidence which the Moonsiff, who held a local investigation and tried the case, declares in his judgment to be most respectable and satisfactory.

The Subordinate Judge placing the onus on the plaintiffs has found that they have had no possession of the disputed land within 12 years and that their claim is barred.

On the whole, therefore, we think that the Moonsiff was not wrong in making Man Koomaree and the others parties under Section 73; and that even if he was wrong the onus would not under the circumstances of this case be shifted, but would remain on the plaintiffs; and that therefore the Subordinate Judge was right also.

The special appeal is dismissed with costs.

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The 1st February 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Legal possession—Section 224, Act VIII of 1859.

The Court of Wards and others, *Petitioners,*

versus

Burra Lall Oopendronath Deo, *Opposite Party.*

Baboo Unnoda Pershad Banerjee for Petitioners.

Mr. R. T. Allan for Opposite Party.

In order to a legal possession being given under Section 224 Act VIII of 1859, it is essential that all the requirements of that Section be carried out.

Kemp, J.—It appears that in this case an appeal is now pending before this Court in which the question whether Burra Lall Oopendronath Deo, the nephew of the late Maharajah of Chota-Nagpore, or the sons of the late Rajah, are entitled to his estate, has to be decided.

Burra Lall Oopendronath Deo has obtained a decree in the first Court, and an appeal has been preferred by the Court of Wards, who now represent the minors, the alleged sons of the late Rajah.

It is said on behalf of the decree-holder, that he had substantially obtained possession of this estate before the order passed by this Court on the 24th of November last. The Judicial Commissioner has found that possession was given to the decree-holder, Burra Lall, before the order of this Court; and therefore he reversed the order of the Assistant Commissioner directing the ryots to pay rent as hitherto to the Court of Wards.

The question we have to decide is, whether possession had been legally given to the decree-holder before the order of this Court passed on the 24th of November. The hookoomnamah directing the Nazir to give possession to Burra Lall is dated the 27th of October. It appears that on the 20th of November the Nazir went to Ranchee, the principal village of the Raj and the place of residence of the Ranees. On the 20th or 21st he did not proclaim the order, but on the 22nd of November he proclaimed the order of the Court in the villages of Rantoo and Ranchee. Peadahs were then deputed to proclaim the same order in other villages of the Raj. It is, however, stated by the Nazir in his examination when cross-examined, that no copy of the warrant was fixed in any conspicuous place on the land or other immoveable property.

Now, we are of opinion that under Section 224 of Act VIII of 1859, it is essential that all the requirements of that Section should be carried out; and as in this case it is clear that no copy of the hookoomnamah was fixed on any place on the land in dispute, we think that the possession which it was alleged had been given to the decree-holder is not a possession which we can call a legal possession under Section 224. We therefore make this rule absolute, reverse the order of the Judicial Commissioner, and direct that the estate remain in the custody of the Court of Wards. No costs.

The 1st February 1871.

Present:

The Hon'ble G. Loch and Onoocool Chunder Mookerjee, *Judges.*

Rent-suit—Registered tenants—Execution—Notice—Sale under Act VIII (B. C.) 1865.

Case No. 1633 of 1870.

Special Apeal from a decision passed by the Subordinate Judge of Jessore, dated the 25th May 1870, *reversing a decision of the Moonsiff of Magoorah, dated the 26th January* 1870.

Sadhun Chunder Bose (Plaintiff) *Appellant,*

versus

Gooroo Churn Bose and another (Defendants) *Respondents.*

Baboos Sreenath Doss and *Bungshee Dhur Sein* for Appellant.

Babuo Grija Sunkur Mojoomdar for Respondents.

By law a zemindar is not bound to recognize as his tenant one whose name has not been registered in his books; and when his rent becomes due and is not paid, it is sufficient for him to bring his suit against

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the parties from whom he has hitherto received rent.

When a sale takes place under the provisions of Act VIII (B. C.) of 1865 the whole tenure is sold, the purchaser acquiring it free of all incumbrances created by any holder.

Loch, J.—We think that the judgment of the Lower Appellate Court must be set aside. That judgment is mainly based on the ground that in obtaining a decree under Act X of 1859, there was collusion between the putneedar and the plaintiff and others; and having laid that down as the foundation of the judgment, the Subordinate Judge goes on to declare that the sale also is collusion, and he reverses the judgment of the first Court.

It appears that the tenure in question was originally held by one Onoop Sircar, and his name was recorded in the zemindar's books. After his death, his widow, Porosh Monee, continued to pay the rents; but one Neemanund claimed a share in the estate, as being the grandson of Ram Chunder, the cousin of the said Onoop Sircar. He brought a suit against Porosh Monee, which was compromised, Porosh Monee taking 9 annas and Neemanund 7 annas; and after his death, his mother Bhyrobee succeeded as his heir.

Onoop Sircar left, besides his widow Porosh Monee, two sons, Benee Madhub and Prosunno Coomar. Prosunno Coomar died without leaving any children, and was succeeded by his mother Porosh Monee; and when Benee Madhub came of age, he brought a suit to set aside the arrangement between Porosh Monee and Neemanund; but he failed, and his suit was dismissed in 1863.

Subsequently, in 1867, the putneedar brought a suit for arrears of rent of the tenure against Benee Madhub and Porosh Monee, and obtained a decree on the 18th of January 1867. He subsequently, as is stated to us, gave a dur-putnee of this tenure to one Ram Gopal, and made over the unexecuted decrees which he held against tenants to the said Ram Gopal to enable him to recover the arrears of rent. It is said on the other side that he did not make over but sold that decree to Ram Gopal. But this is of very little consequence on the present question. Ram Gopal executed the decree, brought the tenure to sale, purchased it himself, and then sold it to the plaintiff, who in attempting to get possession was ousted by the defendant Gooroo Churn, who held a pottah under the said Bhyrobee.

The Subordinate Judge considers the collusion of the putneedar with other parties proved by the fact that in the suit brought by Benee Madhub in 1863 to set aside the *ruffanamah* entered into by his mother with Neemanund, the putneedar was made a *pro forma* defendant; and he concludes that he must therefore have been aware that Bhyrobee was admitted to be the owner of 7 annas of the tenure, and knowing this, he was bound to make her a party in the suit for arrears of rent which he brought against Benee Madhub and Porosh Monee.

Even admitting that he was aware of the existence of the decree passed in that case, it does not appear that Bhyrobee ever paid rents to him. It is not attempted to be shown that she ever sought to have her name registered; and therefore when his rent became due, it was sufficient for him to bring his suit against the parties from whom he had hitherto received the rents, and who failed to pay them when they became due.

We cannot see, therefore, that there is any proof that the putneedar colluded with other parties.

But it is said by the respondent, if the putneedar did not collude, Benee Madhub and Ram Gopal and the present plaintiff have all colluded together; they are intimately connected, and knowing that Bhyrobee had a share should have given her an opportunity of paying up; and therefore there was a collusion which vitiates the sale.

But all that Ram Gopal did was to execute the decree which had been transferred to him by Savi. It is not shown that he did not pursue the course appointed by law. There is nothing but a general allegation of fraud against the sale proceedings—they have not been in any way challenged specifically; and we do not see that when a decree-holder has got a decree, he is bound to give notice to any party who he may know has an interest in the property liable to be sold. All that is necessary is to proceed according to law, and Ram Gopal in this case did proceed according to law; therefore the plea of collusion utterly fails.

But it is said in support of the judgment of the Lower Appellate Court, that even if collusion is not proved, the plaintiff can get no more than the share of the judgment-

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debtors against whom the decree was made, their rights and interests alone being sold.

But it appears to us that if this sale took place under the provisions of Act VIII of 1865, B. C.,—and it appears that it was held under that law,—the whole tenure was sold; and under the provisions of Section 16 "the purchaser of an under-tenure sold under "this Act shall acquire it free of all incum- "brances which may have accrued thereon by "any act of any holder of the said under- "tenure."

Lastly, it is urged in support of the judgment of the Lower Appellate Court, that Bhyrobee, and on her part Gooroo Churn, set forth that the land in dispute formed no part of the tenure sold, and we find that the first Court raised the following issue on this point:—

"Do the disputed lands pertain to the "alleged jumma for rupees 9-2, or whether "the lands covered by Dags No 1 and 2 are "the mohutran tenure of Bhyrobee Dossee"?

The first Court decided this issue against the defendant Bhyrobee, but the Subordinate Judge after noticing the claim has most carelessly put this issue aside, making a remark or two on it; whereas he should have decided it distinctly, it being the most material issue in the case. Had he decided it, possibly this present appeal might have been prevented. It is a point which he must decide; it was put before him, and he ought to have decided it.

We reverse the decision of the Subordinate Judge, and remand the case to him for the trial of the following issue, namely:— "Whether the lands in dispute in this suit "belonged to the tenure sold as appertaining "to the jumma of rupees 9 and 2 annas; "or whether as alleged by her, Bhyrobee, "dags 1 and 2 are her mohutran lands; "and whether the remaining lands belong "to other jummas."

The appellant will have his costs of this appeal.

Mookerjee, J.—I concur in decreeing this appeal. It is admitted before us that there is no proof of fraud or collusion on the part of the putneedar Savi who obtained the decree for rent. It is merely said that he ought to have known that Bhyrobee was a shareholder, and therefore ought to have sued her for rent though she was not a recorded tenant and had taken no measures to effect a registry of her name in the serishta of Mr. Savi, simply because Savi was a *pro forma* defendant in a certain suit brought by one Ram Chunder, the son of Onoop, against Bhyrobee to set aside a compromise entered into between the mother of Ram Chunder and Bhyrobee. Savi did not enter appearance in that suit, as it was one in which he had no sort of interest whatever. It is contended that Savi not having made Bhyrobee a party to the rent-suit, the Court was bound to presume fraud and collusion on his part. I do not agree in this proposition. By law the zemindar was not bound to recognize Bhyrobee as his tenant, unless she had caused a registry of her name in his books. Savi, therefore, cannot be said to have acted fraudulently. There may be very good ground to presume that Ram Chunder would have been glad to see this jote sold, but it is not shown that in omitting to sue Bhyrobee, Savi was acting in concert or collusion with Ram Chunder.

It is next said that the arrear for which the tenure was brought to sale and the rent-suit was brought was a very trifling sum; but it appears that the annual rent of this jote is also a very small amount, and that the arrears were above the rent due for an entire year.

In order to get rid of a decree passed by a Collector under the provisions of Act X of 1859, and to set aside a sale held in execution thereof on the ground of fraud, the plaintiff was bound to prove fraud on the part of the putneedar who obtained the decree, and that fraud was committed in the conduct of the sale or in the publication of the necessary processes required by law to be duly published previous to the sale. What the purchaser from Savi did, was merely to give effect to the decree which had been transferred to him by putting it into execution. No such fraud as would vitiate the decree or the purchase of the defendant is made out in this case, even according to the plaintiff's statement or according to the finding of the Subordinate Judge. Under the whole of the circumstances of this case which was gone through at considerable length before us, we do not find that any fraud is proved either on the part of the decree-holder or the purchaser.

The other points urged by the appellant's vakeel have been fully disposed of in the judgment of my learned colleague, and I agree generally with him in the rea-

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sons given for their disposal. I would also remand the case for a decision of the issue pointed out by Mr. Justice Loch. I think the Subordinate Judge was bound to decide this issue before he entered on the trial of the other issues. That issue, if found in favor of the plaintiff, would have disposed of the whole case, and consequently the other issues would not perhaps have been required to be decided. If the lands sued for in this suit were outside the jote purchased by the defendant, there is an end of all questions of fraud in the matter of the sale.

The 1st February 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Case No. 1038 of 1870.

Limitation — Family property — Evidence.

Special Appeal from a decision passed by the Officiating Judicial Commissioner of Chota-Nagpore, dated the 4th March 1870, *reversing a decision of the Deputy Commissioner of Hazareebaugh, dated the 26th August* 1868.

The Court of Wards on behalf of Teknit Ram Chunder Singh, minor, (Defendant) *Appellant,*

versus

Bunwaree Lall Thakoor (Plaintiff) *Respondent.*

Baboo Unnoda Pershad Banerjee for Appellant.

Baboos Kalee Prosunno Dutt and *Taruck Nath Sein* for Respondent.

The Political Department in Chota-Nagpore, as judgment-creditors, took out attachment against a family estate in which the rule of primogeniture prevailed to meet ancestral debts, and appropriated the proceeds in satisfaction. Objection was made by a member of the family claiming ten of the villages as held by him and his ancestors under a mokurruree grant for maintenance. An answer was put in and litigation followed resulting in a final decision by the Civil authorities of the Zillah, that the claimant was not entitled to four out of ten villages claimed and the proceeds were diverted to the payment of debts which were not his. He then sued for a declaration of his right and title to the four villages:

HELD that the possession of the Political Department had not been adverse to the plaintiff, and his cause of action did not arise till his title was denied and the proceeds diverted from his use.

The copy of a copy of a document may be admitted as evidence when it comes from a public office and the original is shewn to have been lost, but not otherwise.

Kemp, J.—THIS suit was remanded on the 6th of September 1869 by Justices Markby and Hobhouse. It appears that in the first instance, the lower Courts had applied Clause 5 and Clause 16 Section 1 Act XIV of 1859 to the case, and held that the suit of the plaintiff was barred. In special appeal, the learned Judges remanding the case observed, that as the suit was one to recover possession of immoveable property, it was specially provided for by Clause 12 Section 1 of the aforesaid Act; and that it was with reference to that Clause that the question of limitation must be tried. The case was, therefore, remanded for that purpose, and the Judges in remanding it thought it desirable that in whatever way the question of limitation be determined, all the other questions which had arisen or might arise in it should be disposed of also.

The case is briefly this:—The plaintiff, who is the special respondent before us, sues for declaration of his right and title to four mouzahs, as comprised within the sunnud granted to his ancestor in lieu of maintenance by a former Tekait. It appears that in this family the rule of primogeniture prevails, and that the younger branch of the family receive as maintenance a certain number of mouzahs in the shape of Babooanah. It is alleged by the plaintiff that his ancestor obtained from the ancestor of the defendants a mokurruree sunnud for six mouzahs, that the sunnud was granted in the year 1232 and that in the sunnud there is mention of the fact that the sunnud was granted for these six mouzahs as per huddoodbundee. The sunnud was registered in April 1826 before the Judge of the Zillah. The huddood-

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bundee referred to in the original grant has not been filed in original, but a copy of a copy of that deed said to have been obtained from the Cazee's office has been put in. It is alleged that the original huddoodbundee was registered not before the Judge nor at the same time as the sunnud, which under ordinary circumstances it ought to have been, both being of the same date, but that it was registered more than a year afterwards by the Cazee. The defendants admit that the plaintiff is entitled under the sunnud to six mouzahs of which he is in possession, but with reference to the four disputed mouzahs they deny that they are comprised within the sunnud put in by the plaintiff, and allege that the huddoodbundee is spurious.

The first Court, after disposing of the issue in bar, observes that there can be no question that at the time the sunnud was given a huddoodbundee was also written, but what the huddoodbundee contained is not mentioned in the sunnud. The plaintiff, the first Court observes, filed a copy of a copy of the huddoodbundee registered by the Cazee, but the Court had the gravest doubts regarding that document. The Deputy Commissioner observes that although that huddoodbundee purported to have been executed on the same day as the sunnud, and although the sunnud was then registered before the Judge, the huddoodbundee registered before the Cazee was not registered until a year and upwards after the sunnud; and further that in 1830, when the plaintiff applied for registration of his name in respect of the six mouzahs under the sunnud, he did not produce the huddoodbundee, nor did he say any thing with reference to the four additional mouzahs now claimed. The first Court therefore held, that the plaintiff was dispossessed in 1852 by the attachment made by the Political Department; that he had been out of possession ever since; that it had not been proved that the huddoodbundee produced by him is the huddoodbundee referred to in the sunnud, or that the huddoodbundee copy of a copy of which is now produced was granted by the Tekaet Dig Bijoy Singh, or executed by him; that it is not proved that the four villages in dispute are covered by the sunnud, which only covered six villages, and that these six villages are in the plaintiff's possession. The first Court, therefore, dismissed the plaintiff's suit with costs.

In appeal after the remand by this Court, the Judicial Commissioner, after reciting the plaint briefly and the reasons of the first Court for dismissing the suit, observes on the question of limitation that he was of opinion that the suit was not barred by the law of limitation, as it was clear from the pleadings and documents filed that the four mouzahs claimed by the plaintiff were not attached in 1852, and that this is allowed by the Lower Court; and that further it appeared to him that up to the 31st August 1859, the date of the former Commissioner's order, the plaintiff was in possession of these four mouzahs, although "irregularly so; "and that it was in that year that the rent "due on them was recovered from the plaint- "iff and he called upon to take a settlement "on them in the usual terms, it was then "that he was dispossessed of them as "portion of his mokurruree grant; and as "this occurred in 1859 and the suit was "brought in 1867, or eight years after dis- "possession, the suit is not barred by Act "XIV of 1859."

On the merits, he observes that the validity of the sunnud could not be doubted; that in this sunnud the names of the six mouzahs released to the plaintiff in 1859 are mentioned, and that a separate huddoodbundee list had then been given according to which boundaries the plaintiff was to receive possession. With reference to the huddoodbundee filed by the plaintiff, the Judicial Commissioner observes that as this document was said to have been registered by the Cazee, the Cazee's register was sent for but that it was not forthcoming; that the document filed purports to be a copy of a copy taken from the Cazee's office, the original having been burnt with other papers belonging to the plaintiff about 20 or 22 years ago. The Judicial Commissioner proceeds to observe that if such a document really was in existence, it is clearly proved by the evidence of the witnesses that it has been destroyed, and a copy would therefore be admissible. Again, he observes there is no doubt that such a document, namely, a huddoodbundee was given to the plaintiff at the time the sunnud was granted; and in order to satisfy himself that the contents of the document given to the plaintiff were to the nature stated by him, he called for the list of villages in the estate, that is to say in the whole Guddee, filed by Tekaet Girdharee Singh, the grand-father of the minor defendant in 1843. In this list, the Judicial Commissioner says that it appears that three out of the four villages in dispute were inserted in that list as belonging to the plaint-

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iff's father Kunhya Singh ; and further, that a 4th village, not one of the villages now claimed, was mentioned in that list ; but, says the Judicial Commissioner, as three villages whose names correspond with those claimed by the plaintiff are to be found in this list, it may be inferred that the 4th village, although not mentioned, must be inferred to be comprised within the boundaries given in that huddoodbundee. Therefore, it appearing to the Judicial Commissioner that the suit was not barred by the law of limitation, and that the four mouzahs claimed by the plaintiff were part of his mokurruree grant, he decreed the appeal and the plaintiff's suit, reversing the decision of the lower Court.

The case has now come up in special appeal before us. The points taken are,—1*st*.—That the Lower Appellate Court was wrong in holding that the plaintiff's suit is not barred by the law of limitation, as the plaintiff on his own showing was dispossessed in 1852, and more than 12 years have elapsed before the institution of the present suit. There can be no doubt in this case that if we take the attachment of 1852 as the starting point, and if the plaintiff's cause of action arose in that year, that his suit is barred. Clause 12 Section 1 of Act XIV of 1859 lays down that suits for the recovery of immoveable property, or of any interest in immoveable property to which no other provisions of the Act apply, must be brought within 12 years from the time the cause of action arose. The learned Judges who remanded the case directed the lower Court to try it under this Clause ; and therefore if the cause of action accrued to the plaintiff in 1852, the present suit brought in 1867 is barred ; but it is contended on the other side that the attachment in 1852 was not made by either of the parties to this suit, but that it was an attachment made at the instance of judgment-creditors. It appears and is not disputed that the family of the Tekaits were indebted. It is said by the defendants that the attachment was made as against the judgment-debtor, Tekait Girdharee Singh alone. On the other hand, the plaintiff says that the attachment was made to satisfy the ancestral debts of the family for which they were both liable ; but it is clear that the judgment-creditors of the plaintiff did also take out attachment of the six villages covered by the sunnud, as well as the other four villages now in suit, and that the judgment-creditors of the plaintiff did draw out and appropriate in satisfaction of their debt the proceeds of those six villages. We think it is clear that this attachment made by the Political Department, (and it is an attachment peculiar to this district, for in other districts the judgment-creditors would have proceeded against the property and sold it) was made for the purpose of satisfying the ancestral debts of this family. On the attachment being made, the plaintiff in this suit objected that 10 of his villages held by him and his ancestors under this mokurruree grant for their maintenance had been attached. This claim was made immediately after the attachment, and it was not until three years after the claim was made that any answer to that objection was put in by the other side. After considerable litigation, and on an appeal to the higher authorities of the zillah, it was finally decided in 1859 that the plaintiff was entitled only to six mouzahs for his maintenance under the sunnud, and that these six mouzahs must be released to him ; and with reference to the remaining four mouzahs, it was held that they were not covered by the sunnud, that they had been improperly in the possession of the plaintiff for a long time, and that he would be allowed to hold them on payment of a proper rent and making the usual bundobust or settlement. The plaintiff refused to take a bundobust, and the proceeds of these four villages instead of being appropriated to the payment of the plaintiff's debts were appropriated to the satisfaction of the debts of the judment creditors of the defendants. It is, therefore, in 1860 that the plaintiff's cause of action arose. There was nothing in the attachment, and there was nothing in the possession of the Political Department adverse to the plaintiff, or which in any way invaded his right and title until 1860, when it was declared that he had no title to the four villages, subject of this suit, and the proceeds of those four villages were diverted from the payment of his debts and applied to the liquidation of defendant's debts. We, therefore, think that this suit is not barred by the law of limitation, but on the merits we cannot concur with the decision of the Judicial Commissioner.

We think that the grounds taken in special appeal, namely, that the evidence as to the loss of the original huddoodbundee is not legally sufficient to allow a copy of a copy (even supposing it to be admissible in evidence) to be used against the special appellant ; further, that the Lower Appellate Court was wrong in law in using as evidence against the defendants an old list of villages alleged to have been filed in the Commission-

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r's Court in 1843 by the grand-father of the minor defendant, without taking evidence as to its having been actually filed by him; and also that the Judicial Commissioner has also erred in giving the plaintiff a decree for possession as regards the villages Mohooa Singha, &c., although these villages are not included in the list of villages above referred to,—are good grounds of appeal.

With reference to the first objection, we are fully sensible of the wisdom of the remarks made in the decision of the Privy Council, dated February 1868,* quoted by the special respondent, that with regard to the admissibility of evidence in the native Courts of India, no such strict rules can be applied as those which are generally acknowledged and carried out in the Courts of England; and we also think that we ought not to apply any such strict rule to the admission of documentary evidence, where it can be shown that the copy of a copy of a document comes from a public office, and that sufficient evidence has been given of the loss of the original. Now, in this case, all the evidence that has been given is that the house of the plaintiff was burnt 20 or 25 years ago, and there is no evidence whatever of the loss by fire of this original document; and further we find that the register called for from the Cazee's office is not forthcoming. The copy which is filed purporting to be given by the Cazee does not bear the signature of that officer; the original was not registered, as it ought to have been, at the same time and in the same office as the mokurrurree sunnud; and therefore we think with the first Court that this document is of a highly suspicious nature, and that in the absence of all evidence of a satisfactory character as to the loss of the original document, the Deputy Commissioner was right in rejecting this document as inadmissible.

With reference to the list which the Judicial Commissioner has admitted as evidence against the special appellant, we think that he was wrong in law in making use of that list as evidence as against the special appellant. The list purports to be a list of the villages of the whole Guddee or parent estate. In that list mention is made of three villages as being in the possession of Kunhya Singh, but there is nothing to identify these three villages with the mokurrurree sunnud granted to the ancestor of the plaintiff, nor is there any thing in that list to show that the villages mentioned therein as in the occupation of Kunhya Singh, the father of the plaintiff, were held by him for his maintenance under the sunnud or grant.

Again, the Judicial Commissioner is clearly wrong in decreeing to the plaintiff a village which is not even to be found in the list itself.

We have a few more remarks to make on the merits of this case independent of the grounds taken in special appeal. We are of opinion that the huddoodbundee is clearly spurious for these reasons, that in the mokurrurree grant six villages are distinctly mentioned by name, the aggregate jumma of rupees 10 and some annas is also recorded, and the jumma of each village is separately specified: it then goes on to say "I give you "these six villages as per huddoodbundee." Of course that means that the huddoodbundee contains a description of the boundaries of the six mouzahs granted, because the six mouzahs are clearly identified, and the jumma are separately specified. Now, the huddoodbundee put in by the plaintiff not only gives boundaries extending far beyond the limits of six villages originally granted, but it also includes villages not granted at all—and this alone throws the greatest suspicion upon its genuineness; and when to this circumstance we add the fact that the mokurrurree sunnud which is not disputed is registered before the Judge, and that this deed which is now filed and purports to be a copy of a copy of the huddoodbundee alleged to have been executed at the same time as the sunnud was not registered until more than a year after, and that before a Cazee, we can have no hesitation in coming to the same conclusion at which the first Court has arrived that this is a spurious document. Again, the Judicial Commissioner takes no notice whatever of a very important point in the case noticed by the first Court, namely, that in 1830, when the plaintiff applied for registration of his name as mokurrureedar with reference to the six villages covered by the sunnud, he did not file this huddoodbundee; and further that he omitted to make any mention of the fact that he was in possession of the four villages now in dispute, or to ask that his name should be recorded with reference to these four villages as malik.

For these reasons, we reverse the decision of the Judicial Commissioner, restore the decree of the first Court, and dismiss the plaintiff's suit with costs of both Courts, including the costs of this appeal.

* 4 W. R., P. C. p. 121.

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The 2nd February 1871.

Present:

The Hon'ble L. S. Jackson and W. Ainslie, *Judges.*

Butwarrah—Right of suit.

Case No. 1527 of 1870.

Special Appeal from a decision passed by the Officiating Additional Judge of Tirhoot, dated the 25th April 1870, *reversing a decision of the Sudder Moonsiff of that district, dated the* 12*th August* 1869.

Bhekdharee Singh and others (Plaintiffs) *Appellants,*

versus

Kishen Pershad Singh and others (Defendants) *Respondents.*

Baboo Mohesh Chunder Chowdhry for Appellants.

Baboo Chunder Madhub Ghose for Respondents.

A suit to set aside a mokurruree lease granted by a co-sharer was held to be premature as having been brought before completion of a butwarrah which was in course of being effected, the plaintiff having no *locus standi* to bring a suit in respect of a mokurruree by which he might never be injuriously affected.

Jackson, J.—THE plaintiff in this case, who is the 6 annas co-sharer in an estate which was under partition, sued the defendant to get rid of an alleged mokurruree lease granted by a co-sharer who held 2 annas of the same estate under which the defendant occupied the particular lands,—being part of the estate in question.

The Moonsiff, it appears, gave the plaintiff a decree, which was afterwards set aside by the Zillah Judge for reasons stated in his judgment.

It appears to us, from the circumstances of this case, that the plaintiff came into Court prematurely. The butwarrah had not yet been completed. It was uncertain what lands might ultimately be assigned to the plaintiff or to the other co-sharers; and it was therefore quite needless for the plaintiff, and in fact he had no *locus standi*, to bring the present suit in respect of a mokurruree by which he might never be injuriously affected at all.

We think the suit ought to have been dismissed on this ground, and neither the Judge nor the Moonsiff gave the proper decision in the case. The judgments of both the lower Courts, therefore, will be set aside, and the plaintiff's suit dismissed without prejudice, however, to any claim or right which he may hereafter find it necessary to advance in respect of the lands in suit.

The plaintiff will pay the costs of the two lower Courts, but in this Court each party will pay his own costs.

The 2nd February 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Purchaser of a plaintiff's rights—Appeal.

Dhunnoo Sowdagur, *Petitioner,*

versus

Sunnoo Bibee and others, *Opposite Party.*

Baboo Okhil Chunder Sein for Petitioners.

Mr. R. E. Twidale and *Baboo Hem Chunder Banerjee* for Opposite Party.

A party who purchases the rights and interests of the plaintiffs after a suit has been dismissed, is not entitled to appeal against the order of dismissal without joining the original plaintiffs in the suit as appellants.

Kemp, J.—THIS is an application on the part of one Dhunnoo Sowdagur to be allowed to appeal specially against the decision passed by the Judge of Chittagong on the 6th of May 1870. It appears and is admitted that the original plaintiffs were Yusuf Ali and Golam Hossein. They sued one Sunnoo Bibee, and the suit was dismissed as against the original plaintiffs. Dhunnoo Sowdagur, however, who now seeks to appeal purchased the rights and interests of the original plaintiffs, Yusuf Ali and Golam Hossein, after the dismissal of the suit, and he alleges that he is entitled to appeal against the decision of the Judge. The Deputy Registrar on the back of the petition certifies that the applicant represents himself to be the purchaser of the rights and interests of the plaintiffs, but files no proof in support of his purchase or in support of his name having been placed on the record before the lower Court.

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Justices Phear and E Jackson, on the 24th of August 1870, directed a rule to issue calling upon the other side to show cause within 3 weeks of the service of the rule why the applicant should not be allowed to carry on the appeal.

We think it very clear that according to the ruling laid down in Volume IX, Weekly Reporter, page 311, and particularly with reference to the remarks made by the late learned Chief Justice Sir Barnes Peacock, that this is a case in which the applicant Dhunnoo Sowdagur is not entitled to appeal without joining the original plaintiffs in the suit as appellants. Not having done so, and according to the rule laid down in the decision above quoted, we reject his application to appeal singly.

We say nothing as regards his power to appeal jointly with the original plaintiffs: should he do so, any objections that may be raised with regard to his being out of time will then be taken into consideration. The rule will be discharged with costs.

The 2nd February 1871.

Present:

The Hon'ble L. S. Jackson and W. Ainslie, *Judges.*

Assignment of rent—Tenancy.

Case No. 1500 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Officiating Judge of Gya, dated the 21st April 1870, *modifying a decision of the Deputy Collector of that District, dated the 4th February* 1870.

Dhoolee Chund (Defendant) *Appellant,*

versus

Rajroop Koer and others (Plaintiffs) *Respondents.*

Mr. R. T. Allan for Appellant.

Baboos Kalee Mohun Dass and *Bhowanee Churn Dutt* for Respondents.

A party holding an assignment from the landlord to recover rents from C, a registered tenant, having sued both C and D as co-tenants of the tenure, the suit against D was dismissed by the lower Courts:

HELD that as the assignment respected the rents of that tenure, and D had admitted being in possession of the land, the suit ought to have been allowed to proceed against both.

Jackson, J.—IN my opinion this case has been erroneously tried. The plaintiff holding a *tunkha* or assignment which enabled her to bring a suit against Doolee Chund, the registered tenant of a certain holding, brought a suit against Doolee Chund and Deen Doyal as co-tenants thereof.

It appears, at least it is so alleged by the defendant before us, that under certain family arrangements the property, in respect of which the rent is due, is now held by Deen Doyal and not by Doolee Chund; but in consequence of the *tunkha* on which the plaintiff sues not specifying the name of Deen Doyal, the lower Court declined to entertain the suit as against Deen Doyal, although Deen Doyal in his own answer admitted that he was in possession of the land, and therefore of course liable for the rent.

Having released Deen Doyal in this way, the Court then went on to try whether Doolee Chund was liable for the rent. The Deputy Collector considered that he was not liable; but on appeal the Zillah Judge, upholding the order as to Deen Doyal, reversed the decision in regard to Doolee Chund and gave plaintiff a decree against the latter.

Against that decree the defendant Doolee Chund has come up in special appeal. I should have thought that if the plaint had been improperly framed by reason of Deen Doyal being sued, although the *tunkha* did not enable the plaintiff to sue him, the whole suit ought to have been dismissed. But, in reality, it seems to me that the objection was an invalid one; tha tthe landlord had assigned the right to recover the rents in respect of that tenure to the plaintiff,

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and that the name of Doolee Chund alone being specified was referable to the fact that he was the registered tenant. I think, therefore, more especially when Deen Doyal admitted being in possession of the land, that the suit ought to have been allowed to proceed against both of them. The result of the lower Courts not doing so has been that great complication has arisen. A party has been made answerable for rent in respect of land of which he is not in possession, and the party who has admitted himself to have been in possession of the land has been absolved from liability to pay rent. A further complication in regard to costs has also resulted.

I think the trial of both the Courts ought to be set aside, and the suit ought to be remanded in order that the Deputy Collector should try whether both Doolee Chund and Deen Dyal, or, if not both, which of them is liable for this rent.

Ainslie, J.—I concur.

The 3rd February 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Certificate of administration — Section 5 Act XXVII of 1860 — Jurisdiction—Procedure.

Case No. 406 of 1870.

Miscellaneous Appeal from an order passed by the Judge of Beerbhoom, dated the 6th August 1870.

Gour Soondur Paroy and another (Objectors) *Appellants,*

versus

Kristo Kant Mahaton (Petitioner) *Respondent.*

Baboo Preonath Banerjee for Appellants.

Baboo Kishen Succa Mookerjee for Respondent.

Where security has been taken by an order of the High Court from the holder of a certificate under Act XXVII of 1860, a Zillah Judge is not competent of his own motion to release the money and give it back. If he thinks the time for doing so has arrived, it is for him to report the circumstance to the High Court for orders.

Such security should not be returned before the expiration of the time allowed by law to an opposing claimant for bringing a regular suit.

Glover, J.—Kristo Kant Mahaton obtained a certificate under Act XXVII of 1860 to collect debts due to a certain estate. On the application of the present objector, and by an order of this Court passed on the 7th of July 1867, the Judge was directed to take security from Kristo Kant under Section 5 of the Act. Security to the amount of 500 rupees was taken accordingly. The certificate-holder now applies to have that money refunded to him on the ground that the time for appealing against the order passed under Act XXVII has expired. The Judge considered (for reasons given by him in his decision) that he had authority to cause the refund of the security-money; and finding that the period for appealing against the order under Act XXVII of 1860 had expired, he made an order accordingly for the refund of the money to the petitioner.

It appears to us that the Judge in this was wrong. Section 5 of the Act lays it down in express words, that the object of taking security from a certificate-holder is to indemnify any person who may be found hereafter in a regular suit to have a right to the monies collected as owner of the estate. Now, as a regular suit for immoveable property is within time if brought within 12 years from the time the cause of action arose, it is clear that if this money is given back to the petitioner before the expiration of the time allowed by law for bringing a regular suit, the object of taking the security will be altogether defeated. But in any case, we think that the Judge would not be competent of his own motion to release the money and give it back to the petitioner. The order to take security was passed by a Division Bench of this Court, and the only thing left to the discretion of the Judge was the amount of security to be taken. If the Judge considered that the time had come for releasing the money thus deposited, it was for him to have reported the circumstance to this Court, and to leave this Court to pass its own order in the matter.

The appeal is, therefore, allowed and the order of the Judge reversed with costs.

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The 3rd February 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Enhancement of rent—Rule of proportion—Procedure.

Case No. 1609 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Additional Judge of Hooghly, dated the 23rd May 1870, *affirming a decision of the Deputy Collector of that District, dated the 28th February* 1870.

Raj Kishen Mookerjee (Plaintiff) *Appellant,*

versus

Kalee Churn Dobaree and others (Defendants) *Respondents.*

Baboos Hem Chunder Banerjee and *Umbika Churn Banerjee* for Appellant.

Baboos Mohinee Mohun Roy and *Pearee Mohun Mookerjee* for Respondents.

In a suit for enhancement of rent on the ground that the produce and productive powers of the land have increased otherwise than by the agency or at the expense of the ryots, where defendants plead protection under Section 4 Act X of 1859, if the Judge finds that this plea is not made out and that the plaintiff establishes the ground of his claim, he must apply the rule of proportion laid down in the Full Bench Ruling in the case of Thakooranee Dossee.

Kemp, J.—THIS was a suit to enhance the rent payable by the special respondents after service of notice. The former rent appears to have been rupees 104-15 annas, and the enhanced rent now demanded is rupees 268-11 annas 17 gundahs on a holding of 33 beegahs 18 cottahs of land.

The ground upon which the zemindar seeks to enhance was that the value of the produce and the productive powers of the land have increased otherwise than by the agency or at the expense of the ryots.

In the first Court the Deputy Collector found that the ryots had made out their plea under Section 4 of Act X of 1859, and with reference to the ground upon which enhancement was claimed, he found that the plaintiff had failed to prove that the value of the produce or the productive powers of the land had increased otherwise than by the agency or at the expense of the ryots. The suit was therefore dismissed.

On appeal to the Additional Judge of Hooghly, he laid down the issue properly, namely, he said that the question for the Court to decide was whether the plaintiff was entitled to receive from the defendants rent at the increased rates, and on the grounds mentioned in the notice served on the latter, namely, that the value of the produce and the productive powers of the defendant's land had increased without the agency or at the expense of the ryot; but in deciding this point it is very clear that the Judge throughout his judgment has thought the plaintiff had, not only to make out that the productive powers of the land and the value of its produce had increased otherwise than by the agency or at the expense of the ryot, but that he had also to prove that there was a nett increase in profits to the ryot, after making certain deductions and allowances which are detailed at great length in the decision of the Judge; for we find that in two passages of his judgment, he states "that the plaintiff has failed to prove that the defendant's profits are greater than formerly;" and again in the latter portion of his judgment, where he says that he must decide the case on the evidence before him, he says that "there is no evidence to show what is the amount of the defendant's increased profits or that there are any," and therefore that the case must be dismissed.

In special appeal it is contended, that the Judge has wholly misapprehended the requirements of the law under Clause 2 Section 17 of Act X of 1859; that as the plaintiff has proved that the value of the produce and the productive powers of the land have increased without the agency or at the expense of the ryots, the plaintiff had made out sufficient grounds to entitle him to a decree; and that the proper mode of determining the case, the plaintiff having made out those grounds, was to follow the rule of proportion as laid down in the celebrated case of Thakooranee Dossee, decided by a Full Bench of the whole Court.*

* 3 W. R., Act X, p. 29.

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We think that this case must be remanded for the Judge in the first place to try whether the tenure is protected under Section 4 of Act X of 1859, a point upon which the Deputy Collector came to a distinct finding and held that the tenure was protected.

The Judge has not noticed this part of the case at all. If he finds that the tenure is not protected under Section 4, then the onus will be on the landlord to prove the ground of his right to enhance and to show that the value of the produce and the productive powers of the land have increased otherwise than by the agency or at the expense of the ryot. With reference to this part of the case, we direct his attention to the Full Bench Ruling to be found in Volume IX of the Weekly Reporter, page 190, dated 31st of January 1868. He will do well to study carefully the remarks of the learned Chief Justice in that case before coming to a finding upon this issue. All that is necessary for the plaintiff to establish, if the first issue is found in his favor, namely, that the tenure is not protected under Section 4, is that there has been an increase in the value of the produce and in the productive powers of the land, and that such increase has been cause *otherwise than by the agency or at the expense of the ryot.* If he establishes this, then under the ruling to be found in the case of Thakooranee Dossee the Judge must apply the rule of proportion as laid down in that case and award a proportionate increase. In coming to a conclusion as to whether the value of the produce or the productive powers of the land have increased without the agency or at the expense of the ryot, he will not take any one exceptional year in which a temporary increase may have been caused by accidental causes,—such as bad harvests and the like ; but he must take an average of say 4 or 5 years as he may think fit, and apply the principle of proportion as laid down in the case of Thakooranee Dossee. He will do well to weigh the observations made by Mr. Justice Macpherson in that case, *viz.*, "it is necessary that the officer making the enquiry in such a case must be satisfied that the enhanced value of the produce of the land proved by the zemindar is likely to be a durable one, and not an accidental and exceptional high price of a particular year in consequence of draught, scarcity, bad harvests or other irregular causes."

The case is remanded for the Judge to dispose of it with reference to these remarks.

The 6th February 1871.

Present :

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Joinder of causes.

Cases Nos. 1471 to 1495 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 25th April 1870, *affirming a decision of the Moonsiff of that District, dated the* 31*st December* 1869.

Nehal Singh and others (Plaintiffs) *Appellants,*

versus

Syud Alai Ahmed and others (Defendants) *Respondents.*

Baboos Mohesh Chunder Chowdhry and *Boodh Sein Sing* for Appellants.

Mr. R. E. Twidale and *Moulvee Syud Murhamut Hossein* for Respondents.

A number of cases having been instituted against the same defendant and relating to the same matter, the plaintiff in one of them applied to both the lower Courts to have them all tried together, pointing out particularly that the documentary evidence in one of the other cases was necessary and should be made use of in the trial of his case. This application was refused by the first Court, and the Lower Appellate Court decided the case of the applicant upon evidence recorded with it, and disposed of the others as governed by that judgment :

HELD that all the cases should have been tried together; but as the Judge failed to comply with the application to do so, he should have tried each case separately on its merits.

Loch, J.—IT appears that all these cases were before the Lower Appellate Court at one and the same time, and besides these cases there were others against the same defendant and relating to the same matter.

The plaintiff, Nehal Singh, appellant in the case before us, applied to both the Courts below to have all the cases tried together, pointing out particularly that the documentary evidence in Jotee Singh and Hur Dyal's case was necessary and should be made use of in the trial of his case.

The first Court refused to take all the cases together, giving a most unsatisfactory reason for such refusal, and the Lower Appellate Court passed no order at all. The Lower Appellate Court, however, decided the case of Nehal Singh upon evidence that was recorded with it, and then disposed of the other 24 cases as governed by the judgment passed in that case.

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It is clear that if the Judge failed to comply with the prayer of the petitioner, he should have tried each case separately on the merits, and should not have made all the cases dependant upon the judgment passed in Nehal Singh's case, for although we find that in this case there was a summary order of the Collector of 1853 on which the Judge evidently relied as showing that limitation barred the suit, yet that judgment was not filed in 15 out of the 25 cases, and is not applicable to any of those 15.

We think that the Subordinate Judge has failed to give any good reason for refusing the prayer of the petitioner, and by his refusal has caused a considerable degree of confusion in the disposal of these appeals. We think, for the ends of justice and the proper determination of the question between the parties, that all these cases should be tried together, and all the evidence which is put forward in them should be looked to; and if necessary, the Court should send for the records of Jotee Singh and Hur Dyal's case, and having gone through all the evidence pass a proper decision.

The costs will abide the ultimate result.

Mitter, J.—I concur.

The 6th February 1871.

Present:

The Hon'ble L. S. Jackson and W. Ainslie, *Judges.*

Ancestral property—Partition—Pleadings.

Case No. 1585 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Gya, dated the 27th April 1870, *affirming a decision of the Sudder Moonsiff of that District, dated the 14th July* 1869.

Ram Lochun Pattuck (Defendant) *Appellant,*

versus

Rughoobur Dyal and others (Plaintiffs) *Respondents.*

Baboo Kishen Succa Mookerjee for Appellant.

Baboo Khetter Nath Bose for Respondents.

In a suit to obtain by partition half of an ancestral dwelling-house in which defendant was living, the latter averred that the house in which plaintiff was living was likewise ancestral, and that, in a partition between them, the houses which they respectively occupied had fallen to their respective shares. Plaintiff replicated that his house was not ancestral, but had been purchased out of his own funds:

HELD that it was necessary to inquire into plaintiff's title under the whole circumstances of the case, and when it appeared that he was in separate occupation of a portion of the ancestral dwelling-house, whether he had a right to the partition of the one without bringing the other into hatchpot.

Jackson, J.—IN this case, it appears to me that the decisions of both the lower Courts are erroneous, although they do not agree in the *ratio decidendi.*

The plaintiff sued to obtain by partition half of an ancestral dwelling-house in which the defendant was living. The defendant answered that the dwelling-house in which he lived was no doubt ancestral, but he also averred that the house in which the plaintiff himself was living was likewise ancestral, and he declared that in a partition between them the houses which they respectively occupied had fallen to their respective shares. The plaintiff appears to have put in a sort of replication to this in which he denied that the house in which he lived was ancestral, and declared that he had purchased it out of his own funds.

The Court of first instance enquired into the two allegations, *viz.*, whether there had been a partition or no, and whether the house occupied by the plaintiff had been purchased by him. It found both points in the negative, but it declared that as the defendant did not seek for a portion of the house occupied by the plaintiff, and as the house occupied by the defendant was admittedly ancestral, the plaintiff must be entitled to a half share of it, and that the defendant would be at liberty to take any course he might think fit in regard to the other dwelling-house. It therefore gave plaintiff a decree.

This case going on before the Subordinate Judge, he affirmed the judgment of the Court below, but considered that it was irregular to go into the question of purchase by the plaintiff, inasmuch as the suit of the plaintiff related to the one house alone.

Now it seems to be obvious that when the plaintiff sought to recover by partition half of one of the ancestral dwelling-houses, it was necessary for the Court to enquire whether, in the whole circumstances of the case, the plaintiff was entitled to that partition or no; and when it appeared that the plaintiff was already in separate occupation of a portion of the ancestral dwelling-house, the Court would have to decide whether he

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had a right to the partition of the one house without bringing the other into hatchpot. In point of fact, it would seem to be a very probable account of the matter that one party having got one of the houses and the other party the other, they were respectively occupying these two houses by agreement.

I think, therefore, that the decisions of both Courts must be set aside, and the case must go back to the Court of first instance in order that, regard being had to the facts found, it may determine whether the plaintiff was entitled to any further partition or no. That Court could not refer the defendant to a separate suit, but must decide the case with reference to the whole of the circumstances.

The costs of special appeal will be costs in the cause.

It is necessary to add that the first Court appears to have gone entirely on the failure of proof of a formal partition, that is to say, of a partition reduced in writing and arrived at with certain formalities: but it was not necessary that such a partition should be proved. It was quite competent to the Court to infer from the facts that the parties had come to an arrangement amongst themselves, one to occupy one house, and the other the other.

Ainslie, J.—I am of the same opinion.

The 6th February 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Sections 11 and 12 Act XI of 1859—Partition—Jurisdiction—Parties—Decree—Possession.

Case No. 1940 of 1870.

Special Appeal from a decision passed by the Judge of Sylhet, dated the 9th May 1870, *modifying a decision of the Subordinate Judge of that District, dated the 15th July* 1869.

Hur Gobind Dass (one of the Defendants) *Appellant,*

versus

Burola Pershad Dass (Plaintiff) *Respondent.*

Mr. C. Piffard and *Baboos Hem Chunder Bannerjee, Mohinee Mohun Roy* and *Huree Mohun Chatterjee* for Appellant.

Baboos Ashootosh Dhur and *Kalee Mohun Dass* for Respondent.

In a suit for a declaration of plaintiffs' right to *ijmalee* or joint possession of a zemindaree and for possession of two plots from which they alleged they had been dispossessed, and also to set aside proceedings taken by the Collector under Sections 11 and 12 Act XI of 1859 on the application of the other sharers (defendants) while plaintiffs were minors, notwithstanding their mother's protest and without inquiry;

HELD that it was open to the plaintiffs to contend by a Civil suit that no separation of shares ought to have been granted by the Collector because the lands are held *ijmalee* by all the sharers, and there has never been any apportionment.

In such a suit the Collector is not a necessary party.

Where possession is given to one of two joint holders of a decree, it must be held to be given on behalf of both.

Jackson J.—WE think we need not call upon the respondent to answer the objections raised in this special appeal.

We have heard the learned Counsel for the special appellant at great length, and we have given very full consideration to all the points which he has urged for the special appellant. The special appeal is from a decision of Judge of Sylhet. The suit was instituted in the Court of the Subordinate Judge of Sylhet. The plaintiffs alleged that they were the proprietors of a 4 anna *ijmalee* share in a certain estate with the exception of certain plots of land, and claimed generally as regards those ijmalee rights in the 4 annas for a declaration of their title; they claimed also as regards two plots of land a two anna share under a different title. The cause of action stated by the plaintiffs was that the defendants Hur Gobind Dass and Gour Chunder Dass, the owners of the remainder of this ijmalee estate, had alienated certain specific plots of ground in the names of their wives, and had presented a petition to the Collector under Section 11 Act XI of 1859 asking that a separate account might be opened for that separate portion of the estate which they so made over to their wives, and might be dealt with as a separate estate on the Collector's rent-roll. The plaintiffs said that these proceedings of the defendants were fraudulent, inasmuch as they made over a large quantity of land at a very small amount of jumma; that they, the plaintiffs, being co-sharers of the estate, had not recognized that jumma as being the proportionate jumma for those

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lands; that the transaction took place while they, the plaintiffs, were minors; that their mother protested before the Collector against this separation; that the Collector rejected their application without any enquiry and went on to accede to the request of the defendants and constituted these separate lands as a separate estate and ordered a separate account to be kept in his office for the share of the lands so made over by the defendants to their wives. The plaintiffs now sue to set aside all these proceedings, and they sue to recover possession of two annas of two plots of land, of which they say they have been dispossessed, and to recover wassilat.

Both the lower Courts have concurred on the question of fact which was raised in this litigation. They were satisfied that the plaintiff's statement that the lands of the estate were ijmalee and not separated amongst the sharers of the estate, was the true story, and that the defendants' statement that there had been separation was incorrect. Both the lower Courts have accordingly decreed the plaintiff's suit on all points.

The Judge in the first instance had some hesitation as to whether a suit could be brought in the Civil Court to set aside the proceedings of the Collector under Section 11 Act XI of 1859. But on reviewing his judgment on this point and following a precedent of this Court, he came to the conclusion that he had authority, and he accordingly decreed the plaintiff's claim.

The special appeal to this Court is on numerous points. The first point is that there has been a misjoinder of claims, and that all the defendants were not parties to the whole of the different claims which were raised in the plaint. Section 8 Act VIII of 1859 allows a joinder of claims as between the same parties. In this case, the defendants are either Hur Gobind Dass and Gour Chunder Dass or their wives; and certainly as regards the main claim the whole of the defendants were interested. As regards a very small portion indeed of the wassilat only could it even be pretended that some of the defendants were not interested, and even as against them the claim I understand made against the whole of the defendants. Whether, therefore, they are liable or not is the question. But as the claim was put there was no misjoinder.

The next point urged was that the plaintiffs had not come into Court within three years of an Act IV award. It appears, however, that there was no Act IV award as between the present plaintiffs and the defendants. On the contrary, the plaintiffs and the defendants were in that Act IV case arrayed upon the same side and obtained a decree. Whether actual possession was ultimately given to the defendants or not is immaterial. It has been very properly held by the lower Courts that the decree being to both, if the possession was given to one it was given on behalf of both.

Then the third objection which was alleged was that the Civil Court cannot interfere with any proceedings of the Collector under Sections 11, 12 and 13 of Act XI of 1859, whether those proceedings are regular or whether they are irregular. In support of this view, a decision of this Court was put before us, to be found in IX Weekly Reporter, page 534. There is some expression of opinion to this effect in the decision in that case. The question, however, did not really arise, as is evident from the remainder of the decision, because it was found that the plaintiff had no right whatever in the land for which he had brought the suit. There has been a subsequent decision of this Court to be found in XIII Weekly Reporter, page 37, in which Mr. Justice Macpherson alluding to the former decision stated that he did not think that under no circumstances whatever could the Collector's proceedings be interfered with, and in fact the learned Judges in that case went on to set aside the proceedings of the Collector as having been without jurisdiction. In that case the Collector had been applied to by one of the recorded sharers of a joint estate to open out a separate account as regards his separate share. One of the recorded sharers had appeared before the Collector and made objections to the application. The Collector disregarding the provisions of Section 12 Act XI of 1859, which directs that in such a case the Collector shall refer the parties to the Civil Court, went on and ordered the separation of the share of the estate. Mr. Justice Macpherson held that such proceedings were against the law, and that the acts of the Collector were therefore void and should be set aside.

In this case also, it seems to us that upon the finding of the Courts below the proceedings of the Collector were without jurisdiction. The law (Section 11 Act XI of 1859) distinctly allows the Collector to act only where the application is made

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by a recorded sharer of a joint estate whose share consists of a specific portion of the land of the estate. It has been found by both the Courts that the shares of this estate have not been separated and that the defendants are not the proprietors of a specific portion of the land of the estate, but that the plaintiffs have an ijmalee 4 anna share of all the lands in the estate with the exception of a few specific portions. When this application on the part of the defendants was made to the Collector, it does not appear that any enquiry was made by the Collector. There does not appear on these Sections to be any form in which any enquiry shall be made in order to ascertain whether the facts stated in the petition are correct. It is said that the Collector shall publish a notice of the application, and if no objection is urged by any recorded co-sharer the Collector shall comply with the application. The objection which was made on this occasion on the part of the plaintiffs while they were minors was rejected, not after any enquiry, not after ascertaining whether it was true that the defendants held a specific portion of the estate, but solely on the ground that plaintiffs' names were not recorded as co-sharers in the Collector's rent-roll. The plaintiffs, therefore, did all they could to prevent the Collector from carrying out the provisions of this law to their injury. The Collector being unable, as the law stands, to afford any remedy, it seems to me that they are fully entitled to come into the Civil Court for a redress of the injury which they have sustained under these proceedings.

It has also been objected that the Collector not having been made a party to these proceedings, no order can be passed as regards the Collector, and that the proceedings have thus become void. In fact, however, the Collector is not in any way a necessary party to these proceedings. The real question is as between the parties themselves, whether the plaintiffs are owners of an ijmalee share of the estate or whether the plaintiffs and the defendants have been separate and they are in possession of distinct shares. That is the point for decision, and on that point, of course, it is not necessary that the Collector should be in any way made a party. The Courts having decided in favor of the plaintiffs' allegation, it follows that the Collector's proceedings fall of themselves to the ground. The Collector has, in fact, separated and declared a certain specific land of the estate as belonging to the defendants, which land in reality belongs partly to the plaintiffs. The Collector should, we think, alter his register in accordance with the facts found in the decisions of the Courts below.

In addition to these, however, objections were also urged against the findings of fact upon which the lower Courts based their decisions. It was said that even the plaintiffs' own title deeds and the manner of dealing with the property in successive sales, proved that the different vendors dealt with their portions as if they were separate and not ijmalee. The learned Counsel has gone through these different deeds, but he fails in satisfying us that this is the case. We think that upon the face of those deeds, there being no specification of any land whatever, no boundaries having been given of the different plots of land thus alienated, those deeds prove *primâ facie* that the different shares of the estate were ijmalee and not separate.

Then it is said that no sufficient consideration was given to the butwarah. This butwarah, however, does not distinctly mention the specific portions of land as belonging to specific sharers of the estate, and this butwarah was rejected by the lower Courts on the ground that there was no sufficient evidence to prove that it was executed and that it was acted upon ; and, certainly, there is this remarkable fact that out of the 6 or 8 bills of sale, not a single one of them alludes to this butwarah.

Further objection is also taken that the defendants Hur Gobind Dass and Gour Chunder Dass have been saddled with all the costs of this case. We think, however, that they have been very properly made liable. It was their act which caused all these proceedings, and the other defendants are their wives. It does appear to us that the whole of their proceedings have not been *bonâ fide*, that they have been attempting to carve out a certain share of the estate in the name of their wives, and they have been very properly made liable to pay all the costs of the case.

We think that this special appeal should be dismissed with costs. Hur Gobind Dass and Gour Chunder Dass will pay all the costs of the case.

Mookerjee, J.—I concur in dismissing the appeal. I am of opinion that the Civil Court has jurisdiction to try the present suit, being one for a declaration of the

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plaintiff's right to an ijmalee or joint possession of a zemindaree, and for possession of 2 plots of land from which the plaintiff alleges he has been dispossessed. The contention raised by the learned Counsel for the appellant to the effect that the determination of the Collector under Sections 11 and 12 of Act XI of 1859 was final, and that the only remedy left to the other co-sharers is to have an account opened for himself, is evidently wrong.

The contention of the plaintiff which both the Courts find to be correct, namely, that there was no specification or partition of the lands of the zemindaree, and that therefore the Collector had no jurisdiction to proceed under Section 11 of the enactment in question, goes to the very foundation of the authority of the Collector. Section 11 Act XI of 1859 enacts that "when "a recorded sharer of a joint estate whose "share consists of a specific portion of the "land of the estate, desires to pay his share "of the Government revenue separately, "he may submit to the Collector a written "application to that effect." Now, where the Collector has proceeded to a separation of shares consisting of particular and specific portions of zemindaree lands by opening a separate account with one of the sharers, without any inquiry whatsoever, merely on an ex-parte statement of the sharer who desires to have such a separation under Section 11, it is, I apprehend, open to the party who is aggrieved by such a separation to contend by a Civil suit that no separation ought to have been granted because the lands are held *ijmalee* by all the sharers and there has never been any apportionment of the lands. Further, I am of opinion that it is not correct to say that the Collector passed any decision at all in this case. The law makes no provision for any inquiry by the Collector, and therefore a Collector's order is not a decision.

We find that Section 12 enacts that whenever any recorded sharer objects to the opening of the separate account prayed for by his coparcener on any of the grounds specified in that Section, the Collector shall refer the parties to the Civil Court, suspending all proceedings till the objection is judicially determined by a Court competent to decide questions of right between the parties, *i. e.*, the Civil Court. The Collector in this case refused to entertain the objection of the plaintiff on the ground that the plaintiff was not a recorded proprietor. The plaintiff, therefore, comes to the Court to which he would have been inevitably referred, if his name had been recorded in the Collector's rent-roll. Now if we accede to the defendant that his contention is right, we will have to hold that because the name of the plaintiff was not recorded in the Collectorate he has no remedy at all. The consequence, perhaps, will be that a joint ijmalee holder of a zemindaree will at once be made a zemindar of a specific portion of it without any butwarah either under Act XIX of 1814 or any partition privately made by the parties and assented to by them. It is preposterous to suppose that because the Legislature empowers the Collectors to open a separate account with a recorded sharer of a joint estate possessing certain definite portions of the lands as his share of the zemindaree when there is no objection on the part of the other sharers, that therefore, even where there are objections and most valid and material ones to the proceedings of the Collector, namely, that he, the Collector, had no jurisdiction under Section 11 of the Act, that if the Collector proceeds nevertheless to open the separate account, the party, *i. e.*, the sharer aggrieved, will have no remedy, but must remain content to see that his possession over all the lands of the zemindaree as an ijmalee holder is at once at the flat of the Collector converted into an exclusive possession of perhaps a very inadequate and unfair portion of the same.

Moreover, according to Section 1 Act VIII of 1859, the Civil Court is empowered to "take cognizance of all suits of a civil nature when their cognizance is not barred by any Act," &c. There is no law which bars the cognizance of suits of this nature, but there is on the other hand a clear and positive enactment to the effect that if there is any objection by another share-holder, that objection must be decided judicially by the Civil Court before the Collector can proceed.

It is said that the plaintiff has mistaken his remedy and that his proper course was to have obtained a registration of his name in the Collectorate and then to have applied to that officer to open a separate account with him. But this argument carries with it its own refutation. The plaintiff does not say that his share consists of a specific portion of the land of this estate, and his allegation is also that the male defendants have falsely and fraudulently set forth the best lands of the zemindaree as appertaining to his specific portion therein. If he applies to the Collector,

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he can only do so on an allegation that his share of the zemindaree consists of separate lands, which is simply not his case. I, therefore, think there is no force in the contention of the appellant that the Civil Courts have no jurisdiction to entertain suits of this nature. In this view of the law I am supported by a decision of this Court, reported in Volume XIII, Weekly Reporter, page 37, Civil Rulings.

The other objections raised in this appeal have been met and disposed of by my learned colleague, and I agree in the reasons given by him for rejecting them as untenable.

The 7th February 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Act XVIII of 1869—Stamps—Civil Courts—Pottahs—Court of Wards.

Case No. 1560 of 1870.

Special Appeal from a decision passed by the Officiating Judge of Chittagong, dated the 7th May 1870, *affirming a decision of the Additional Subordinate Judge of that District, dated the 25th February* 1870.

Mahomed Reza and others (Plaintiffs) *Appellants,*

versus

The Collector of Chittagong and another (Defendants) *Respondents.*

Baboo Okhil Chunder Sein for Appellants.

Baboos Unnoda Pershad Banerjee, Juggadanund Mookerjee and *Jadub Chunder Seal* for Respondents.

Act XVIII of 1869 allows the Civil Court to receive the proper amount of stamp not only in cases of insufficiency of stamp but also where documents have not been stamped at all.

Where a pottah without any term of years is granted by a Court of Wards, it must be considered as not extending over ten years, and on the expiry of that period if the lessee refuses, after notice, to appear and make a fresh settlement, the Collector may settle with other parties.

Jackson, J.—We think that the Lower Appellate Court is wrong in stating that a Civil Court is not authorized under the present stamp law, to receive the proper amount of stamp which should have been affixed on the plaintiff's pottah under the law in force when it was executed. Under the present law, the power of the Civil Court differs to some extent from its powers under Act X of 1862. Act XVIII of 1869 allows the Civil Court to receive the proper amount of stamp, not only in cases of insufficiency of stamp, but also in cases where documents have not been stamped at all. Although, however, we think that the lower Court is wrong on this point, we also think that it is not necessary to remand this case for a fresh decision. This is a suit to recover possession of certain land on the allegation that the plaintiff had obtained a pottah from the Collector acting on the part of the Court of Wards. It appears that the document which was not sufficiently stamped was a talookdaree pottah. If, however, the talookdaree pottah is taken into consideration, it will appear to be a pottah without any term of years, and it must therefore be considered to be a pottah not extending over ten years which under the law is the longest period for which the Court of Wards can grant such a pottah. It is admitted in this case that ten years have expired, and it is also admitted that the Collector wishing to make a re-settlement of this land gave notice to the plaintiff to appear and make a fresh settlement. The plaintiff refused to appear, and thereupon the Collector made a fresh settlement with other parties who have duly taken possession. The plaintiff is not entitled, under the circumstances, to obtain re-possession of the land.

It is said that even if under the terms of the pottah, the period of holding the land was concluded, still the plaintiff was entitled to a fresh settlement. The Collector appears to have been willing to make a fresh settlement with the plaintiff, but he refused to appear.

Lastly, it is said that although the talookdaree pottah was no longer in existence still the plaintiff ought to be put in possession of the land as an occupant ryot. We think it is hardly necessary to decide any such allegation; there is no doubt that it is quite unfounded.

We think, under these circumstance, it is unnecessary to remand the case. We dismiss the suit with all costs.

Mookerjee, J.—I concur.

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The 7th February 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Declaratory suit—False documents—Onus probandi.

Case No. 1665 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 12th February 1870, affirming a decision of the Moonsiff of Naraingunge, dated the 30th July 1869.

Joy Chunder Tuppadar and others (Defendants) *Appellants,*

versus

Ram Churn Doss and others (Plaintiffs) *Respondents.*

Baboos Nuleet Chunder Sein and *Okhil Chunder Sein* for Appellants.

Baboo Kalee Kishen Sein for Respondents.

D sued T for arrears of rent on the allegation that he held a kursa jumma. T admitted only a lower rent alleging that he held a jumma under a meeras-howladaree pottah. The result not being favorable to D, he brought a suit for a declaration that the pottah put forward by T as a meeras-howlah pottah was a false document:

HELD that the plaintiff was bound to make out a *prima facie* case before the onus could be thrown upon the defendant of proving the genuineness of his pottah.

Jackson, J.—THIS case arose out of certain proceedings under Act X of 1859.

The plaintiff sued the defendant for certain arrears of rent alleging that he held a kursa jumma. The defendant in answer alleged that he held a meeras-howladaree jumma under a meeras-howla pottah. The plaintiff's contention was that the rent was rupees 4-1, and the defendant's contention was that the rent was rupees 2-4. The quantity of land in dispute is one kanee. The proceedings under Act X did not result favorably to the plaintiff, and in consequence of that the plaintiff has brought this suit for a declaration that the pottah put forward by the defendant as a meeras-howla pottah is a false document.

The lower Courts have decreed the plaintiff's claim, and on special appeal the defendant has taken objection to the grounds on which that judgment has been based. We have heard the case at great length and have passed in review the whole of the evidence put forward by the parties. On the part of the plaintiff there seems hardly any evidence at all. The plaintiff has not even put in his zemindaree papers to show that the rent which he alleges that the defendant paid is the rent which he has all along paid. He has not proved in any way in what manner the tenure commenced. There are some vague assertions that it commenced some 18 or 19 years ago; but in what manner and under what circumstances the tenure was created, there is a total absence of all evidence. The defendant, on the other hand, has proved his howla-pottah of the year 1211; he has produced a number of old receipts which mention that they were receipts for rent paid for a howladaree-jumma; he has shown that nearly 12 years ago when the estate in which this jumma is situate, was surveyed, the agent of the then zemindar admitted that the defendant's family held certain howladaree lands: he has shown that Ram Chunder Doss, the person by whom the howladaree pottah is signed, is alluded to in certain *goshowra* papers in the Collectorate as having been the malik of this estate. Both the Courts have rejected the whole of the evidence put forward by the defendant. They seem to have put the whole onus in this case upon the defendant: neither Court alludes in any way to the evidence of the plaintiff. The pottah is rejected by the Appellate Court because no evidence was produced to show from whose custody it came. The old dakhillahs and the old kubooleuts put in by the defendant are rejected for very much the same reason. The important document, namely, the admission of the plaintiff's predecessor's agent before the survey authorities, is set aside, first, because there is no evidence to show that the agent, one Bungo Chunder Doss, was the agent of the then zemindar, Mr. Lamb; secondly, because there was no identification of the land at that time; and thirdly, because there was no evidence that this agent had any authority to make any such admission. The document from the Collectorate is set aside because

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there is no direct evidence that Ram Chunder Doss was the owner of the talook, and the mere fact that he is mentioned as such in the Collectorate papers, which are not very ancient, would not be sufficient evidence on the point.

The special appeal before us is on the ground that it is not right to reject the whole of the principal documents simply because evidence was not given as regards their custody, and that as regards the thak proceedings there is direct evidence on the part even of the plaintiff's witnesses proving that Bungo Chunder was the agent of the plaintiff's predecessor, Mr. Lamb. On this point there has been certainly a clear mistake on the part of both the lower Courts. There is direct evidence on the part of the plaintiff's own witnesses that Bungo Chunder was the agent of the plaintiff's predecessor, and the thak proceedings show that he was acting as the agent at the time of the survey, and that long before the contention between the present parties commenced it was admitted that the defendant's ancestor held a howla within this estate. Such admissions are undoubtedly evidence and very strong evidence in support of the defendant's case.

The Courts below seem to me, however, to have been wrong in law in throwing the whole onus in this case on the defendant. The plaintiff has not brought this suit to obtain possession of the land: he has brought this suit simply for a declaration as regards this plot of land that the pottah which the defendant has put forward is false. Admitting that such a suit can be brought, I certainly think that it is for the plaintiff to produce some evidence in support of his allegation. If the defendant had not appeared at all in this case, the plaintiff would have been bound to prove his allegation before he could obtain a decree. In the same way, even if the defendant appears, it seems to me that the plaintiff must make out some *primâ facie* case. Of course, if he can show at all any ground whatever for suspecting the pottah, then the onus of proving the genuineness of the pottah falls upon the defendant. The documents by which the tenure is supported in this case are documents of ancient date, and though it is possible that it would have been better if the defendant had been called on to prove that these were the documents under which he held the tenure, and whence he had obtained them and where he kept them, still I am not prepared to say that these documents are to be declared false simply because the defendant did not follow this particular procedure. The documents have come from the proper custody and from the person in whose custody they would naturally be, and no sufficient reason is given to my mind for rejecting them. It is certainly not right in law to declare them false, because the defendant did not give his own deposition stating whence he had obtained them. It by no means follows that they are false even if they are not proved.

But the tenure being supported not only by these ancient documents, but also by admissions from the zemindar's agent dating many years back, affords a strong presumption that the tenure is really what is stated by the defendant, namely, a howla. Both the Courts admit that for many years the defendant has been in possession of this tenure. In fact, his possession seems to go back to such a date that neither the plaintiff nor the defendant can give any distinct evidence as to who was the zemindar of the estate at that time. The defendant's allegation is that Ram Chunder Doss was the zemindar. The plaintiff is unable to disprove it. The defendant has given no good evidence in support of it. The *goshowra* paper standing alone, as it does, is unintelligible. In what manner it was prepared and how and under what circumstances the facts stated therein were ascertained, there is no evidence to show.

It seems to have altogether escaped the notice of the lower Court that it is most improbable that if the defendant wished to forge a pottah, he would forge one signed by a person regarding whom there was uncertain information.

On the whole, after giving to this case long consideration and after hearing the arguments on both sides, we think that there is no sufficient evidence on the record upon which the Court can declare the defendant's pottah to be false. We think, therefore, that the plaintiff's suit to set aside his pottah should be dismissed with costs. We set aside the decision of the Lower Appellate Court as regards the first plot, there being no appeal before us as regards the second plot.

We think the costs of all the proceedings as regards the first plot should be borne by the plaintiff.

Mookerjee, J.—I concur.

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The 7th February 1871.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Decree for enhancement.

Case No. 1793 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Officiating Judge of Purneah, dated the 28th July 1870, *reversing a decision of the Deputy Collector of that District, dated the 29th April* 1870.

Chunder Mun Chowdhry and another (Defendants) *Appellants,*

versus

Sree Mun Chowdhry (Plaintiff) *Respondent.*

Baboos Taruck Nath Sein and *Chunder Madhub Ghose* for Appellants.

Baboo Kalee Kishen Sein for Respondent.

A decree for enhancement of rent can have no retrospective effect.

Loch, J.—THE present suit is brought for arrears of rent for 1275 and 1276, Moolkee, on the allegation that the plaintiff's lessor, Mr. Forbes, obtained a decree for kubooleut at an enhanced rate.

The judgment of the first Court in which that decree was obtained has not been filed; and though the judgment of the Appellate Court confirming that decree is on the record, it gives no information whatever as to the amount of the jumma or the duration of the kubooleut. As it was, the decree of the Lower Appellate Court in that case bears dated the 26th June 1868, corresponding to Assar 1275, B. S., or 1276, M. S. Now as the present suit is for the rents of 1275 and 1276, Moolkee, the decree which was passed in Assar 1276, M. S., can have no retrospective effect, whatever rights the plaintiff may have gained for the years to come.

Another objection taken to the judgment of the Lower Appellate Court is, that the receipts given by the gomashta of the plaintiff have been found by the lower Court to be genuine, and as far as the defendants were concerned *bonâ fide.* It is clear that these "*farugs*" are acquittances for all demands of rent up to the close of 1275 and 1276; and this being their purport, it is clear that the plaintiff can have no claim against the defendants for the rents of those years.

We think, therefore, that the judgment of the Lower Appellate Court must be set aside with costs of this Court and of that Court, and the decree of the first Court dismissing the suit must be affirmed.

Mitter, J.—I concur in dismissing the suit.

The 8th February 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Jurisdiction—Execution of a Collector's decree.

Case No. 1651 of 1834.

Special Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 12th May 1870, *reversing a decision of the Moonsiff of Naraingunge, dated the 17th December* 1869.

Raj Kishore Mullick *alias* Chytan Krishno Mullick (Plaintiff) *Appellant,*

versus

Brindabun Chunder Poddar and others (Defendants) *Respondents.*

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Baboos Romesh Chunder Mitter and *Sreenath Banerjee* for Appellant.

Baboos Grija Sunkur Mojoomdar and *Jadub Chunder Seal* for Respondents.

A Civil Court cannot set aside the proceeding of a Collector in execution of a decree of his own Court.

Jackson, J.—We think we ought not to interfere in this case. We think that the order of the Collector, dated the 30th May 1866, has been very properly stated by the lower Court to be an order which virtually rescinded the sale as well as the decree, and which also set aside the whole of the proceedings. I am aware that these words are not distinctly stated in the Collector's order; still I have no doubt in my mind that that was the effect of that order, and that that was the intention of that order. The Collector had evidently found that the defendant had not been properly dealt with before the decree had been passed, and that he was entitled to a further trial as to whether the money decreed against him for rent was due by him or not; and therefore the order was passed, however carelessly it was worded, setting aside the proceedings. It seems to me that this Court cannot set aside the proceedings of the Collector in execution. I think that the plaintiff has no case under the circumstances. The Deputy Collector took the same view of the Collector's order, the Collector took the same view of it, and the Board of Revenue took the same view of it. The Deputy Collector did not think it proper to give a bynamah, and I think that on this ground also the decision of the Court below is quite correct. Under the circumstances, the Appellate Court very properly dismissed the suit, and we confirm that decision and dismiss the appeal with costs.

Mookerjee, J.—I concur in dismissing the appeal. The defendants objected to the sale of their property on several grounds before the Deputy Collector, who, however, overruled them. The defendants then appealed to the Collector, who decreed the same and remanded the case to the Deputy Collector for further investigation. The legal effect of such an order was to set aside the order of confirmation of the sale passed by the Deputy Collector. On re-trial the Deputy Collector had to amend his former decree considerably and pass a fresh one for a much smaller sum. The plaintiff then applied to the Deputy Collector for a certificate under Section 11 of Act VIII of 1865, B. C.; but the Deputy Collector refused to give him one on the ground that the sale had been set aside by the Collector. The plaintiff then appealed to the Collector, who construed his own order as an order disallowing the sale. The plaintiff then went to the Commissioner, and ultimately to the Board of Revenue and the Lieutenant-Governor, but was every where unsuccessful. He therefore instituted this suit to get possession of the property purchased by him and to get a bynamah. I think under the circumstances that the sale had been set aside, and that therefore the plaintiff has no *locus standi*.

It appears to me, moreover, very doubtful whether a Civil Court can compel the Deputy Collector to grant a sale certificate to the plaintiff for a purchase made by the plaintiff in a sale held by that officer in execution of a decree for arrears of rent. In suits for rent the Collector's Court appears to be a Court of exclusive jurisdiction having full powers in the disposal of them. It is a Court, too, of competent jurisdiction, and sales held under decrees passed by the Collector cannot, except upon proof of fraud, be set aside by a Civil Court. I apprehend that a Civil Court cannot, therefore, try whether an order passed by the Collector in execution of a decree of his own Court was proper or not. If the Collector passes a decree for rent and then refuses to execute the same for any reason, good or bad, I apprehend that the decree-holder cannot bring a suit in the Civil Court to compel the Collector to execute it. The only remedy left to the decree-holder in such a case appears to me to be by an appeal to the Court to which the Collector's Court is a subordinate one. I think, therefore, that a Civil Court has no power to direct a Collector to grant a sale certificate to a purchaser in his Court, when he, the Collector, declines to give one on the ground that the sale had been set aside.

The Collector is also not made a party to this suit, and having no opportunity of justifying his refusal may not be bound by the decree of the Civil Court. Under all these circumstances, I think the suit of the plaintiff was rightly dismissed by the Court below, and we must dismiss this appeal also with costs.

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The 8th February 1871.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Transfer of plaintiff's interest—Appeal—Assessment—Right of occupancy.

Case No. 1725 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of East Burdwan, dated the 29th June 1870, *reversing a decision of the Moonsiff of Kytee, dated the* 31*st December* 1869.

Moneerooddeen Mojoomdar (Plaintiff) *Appellant,*

versus

Parbutty Churn Ghose and others (Defendants) *Respondents.*

The Advocate General and *Baboos Unnoda Pershad Banerjee* and *Romesh Chunder Mitter* for Appellant.

Baboos Mohendro Lall Shome and *Oopendro Chunder Bose* for Respondents.

Where the whole interest of a sole plaintiff had been transferred with his unqualified assent, and the transferree was substituted for the original plaintiff in the very inception of the case, the defendant's written defence being afterwards put in without demur, it was held not to be necessary for the original plaintiff to be associated with the transferree in an appeal by the latter.

A landlord having obtained a decree declaring that certain homestead land was liable to assessment, the occupants owing to certain criminal proceedings against them abandoned the land, and the landlord leased it out to others who held possession paying rent for upwards of 12 years, after which they were ousted by the original occupants who claimed the land rent free: HELD in a suit by the lessees that they were entitled to recover possession.

Kemp, J.—THE plaintiff is the special appellant.

The suit was to recover possession of certain jummai homestead lands with the cost of removing a wall erected by the defendants. One defendant only appeared. The plaintiff alleges that on the desertion of the land by the former tenants, owing to certain fouzdaree proceedings in which warrant for their arrest had issued, the possession of the land became vacated, and that he obtained a lease from the landlord and had been in peaceable possession for many years until forcibly ousted in Bysack 1276 by the defendants who have erected a wall on the disputed land.

The pottahs under which the plaintiff alleges tenancy are filed, as also receipts for rent from 1262 to 1275. B. S. The plaint was filed on the 13th May 1869. On the 14th idem, and before the written statement of the defendant was filed, the plaintiff sold his rights and interests to one Moneerooddeen. who, with the consent of the original plaintiff and without objection and by order of the Court, was substituted for the original plaintiff and permitted to carry on this suit.

The defendant who put in an appearance, namely, Parbutty Churn Ghose, alleges that the plaintiff's vendor had no title in the land, and that he was never in possession of the same ; that the land in dispute was rent-free land from before 1790, A. D. ; that no suit for resumption of this land was instituted ; and that the allegation that either the defendant or his predecessors had abandoned the land was false. The defendant admits that some of the houses and the former wall of the homestead were sold in execution of a decree in 1854 ; that the defendant still remained in possession, dwelling in the western house ; that in the year 1869 the defendant was about to re-erect the other houses and the wall when the landlord put up the plaintiff to bring this false suit ; that a long standing feud existed with the former landlord, the late Saroda Pershad Roy.

The landlord put in a written statement supporting the plaintiff. The landlord states that he obtained a decree declaring that the land in dispute was not rent-free and was liable to assessment ; that owing to certain fouzdaree proceedings, the defendant with his family abandoned the land which becoming vacant came into the khas possession of this defendant who leased them out to the plaintiff's vendor ; that the allegation of the defendant that any of the former houses remained, or that he was in possession of any portion of the land at any time within 12 years prior to suit, is false.

The first Court after proceeding to the spot and making a careful enquiry, in an elaborate and well-considered judgment, found that the defendant and his family deserted the land in dispute in consequence of a criminal action early in 1261, B. S. ; that the house occupied by them were put up to sale to realize a fine imposed upon the defendants by the criminal authorities ; that the purchasers at the sale removed the materials of the houses ; and the land became vacant and was leased to the original

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plaintiff, who was in possession of the same from 1261 until ousted by the defendant in 1276, B. S.; that copies of certain petitions filed in the Fouzdaree Court, and which have been produced by the plaintiff in this suit, corroborate the allegation made by the plaintiff and his landlord, as well as of the witnesses examined on the spot,—that the defendants deserted the lands. Further, that the fact of their having deserted the lands was in a measure corroborated by the circumstance of their having put in no appearance in the suit which the landlord brought for a declaration of his right to assess the lands, and in which suit his right to assess was declared as it was found that the lands were not rent-free; that payment of rent by the plaintiff has been established by the dakhillas filed by him which have been attested, as well as by the jumma-wasil-bakee filed by the landlord. The oral evidence of independent witnesses also proved that the defendants abandoned the land many years ago.

The Moonsiff also prepared a map of the disputed lands. The suit of the plaintiff was, therefore, decreed.

On appeal the Subordinate Judge of East Burdwan, Baboo Russick Lall Bose, after briefly stating the pleadings, the issues raised in the first Court, and the grounds of appeal, reverses the decision of the first Court and dismisses the plaintiff's suit.

The Subordinate Judge was of opinion that the map prepared by the Moonsiff, and upon which the Subordinate Judge says "the Moonsiff mainly relied," is "not a valid document at all," because "there was no dispute as to boundaries between the parties to be decided by a map."

He further observed that the Moonsiff had "committed an error in deciding the "case on a mere mention of the several "decisions of the Fouzdaree Court, that the "defendants had deserted the holding for "more than 12 years, and decreeing the "plaintiff's claim on that supposition; for it "appeared that the landlord, Saroda Pershad "Roy, had acquired on the 17th Chyte 1261 "a decree against the defendant Parbutty "Churn Ghose and his co-sharers, styling "them in that case inhabitants of Pulasun." The Subordinate Judge therefore, as he says, "failed to understand how the Moon-"siff came to the conclusion that the de-"fendants had deserted the holding in the "year 1261, B. S.

"That the decree passed on the 18th "December 1854 declaring these lands to "be liable to assessment was an *exparte* "decree, Parbutty Churn Ghose not being a "party thereto; that it had not been shewn "that this decree was executed in due "time; and therefore the zemindar had "not acquired any right to hold the "land khas, and the defendant is not bound "by the acts of the zemindar; that it "was very improbable that the defend-"ants would desert the holding simply "because the zemindar desired to have it; "that as the land had only been declared "liable to assessment as not being rent-"free, the zemindar had no right to take "khas possession, and that his leasing it "to the plaintiff conferred no title on the "plaintiff; that the Moonsiff had misplaced "the onus and made the defendant prove "his case instead of making the plaintiff "do so."

In special appeal the Advocate General, who appears for the special appellant, contends that the Subordinate Judge has committed many errors in dealing with the case, and that he has not paid any attention to the real points of the case as found to be proved by the Moonsiff. The Advocate General observes that the Subordinate Judge has not taken any notice of the petitions presented by the defendant in the Criminal Court, which were so far relied upon by the Moonsiff as corroborating the truth of the allegation of the plaintiff and the landlord,—that the defendants had abandoned the land; that it was not, as supposed by the Subordinate Judge, because a suit to assess the lands was instituted by the landlord that it is alleged by the plaintiff that the defendant abandoned the lands and the possession became vacant, but because of the action of the criminal authorities which forced the defendants to leave their homesteads and to remove with their families elsewhere; that the plaintiff's right is derived from the zemindar; the plaintiff avers that he had been in possession for more than 12 years prior to suit adverse to the defendants who had abandoned the land. Therefore the question is not so much, as supposed by the Subordinate Junge, though wrongly, whether the landlord had obtained khas possession rightly, but whether he had really done so and then leased to the plaintiff, who under that lease had been holding for more than 12 years prior to suit.

We have carefully considered this case,

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The valuation put upon it, namely, 51 rupees, is small; but from the earnest manner in which the case has been argued before us, it is clear that the question is one of an importance to the parties not to be measured by the institution stamp.

A preliminary objection was taken by the pleader for the special respondent that the plaintiff Moneerooddeen, who has been substituted for the original plaintiff, cannot be permitted to appeal alone without being associated with the original plaintiff. In support of this objection, the pleader refers us to two decisions published in Volume IX, pages 309 and 487. In the case published at page 309, the first Court had allowed a plaintiff to withdraw from a suit without the concurrence of his co-plaintiffs. The decision reported at page 487 of the same volume followed the ruling at page 309.

In this case the objection was not taken below; the plaintiff Moneerooddeen was substituted in the very inception of the case. The original and sole plaintiff parted with his whole interest and not with a part of it, and the transfer was made with his unqualified assent before the defendant's written statement was put in, and as already said without demur. We overrule this objection which is purely technical.

We think that the decision of the Subordinate Judge must be reversed and the decision of the first Court affirmed. The map which the Subordinate Judge sets aside as an invalid document, because the dispute did not involve a boundary dispute, was made on the spot to ascertain whether the house, or rather the two rooms which the defendant said he still occupied after all his other houses had been sold to satisfy the fine imposed upon him by the Criminal authorities, was within the limits of the disputed land, and it was found to be without them. The Moonsiff did not rely merely upon this map as supposed by the Subordinate Judge, and the latter was clearly wrong in rejecting this map.

Again the Subordinate Judge is wrong in saying that the Moonsiff decided the case on a mere mention of the Fouzdaree proceedings. The Moonsiff referred to no fouzdaree proceedings; but he said, and we think properly, that the evidence of independent witnesses on the spot, who deposed that the defendants with their families had abandoned the lands early in 1261, was corroborated not by Fouzdaree proceedings, but by admissions made in petitions to the Fouzdaree Court by the defendants or their predecessors.

We find that the evidence of the witnesses is greatly supported by the admissions in these petitions, in one of which it is admitted that the defendants had left the village in which the disputed lands are situated to seek service elsewhere, and in the other that they and their families had left the village for many years. The Subordinate Judge then refers to the decision of the 11th Chyte 1261. Now, it is clear that the suit for assessment was brought in Bysack 1271 or at the very commencement of the year. The mere fact of the defendant being described for the purposes of that suit as residing in Pulasun would not be any evidence that they were really residing there at that time, though they may have been so and have left the village, as deposed to by the witnesses, in consequence of the action of the Criminal Court immediately after or at about the time that the suit for assessment was instituted. Again the Subordinate Judge thinks that because the zemindar did not sue for a kuboolent after obtaining a decree to assess the lands, that it must be held that he never duly executed the decree he obtained. Now the case of the zemindar is that the lands were vacated in 1261, not in consequence of the assessment suit, but on account of the action of the Criminal Court; and that the lands were vacated early in 1261 has been proved by the evidence.

The view of the case which was taken by the first Court has wholly escaped the attention of the Subordinate Judge. The landlord, right or wrong, leased out the land in dispute to the plaintiff as land the possession of which had been vacated. The plaintiff has proved his possession under this lease and payment of rent for more than 12 years prior to suit. The evidence and all the probabilities of the case support the view taken by the first Court, namely, that these lands were wholly abandoned by the defendants early in 1261, and that the landlord leased them to the plaintiff from that year, and that the plaintiff had been in undisturbed possession paying rent for the same until wrongfully ousted by the defendants in 1276.

We decree the appeal, reverse the decision of the Subordinate Judge, and restore that of the Moonsiff with costs of all the Courts bearing interest.

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The 9th February 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Execution—Sale proceeds.

Case No. 1795 of 1870.

Special Appeal from a decision passed by the Judge of Dacca, dated the 27th May 1870, *reversing a decision of the Subordinate Judge of that District, dated the 29th June* 1869.

Lalla Mitterjeet Singh (Defendant) *Appellant,*

versus

Sonatun Doss and others (Plaintiffs) *Respondents.*

Baboos Doorga Mohun Doss and *Rash Beharee Ghose* for Appellant.

Baboos Kalee Mohun Doss and *Mohinee Mohun Roy* for Respondents.

Of two rival decree-holders against the same judgment-debtor, one (S) attached a house in execution and the other (L) attached the house as well as the land appertaining to it. In apportioning the sale proceeds in the execution department, the Sudder Ameen did not give any portion to S. who accordingly brought a suit for the satisfaction of his claim from the proceeds of the house on the ground that his had been the prior attachment. The first Court dismissed plaintiff's suit on the ground that it was not satisfied as to the exact value of the house attached; but the Lower Appellate Court decreed it, ordering however that the value was to be ascertained by appraisement in execution.

HELD that the Judge should have himself determined and adjudged the value of the house and not referred that duty to the execution department.

Mookerjee, J.—IT appears that in this case the plaintiff and the defendant were rival decree-holders against the same judgment-debtor, Sib Chunder Sein. The plaintiff held a decree of the Subordinate Judge's Court, and in execution of that decree attached the building of a house. The defendant, who held a decree of the Sudder Ameen's Court, had likewise attached the house as well as the land appertaining to that house. The Sudder Ameen in the execution department when apportioning the sale proceeds did not give any portion thereof to the plaintiff, and the plaintiff has brought this suit on the ground that as he had, previous to the attachment by the defendant, attached the house, he was entitled to be satisfied first out of the sale proceeds. Both the Courts are of opinion that the plaintiff had attached the building only, while the defendant had attached the said house as well as the land belonging thereto.

The first Court dismissed the plaintiff's suit on the ground that it was not satisfied on the evidence put forward by the plaintiff as to the exact value of the house which he had attached. The second Court held that "with respect to the value of the land, the "evidence of the witnesses is so much at "variance with the figures in the kobalah "of a 4 anna share filed by appellant, that "it is not possible to place any reliance on "it." The second Court then proceeds to say:—"But though it may not be easy to "determine the value of the land with the "houses standing on it, I apprehend the "plaintiff is entitled to get the value of the "houses &c. estimated at what they would "be worth, if so sold, as he attached them "without the land." It gives a decree to the plaintiff, but it states that the value of the house is to be ascertained by appraisement in execution.

The defendant appeals to this Court on the ground that the Judge was wrong in not deciding the case himself, but leaving the determination of the value of the house in the execution department. We think this contention is good. The Judge ought to have decided what was the value of the house which was attached by the plaintiff, and having determined and adjudged the value should have awarded that to the plaintiff instead of referring it to the execution department.

It has been objected to by the respondent under Section 348 Act VIII of 1859 that the decision of the Appellate Court is wrong, as it ought to have held that not only the house was attached but also the land on which that house stands; and, secondly, that there ought to have been a local investigation as prayed for by him.

As regards the first objection, we see that the plaintiff's own vakeel admitted that his client had attached only the building and not the land; and it is not shown to us what was the property actually attached by him, and the attachment is not produced. We do not consider this objection to be valid.

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As regards the second objection, it would be at the discretion of the Court, while ascertaining the value of the building, to ascertain it either by the evidence on the record, or by a local enquiry if that be necessary.

We, therefore, remand this case to the Lower Appellate Court to find what was the value of the building which had been attached by the plaintiff and re-try case.

Costs of this appeal will abide the ultimate result.

The 10th February 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Putnee rent—Dur-putneedar—Regulation VIII of 1819—Limitation.

Case No. 1668 of 1870.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 23*rd July* 1870, *reversing a decision of the Subordinate Judge of that District, dated the* 31*st March* 1870.

Khettur Paul Singh and another (Plaintiffs) *Appellants,*

versus

Luckhee Narain Mitter and another (Defendants) *Respondents.*

Baboos Hem Chunder Banerjee and *Mohendro Lall Mitter* for Appellants.

Mr. C. Piffard and *Baboos Sham Lall Mitter* and *Mohendro Lall Seal* for Respondents.

A dur-putneedar paying money as rent to save the putnee from sale, is entitled to a refund even though his name has not been registered in the office of the superior holder.

The status of a dur-putneedar does not depend upon registration or the consent of the zemindar.

In computing limitation, a plaintiff is entitled to deduct the time occupied in prosecuting a suit upon the same cause of action against the same defendant *bonâ fide* and with due diligence in a Court, which from defect of jurisdiction or other cause was unable to decide upon it.

Kemp, J.—This is a suit by a dur-putneedar to recover rupees 3,795-5 annas paid by him to save the superior putnee from sale. The first Court gave the plaintiff a decree. The Judge, on appeal, was of opinion that as the plaintiff had not established his status as dur-putneedar, inasmuch as he had not registered his name in the office of the superior holder, the payment made by him was a voluntary payment and he was not entitled to claim any refund.

We are of opinion that the decision of the Judge in this case is wrong in law. There can be no doubt that under Regulation VIII of 1819 all putneedars or dur-putneedars have the right to alienate or otherwise transfer their property without the consent of the zemindar. It shall not be competent, says Section 5 of the said Regulation, to the zemindar or other superior holder to refuse to register and otherwise to give effect to such alienations. The status of the plaintiff as dur-putneedar does not therefore depend upon registration or the consent of the zemindar.

But it is contended in this case that the special appellant has not conformed to the requirements of Section 5 of the Regulation, that is to say, that he has not furnished security or paid a fee, or obtained registration of his name according to the forms laid down in that Section; and therefore that not being a dur-putneedar he is not entitled to claim any refund. We think that this contention is wrong. Under the Regulation the zemindar or other superior holder in certain cases is empowered to attach the property, if the subordinate holder neglects to register his name, and to hold it in trust for the subordinate holder; and in all cases until the transfer is registered, the old tenant and the tenure itself are liable for the rent due. There may be cases in which a party may become the purchaser of a dur-putnee, and the superior estate may be put up for sale and sold before he could possibly have time to effect the registration of his dur-putnee rights. Can it be said in cases of this description that if the dur-putneedar paid a sum of money on account of the rent due by the superior holder and saved the putnee from sale he would not be entitled to a refund of the sum so paid? The subordinate holder has an interest of his own to protect, which would be altogether sacrificed if he were not able to save the superior tenure from the hammer, for with the superior tenure all subordinate tenures fall in the event of a sale; and, after all, the duties of the subordinate holder as prescribed in the Regulation are formalities. Their primary object is to give the superior holder information of who is his tenant; and until they are conformed to, the superior holder is justified in looking to the registered tenant for his rent.

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We reverse the decision of the Judge, restore the decision of the first Court, and decree this appeal with costs in all the Courts.

With reference to the cross-appeal of the special respondent, we observe that the Judge has found as a fact that the plaintiff was prosecuting a suit upon the same cause of action against the same defendant *bonâ fide* and with due diligence in a Court of judicature, which from defect of jurisdiction or other cause was unable to decide upon it; and that the plaintiff is therefore entitled to deduct from the period of computation the time so occupied under Section 14 Act XIV of 1859. Further, we are of opinion that the suit of the plaintiff is not governed by the three years' limitation clause. It is not a suit to recover money lent on interest or for the breach of any contract. The limitation clause applicable to this suit is Clause 16, Section 1. The plaintiff's cause of action arose in November 1864, and this suit is brought in June 1869 or within six years. The cross-appeal is therefore dismissed with costs.

The 13th February 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Decree—Mistake in heading.

Case No. 431 of 1870.

Miscellaneous Appeal from an order passed by the Officiating Judge of Moorshedabad, dated the 26th August 1870.

Nowab Syud Zoynul Abdeen (Judgment-debtor) *Appellant*,

versus

Phoolash Chunder Bothrah and others (Decree-holders) *Respondents*.

Baboo Mohinee Mohun Roy for Appellant.

Baboos Hem Chunder Banerjee and *Doorga Mohun Doss* for Respondents.

A person to whom the ordering part of a decree gives nothing cannot be treated as having acquired any right in the decree, merely because he has by mistake been described in the heading as the purchaser of the decree-holder's rights and interests.

Norman, C. J.—It is quite clear that the decision of the lower Court in this case must be reversed.

The plaintiffs, Bunko Beharee and Phoolash Chunder Bothrah, who have purchased the rights and interests of Ram Mohun Thakoor, are seeking to execute a decree obtained by Khorshed Hossein against Nowab Syud Zoynul Abdeen, one of the defendants. The decree by mistake is headed—"Ram Mohun Thakoor, purchaser of the rights and interests of Khorshed Hossein, plaintiff, appellant."

The plaintiff in that suit, who was also the appellant in that suit, was Khorshed Hossein, and the decree ordered payment of the costs for which execution is now sought, "to the plaintiff, appellant," that is, to Khorshed Hossein.

There is nothing in the decree which made it the duty of the defendants to make any payment to Ram Mohun. It cannot be contended that Ram Mohun Thakoor has really any interest in the decree. The persons now seeking to execute the decree having purchased the rights and interests of Ram Mohun Thakoor have no interest in the decree, and cannot be treated as having acquired any right merely because a mistake has been made in the heading of the decree. The ordering part of the decree is quite correct; the order of the decree gives nothing to Ram Mohun Thakoor.

The decision of the Judge, which allowed Bunko Beharee and Phoolash Chunder to execute the decree as if it had been a decree in favor of Ram Mohun, is wrong, and is therefore reversed with costs in both Courts.

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The 13th February 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Execution—Bonâ fide proceeding.

Case No. 408 of 1870.

Miscellaneous Appeal from an order passed by the Judge of Jessore, dated the 30th July 1870, *reversing an order of the Moonsiff of Naraïl, dated the 18th December* 1869.

Titooram Bose (Decree-holder) *Appellant*,

versus

Tarinee Churn Ghose and another (Judgment-debtors) *Respondents*.

Baboo Mohendro Lall Mitter for Appellant.

Baboos Bungshee Dhur Sein and *Issur Chunder Chuckerbutty* for Respondents.

A decree-holder having applied for execution, the judgment-debtor applied for a re-hearing; but the latter application having been opposed was rejected. Pending the proceedings on the application for re-hearing, the application for execution was struck off; but very shortly after re-hearing was refused, the decree-holder applied again for execution.

HELD that the omission of the decree-holder to carry on execution proceedings pending the application for re-hearing, was no evidence of want of *bona fides*.

Norman, C. J.—THE case is very simple. This was a decree which was affirmed on appeal on the 9th of February 1864. On the 4th of February 1867, the decree-holders, Titooram and Shama Soonduree, applied for execution. The application of Shama Soonduree was as the heir of one of the original defendants, Guggun. The Moonsiff directed that proof should be put in that Shama Soonduree was the heir of Guggun. On the 13th of February, nine days after the application for execution, the judgment-debtors, who were plaintiffs in the original suit, applied for a re-hearing of the case. That application was opposed on behalf of the two decree-holders, Titooram and Shama Soonduree; and the application for a re-hearing was rejected on the 4th of May. Pending the proceedings on the application for a re-hearing by the plaintiffs, the application for execution by the decree-holders was struck off; but very shortly after the plaintiff's application had been disposed of, namely, on the 28th of June 1867, Titooram and Shama Soonduree again applied for execution of their decree, and from that time to the time of the present application, namely, in June 1869, there is no ground for saying that Titooram was remiss in endeavouring to press on the case in the execution department.

The Moonsiff held that the action taken by the decree-holders in opposing the application of the plaintiffs for a re-hearing was proof that they were *bonâ fide* taking proceedings to keep their judgment in force, and that the application of the 4th February 1867 was a proceeding taken *bonâ fide* to enforce the judgment.

The Judge says that he is of a different opinion. But in this we cannot concur. There is nothing whatever to show that the application of the 4th of February was not a step taken in good faith with a view to execute the decree; and we think that the mere fact that pending the application for a re-hearing the decree-holders did not think fit to carry on these proceedings, is no evidence whatever that that step was not taken in good faith.

The judgment of the Judge is reversed, and that of the first court is restored and affirmed with costs in both Courts.

The 13th February 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Sale of decree — Set-off — Sections 208 and 209, Act VIII of 1859.

Case No. 411 of 1870.

Miscellaneous Appeal from an order passed by the Additional Judge of Nuddea, dated the 23rd July 1870, *affirming an order of the Subordinate Judge of that District, dated the 31st December* 1869.

Kusseemoonissa Bibee (Judgment-debtor) *Appellant*,

versus

Mr. Archibald Hill (Decree-holder) *Respondent*.

Baboo Grish Chunder Ghose for Appellant.

Baboos Umbika Churn Bose, Bhowanee Churn Dutt and *Bipro Doss Mookerjee* for Respondent.

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Where the purchaser of a decree proceeds to execution under Section 208, Code of Civil Procedure, the judgment-debtor cannot be allowed a set-off on account of joint-decrees obtained by himself and others against the vendor subsequent to the sale of the purchased decree.

Even where such decrees are obtained before the sale of the first decree, they cannot be set off against the purchaser under Section 209, not being "cross-decrees against the same parties."

Norman, C. J.—In this case Kusseemoonissa Bibee had brought a suit against Golam Kadir which was dismissed with costs in 1866. Golam Kadir transferred that decree to Mr. Archibald Hill on the 13th Bhadur 1275, or, in other words, August 1868.

Kusseemoonissa Bibee with certain other persons, her sisters, obtained two other decrees against Golam Kadir, the exact dates of which do not appear; but as the suits are numbered 222 and 223 of 1868, they were probably, we may say almost certainly, and we may take them to be in the absence of any proof to the contrary, of later date than Mr. Hill's purchase.

Mr. Hill, as purchaser of the decree of Golam Kadir against Kusseemoonissa Bibee, applied for execution of his decree under Section 208 on the 5th of March 1869. Kusseemoonissa opposed and claimed to set-off the decrees obtained by herself and sisters against Golam Kadir—the sisters, as it appears, having put in a petition giving their consent to the set-off.

The Subordinate Judge in the first instance, and Mr. Pepper, the Additional Judge of Nuddea, affirming the decision of the Subordinate Judge, determined that Mr. Hill, the decree-holder, was entitled to proceed, and that Kusseemoonissa could not set-off the decrees obtained by herself and her sisters against the decree which was being executed by Mr. Hill.

From that decision Kusseemoonissa has appealed to this Court.

We are of opinion that the decree of the lower Courts is correct. In the first place, as we have already pointed out, it is not made to appear that the decrees in favor of Kusseemoonisa and her sisters had been obtained by them at the time when Mr. Hill purchased the decree of Golam Kadir in August 1868. On that ground the case is distinguishable from that decided by the Full Bench on the 6th August 1868, and reported in X Weekly Reporter, Full Bench Rulings, page 32.

There is a second objection which is this—Supposing the decrees of Kusseemoonissa and her sisters to have been obtained before Mr. Hill's purchase, these decrees and the decree of Golam Kadir against Kusseemoonissa were not *cross-decrees between the same parties;* and therefore Section 209 does not in terms apply to the set-off of such decrees. In making his purchase Mr. Hill would not, therefore, take it subject to any other existing right of Kusseemoonissa to set-off the decree obtained by herself jointly with her sisters; and we think that no subsequent consent of the sisters of Kusseemoonissa to set-off their joint decree against the decree of Golam Kadir against her can in any way affect the rights of Mr. Hill, who was no party to that arrangement. The 209th Section distinctly recognizes the rights not only of original decree-holders but of holders of decrees; and if we allow this set-off we shall plainly be disregarding the rights acquired by Mr. Hill under his purchase.

For these reasons, we think that the decree of the lower Courts should be affirmed with costs.

The 13th February 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge.*

Decree for maintenance—Execution—Instalments—Sections 201 and 212, Act VIII. 1859—Section 15 Act XXIII. 1861.

Case No. 413 of 1870.

Miscellaneous Appeal from an order passed by the Additional Judge of Nuddea, dated the 5th August 1870, *affirming an order of the Subordinate Judge of that District, dated the 15th February* 1870.

Peareenath Brohmo and another (Judgment-debtors) *Appellants,*

versus

Juggessuree *alias* Rakhalee Dossee (Plaintiff) *Respondent.*

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Baboo Doorga Doss Dutt for Appellants.

Baboos Mohendro Lall Seal and *Sham Lall Mitter* for Respondent.

A decree for maintenance to be paid at a certain rate per month stands on the same footing as a decree ordering payment by instalments, where the decree-holder may apply for execution from time to time as the instalments fall due and the Court may issue execution under Sections 201 and 212 Act VIII of 1859, and Section 15 Act XXIII of 1861.

Norman, C. J.—THE point of law raised in this special appeal is whether a decree for maintenance at a certain rate, namely, rupees 8 per month, adjudged to be paid by the defendant to the plaintiff, can be enforced by execution of the original decree to be from time to time issued, if default is made by the defendant in making payments as stipulated; or, whether the plaintiff is compelled to bring actions from time to time to enforce the order of the Court made by the decree.

We think that a decree for maintenance to be paid at a certain rate per month stands exactly on the same footing as a decree ordering payment of a sum of money by instalments. In the case of a decree ordering payment of a sum of money by instalments from time to time, as the instalments fall due the decree-holder may apply for execution of decree, showing the amount due and whether any payment on account of such instalments has been made, and on such application the Court, by virtue of the provisions of Sections 201 and 212 Act VIII of 1859, and Section 15 Act XXIII of 1861, may make an order that execution should issue.

This disposes of the only real point in the case, because the objection that the decree, which follows the terms of a solehnamah, is not in accordance with the prayer of the original plaint is one which is not only worthless in itself but cannot be taken in execution of decree. It is quite plain that the decree is in conformity with the terms of the solehnamah. The solehnamah contains a provision that the plaintiff should get rupees 8 per month from the defendant, and that the defendant should from time to time pay that sum to the plaintiff; and the decree orders that the terms of the solehnamah in this respect shall be carried into effect.

The appeal is dismissed with costs.

The 13th February 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Ladies of position—Personal appearance at Court.

Case No. 452 of 1870.

Miscellaneous Appeal from an order passed by the Judge of Dinagepore, dated the 17th September 1870.

Zohurutoollah Chowdhry and others (Petitioners) *Appellants,*

versus

Asalooddeen Chowdhry (Opposite Party) *Respondent.*

Baboo Annund Chunder Ghossal for Appellants.

Baboo Mohinee Mohun Roy for Respondent.

Where a Mahomedan lady of position residing within the town in which a Court held its sitting was willing to admit the Court to an interview at her own residence, the Judge was held to have done wrong in insisting upon her personal appearance in Court.

Mitter, J.—THIS was an application for the cancellation of a certificate granted to one Asalooddeen under the provisions of Act XL of 1858. The cancellation was asked for on the ground that the minor Kureemoonissa, who is one of the petitioners, had reached her majority.

We are of opinion that the evidence given by the petitioners in this case is quite sufficient to show that the age of Kureemoonissa is about 20 or 21. No reliable evidence has been given by Asalooddeen to rebut this evidence, and we see no reason whatever

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to reject the testimony on oath of the mother of Kureemoonissa as well as of her brother, both of whom have been examined in this case. The Judge appears to have rejected the application simply on the ground that Kureemoonissa had refused to appear in open Court to be inspected, relying on her position as a lady of rank. We think that the Judge is quite wrong in insisting upon the personal appearance of Kureemoonissa in Court, it being admitted that she was a lady of position, and that she had offered to be inspected in her residence in the town. We think that under such circumstances, the Judge ought to have proceeded in the manner indicated in the application of Kureemoonissa. But be that as it may, we think the evidence produced on her side is quite sufficient to show that she is no longer a minor.

We therefore direct that the certificate summarily allowed to Asalooddeen should be cancelled and a fresh certificate given to Kureemoonissa as guardian and manager of the property of her infant daughter, Malchetoonissa. The respondent Asalooddeen must pay the costs incurred by the appellant in the Court below and also in this Court, the costs of each Court being assessed at 2 gold mohurs.

Bayley, J.—I think the Judge has shown a want of discretion in refusing to see the lady at her house. The Judge himself states that the lady was "willing to admit the Court to an interview if it is conducted at her own residence," which was actually within the town. He could then, with full regard for the ends of justice, have allowed that indulgence to the lady without any inconvenience to the Court or to other parties in the suit. The Judge further says "if the lady has no objection to unveil in one place, I do not see why any such should not extend to the precincts of the Court." Now, there is great difference between a lady of position appearing before a Commissioner in her own house, and her appearing before an European Officer presiding in a crowded Court of justice. There being nothing shewn to make it necessary to enforce her appearance in *Court* instead of being inspected by a Commissioner at her lodging in the town, the case does not come within the precedents to which the Lower Appellate Court refers.

I concur in the order passed by Mr. Justice Mitter.

The 13th February 1871.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Appellate Court—Section 359, Code of Civil Procedure.

Case No. 777 of 1870.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 20th May 1870, *reversing a decision of the Moonsiff of Aosgaon, dated the 29th November* 1869.

Shurbessur Ghose (Plaintiff) *Appellant,*

versus

Sadhoo Churn Ghose and another (Defendants) *Respondents.*

Baboo Mohendro Lall Mitter for Appellant.

Baboos Chunder Madhub Ghose and *Nil Madhub Sein* for Respondents.

Section 359, Code of Civil Procedure, makes it incumbent upon an Appellate Court to set down distinctly the point or points on which it has to decide the appeal and to record its reasons for the decision it arrives at on each and all of these points.

Glover, J.—THE plaintiff in this case sues to recover possession of his share in an ancestral tank from the defendants Nos. 1, 2 and 3. The defendants Nos. 2 and 3 are the uncles of the plaintiff, and the defendant No. 1 claims to be in possession of the property in suit by purchase (from the plaintiff and from the other two defendants jointly) on the 26th Bysack 1268. To this it is alleged on the part of the plaintiff that at the time the deed of sale was executed he was a minor, and that the defendants Nos. 2 and 3, his uncles, had no authority to dispose of the property in his name, and that as a matter of fact he never gave them such authority.

The Court of first instance held on the evidence that the plaintiff was a minor on the date on which the deed of sale is said to have been executed and was not in a position to give authority to the defendants Nos. 2 and 3 to sell, and that the plaintiff did not give such authority.

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The Judge, on appeal, after remarking that the Moonsiff had failed to comprehend the suit, decided that the kobalah propounded by the defendant was a genuine and *bonâ fide* instrument; that it was supported by an ekrar executed by the same parties, namely, by the plaintiff and his two uncles in the year 1272; and that from the date of the kobalah the defendant had been in quiet possession of the property purchased. The Judge, likewise, found that the plaintiff had entirely failed to establish the case he had set up.

In special appeal it is contended that it is the Judge who has misunderstood the points at issue in this case; that the question was not only whether the deed of sale under which the defendant claimed was a genuine one, but whether the plaintiff was at the time this deed was executed a minor, and so incapable of giving any authority to his uncles to dispose of his share of the ancestral lands. No doubt the decision of the Judge is not as clear as it might have been on this particular issue, and he has not borne in mind the provisions of Section 359 of the Code of Civil Procedure, which made it incumbent upon him to set down distinctly the point or points on which he had to decide the appeal, and to record his reasons for the decision arrived at by him on each and all of these points. Had he distinctly found that the plaintiff was a major on the date of the sale to the defendant, that, coupled with his finding of fact that the deed of sale was a genuine instrument and that under that bill of sale the defendant had been in peaceable possession ever since, would at once have disposed of the case without any possibility of doubt. But although the decision is not as clear as it might be, there are words to be found in the latter part of the Judge's decision which do substantially dispose of this plea of minority. The Judge says "the plaintiff has entirely failed to establish the case he has set up." Now the case set up by the plaintiff was undoubtedly that this deed of sale could not bind him, as it was executed when he was still a minor and by parties who had no authority from him to execute this document, which purports to pass away the property to the defendant. This being so, we can see no object to be gained by remanding the case to the Judge for a clearer finding on that which he seems substantially to have found.

We, therefore, dismiss the special appeal with costs.

The 5th January 1871.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Execution—Sale—Bona fides—Collusion—Onus probandi—Section 359, Code of Civil Procedure.

Case No. 1410 of 1870.

Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 23rd April 1870, affirming a decision of the Subordinate Judge of that District, dated the 14th August 1869.

Tatur Khawas (Defendant) *Appellant,*

versus

Loke Nath and others (Plaintiffs) *Respondents.*

Baboo Bhowanee Churn Dutt for Appellant.

Mr. C. Gregory for Respondents.

The fact of a purchaser at a sale in execution having bought in good faith does not make it immaterial to inquire into his vendor's title.

In a suit to set aside such a sale as colorable, false and collusive, the proof lies with the plaintiff.

The terms of Section 359, Code of Civil Procedure, though not usually enforced with extreme rigour by the High Court, should be complied with by Appellate Courts where the facts of a case are complicated.

Jackson, J.—It appears to me that the judgment of the Lower Appellate Court in this case must be reversed, and that there must be a new trial.

The plaintiff brought his suit to set aside a judgment obtained by one of the defendants, impugning it and the mortgage transaction on which it was based on the ground of fraud. The plaintiff also desired to have his right to 10 beegahs of land declared and his possession therein confirmed, notwithstanding the decree and sale which had taken place under the circumstances first stated.

The Subordinate Judge who tried the suit considered the plaintiff to have made out his case and gave him judgment. The case coming before the Additional Judge of Tirhoot on appeal, the Judge sets out at some length what he understands to be the facts of the case, interspersed here and there with a few words of comment. Having given what he calls a brief outline of the

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case, he gives the following judgment :—"I "am of opinion, after hearing the arguments "on both sides, that the Subordinate Judge "has arrived at a just decision on the sub- "ject, with which I see no reason whatever "to interfere. It is very clear that the "plaintiff (respondent) purchased the pro- "perty in good faith, in possession of which "therefore he should be retained. I place "no reliance on the transaction between the "appellant and the defendant No. 2, which "I look upon as wholly illegal and inadmis- "sible. It is proved that the property had "already been purchased by the plaintiff "(respondent), therefore a second purchase "by the appellant was impossible. The "orders of the lower Court are confirmed, "and the appeal dismissed with costs."

Now, the Judge in this way appears to adopt wholesale the decision of the Court below, together with the reasons on which that decision was based. That is not the duty of the Appellate Court. Section 359 Act VIII of 1859 states that the judgment of the Appellate Court shall contain the point or points for determination, the decision thereupon, and the reasons for decision. Now in some cases, where the facts are extremely simple and the point for determination is unmistakeable, we are not in the habit of requiring an extremely rigorous compliance with the terms of that Section ; but where the facts of the case are at all complicated, the necessity for compliance with them is very obvious, as it is in the present case ; for it seems to me that the Judge's language indicates an imperfect conception of what the case was which he had to decide. He says—"It is very clear that "the plaintiff (respondent) purchased the "property in good faith, in possession of "which therefore he should be retained." If that was so, the title which the vendor could make would be immaterial, so long as the purchaser bought in good faith. He again says—"I place no reliance on the trans- "action between the appellant and the de- "fendant No. 2, which I look upon as wholly "illegal and inadmissible." Now it was not alleged that there was any thing illegal or inadmissible, but that the transaction was colorable, fraudulent and collusive. That was the issue which the Court had to try, and it was an issue the proof of which lay upon the plaintiff, more especially as the defendant rested upon a judgment which he had obtained upon that transaction from a Court of competent jurisdiction. He again says—"It is proved that the property had "been already purchased by the plaintiff "(respondent), therefore a second purchase "by the appellant was impossible." But it was not a question of purchases, but the defendant set up a previous lien and a decree obtained upon that lien.

The case will be re-placed upon the file of the Lower Appellate Court. That Court will carry out strictly the terms of Section 359, stating the points for decision in the case, and giving his decision upon those points consecutively.

Glover, J.—I concur.

The 5th January 1871.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Ferries—Section 2 Act I of 1866.

Case No. 1423 of 1870.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 22nd April 1870, *affirming a decision of the first Subordinate Judge of that District, dated the 11th December* 1869.

Dewan Ram Jewun Singh and another (Plaintiffs) *Appellants,*

versus

The Collector and Magistrate of Shahabad (Defendant) *Respondent.*

Baboo Taruck Nath Paleet for Appellants.

Baboo Juggadanund Mookerjee for Respondent.

A suit to re-open a ferry which had been included in a settlement of an estate obtained by plaintiff from Government, but which had been closed by orders of the Assistant Magistrate, was held not to be maintainable, the ghât where plaintiff wished to re-open it being within 2 miles of the place at which a public ferry was established.

Jackson, J.—THIS suit is described by the Subordinate Judge as being a suit "for re- "opening the plaintiff's ferry ghât, as of "old, at the Soane river at mouzah Muhu- "dema, Pergunnah Dammur in Shahabad,

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"by reversal of the orders of the Assistant "Magistrate and Commissioner closing the "said ghât," and also for damages.

The Subordinate Judge and the Zillah Judge in appeal have both held that this suit is not maintainable. The decision of the Zillah Judge is mainly based upon Section 2 Act I of 1866 of the Bengal Code, which declares "every ferry which has "been or may be declared to be a public "ferry under the provisions of the said Re-"gulation VI of 1819 shall belong exclu-"sively to Government, and no person shall, "except with the sanction of the Magis-"trate of the district, keep a ferry boat for "the purpose of plying for hire within a "distance of two miles above and below the "place where such public ferry is estab-"lished."

It appears that the ferry which the plaintiff desires to re-open was formerly a ferry belonging to the Government, and was included in a settlement which the plaintiff had obtained of a certain estate from the Government, but that another public ferry has since been opened under the direction of the Magistrate, which ferry, I understand it to be admitted, is within two miles of the place where the plaintiff now seeks to re-open his own ferry.

Without considering whether the terms of Section 2 Act I of 1866 relate expressly to the plaintiff's case, it seems quite clear that the plaintiff desired the Court to do that which the Legislature declared it should not be allowed to do, that is to say, allow him to keep a ferry boat for the purpose of plying for hire within a "distance of two "miles above and below the place where "such public ferry is established." That being so, I think the suit must necessarily fail.

Section 4 of the Act appears to provide for his applying for a compensation in respect of loss sustained by him in consequence of the action taken by the Magistrate under this Act. It appears that the plaintiff might, if he had chosen, have obtained such compensation. The Magistrate recommended it, and the Commissioner only refused to give it on the ground that no application had been made to him for it.

The special appeal must be dismissed with costs.

Glover, J.—I concur.

The 9th January 1871.

Present :

The Hon'ble L. S. Jackson and W. Ainslie, *Judges.*

Landlord and lessee—Holding over—Wasilat—Execution.

Case No. 108 of 1870.

Regular Appeal from a decision passed by the Subordinate Judge of Tirhoot, dated the 12th March 1870.

Mr. M. H. Gale (Defendant) *Appellant,*

versus

Maharanee Sreemutty and another (Plaintiffs) *Respondents.*

Mr. A. F. Lingham for Appellant.

Mr. C. Gregory and *Baboo Mohesh Chunder Chowdhry* for Respondents.

Where a lessee whose lease has expired, and who is unwilling to give the increased rent demanded by the landlord, retains possession in the hope of obtaining a new lease without such increase, parties entering upon the land as cultivators with the consent of the landlord are not called upon to show the ex-lessee their authority.

Where wasilat is decreed, the modo of ascertaining it is rightly reserved for the proceedings in execution.

Jackson, J.—We do not think it necessary to call upon the respondent in this case. It appears to us that the decision of the Court below is manifestly just and proper.

For the purpose of the decree which has been given, it does not appear to be necessary to put the case at all higher than it is put in the evidence of Mr. Lamb, the manager for the defendant himself. That witness has distinctly admitted that the defendant, whose lease of the land in dispute expired in the end of the year 1275 Fuslee, was negotiating for a renewal of the lease; that the landlord demanded an increased rent which the defendant was unwilling to

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give ; and that during those negotiations and in the hopes of obtaining a new lease without increase of rent, he at his own risk and peril retained possession of the land and refused to allow the parties, who, it is quite clear had obtained the consent of the landlord to cultivate, to enter upon the land.

It is said that those persons who went for the purpose of cultivation did not exhibit their authority to the defendant. It seems to me that they were not called upon to exhibit any such authority ; and the manager does not appear to be at all certain that if they had exhibited their authority, he would have allowed them to cultivate. He says—"I do not think I should have objected to the ryots cultivating, if they had shown me the authority, nor complained against them." This is certainly a further gravamen in the matter, for it appears that not only did the defendant, by his manager, refuse to allow the persons sent by the landlord to cultivate, but he actually took criminal proceedings against them, and, by what seems to me a lamentable perversion of justice, actually procured them to be punished by the Magistrate for cultivating land which the landlord had authorized them to cultivate.

Then it is said that these criminal proceedings did not extend beyond the month of November, and at any rate the landlord was at liberty to enter upon the land then, and therefore could not be entitled to damages beyond that period.

It seems that the landlord had brought a suit in the Collector's Court to recover possession of the mouzah, and in that suit, which was decided on the 31st of March 1869, the defendant alleged that he was entitled to hold these lands by a cultivating right, and he, consequently, did not in any sense give up the lands nor disclaim a right to them. Under these circumstances, it seems to me that the plaintiff certainly could not understand that she had recovered possession of her lands, and she was quite justified in acting as if she were kept out of possession and in bringing this suit on the 1st October following.

It has been made ground of objection to the decision of the Subordinate Judge that he has not expressly laid down the principle on which damages were to be assessed, nor the period in respect of which the defendant was liable.

I admit that the decision of the Court below might have been more explicit upon the latter point at any rate ; but it seems to me that in the decision of the second issue what the Court has done is really this—It finds that the plaintiff is entitled to rents as damages for the time she has been kept out of possession of these lands. That, I think having reference to the pleadings, must mean the period between the expiry of the lease and the time alleged in the plaint, namely, wasilat for the year 1276 Fuslee. The Court below probably did not mean to give more than that, and obviously the plaintiff would not be entitled to more than he actually claims in this suit. I think, therefore, it may be understood that what the plaintiff is entitled to recover is wasilat for the year 1276 Fuslee.

Then, as to the mode of assessment or ascertaining wasilat, the Court below has reserved that for the proceedings in execution. This is the course taken every day and which the law allows to be taken, and I think no objection can be taken on this point.

I think the decision of the Court below must be affirmed and the appeal dismissed with costs.

Ainslie, J.—I concur.

The 12th January 1871.

Present:

The Hon'ble L. S. Jackson and W. Ainslie, *Judges.*

Certificate of administration—Hindoo family—Separation.

No. 403 of 1870.

Miscellaneous Appeal from an order passed by the Judge of Shahabad, dated the 23rd July 1870.

Mussumat Munbasee Kooer and another (Objectors) *Appellants,*

versus

Nowrungee Lall and another (Petitioners) *Respondents.*

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Baboo Tarucknath Dutt for Appellants.

Baboo Chunder Madhub Ghose for Respondents.

Certain members (N and A) of a joint Hindoo family having commenced a suit to set aside an adoption by one of the family (C), a compromise was effected by which the several parties took separate shares of the family property. C having died, N and A applied for a certificate to collect the debts due to his estate, but were opposed in a joint petition made by the widow and adopted son.

HELD that the applicants could not be entitled to the certificate, which might however be given to the son with the consent of the widow.

Jackson, J.—IT appears to me that the order of the Judge below is erroneous.

The respondents before us applied for a certificate to collect the debts due to the estate of the deceased Chundun Lall, alleging themselves to be his relations on the father's side, and as such his heirs; and thereupon the widow of Chundun Lall and one Bissessur Doyal, alleged to be the adopted son of Chundun Lall, made a joint petition opposing the application.

The Judge having the parties before him found that the alleged adopted son was a person who, as being the sister's son of the deceased, could not lawfully be adopted by him, and therefore considered that, as he could not be the heir and could not have the certificate, the other parties must be entitled to it.

Now it appears that, in the life-time of Chundun Lall, a suit had been commenced by the petitioners, Nowrungee Lall and Amanee Lall, to set aside the alleged adoption and for certain other purposes; and that suit terminated in a compromise by which the several parties to it took separate specific shares of the family property, and the suit came to an end; and from this it results that the family, so far as the petitioners and Chundun Lall are concerned, became separate. That being so, and Chundun Lall having died leaving a widow, the petitioners manifestly could not be entitled to the certificate. The question would remain, therefore, one between the widow and the alleged adopted son; and if those two parties were arrayed on opposite sides before the Zillah Judge and before us, it might have been necessary to decide whether the petitioners were entitled to the certificate: but as that is not the case, and as the widow supports the claim of the adopted son, no inconvenience can arise in giving a certificate to the son, the widow consenting.

The question whether the Judge was right in holding, in the circumstances of this family, that the sister's son could not be adopted, is a question which admits of doubt. That question may arise hereafter, and, if so will be decided at the proper time.

The order of the lower Court must be reversed and a certificate given to Bissessur Doyal with costs.

Ainslie, J.—I concur.

The 12th January 1871.

Present:

The Hon'ble L. S. Jackson and W. Ainslie, *Judges.*

Admission — Evidence—Cross-appeal —Court's duty.

Case No. 1453 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 30th March 1870, *reversing a decision of the Collector of Jungipore, dated the 30th November* 1868.

Oomabuttee (one of the Plaintiffs) *Appellant,*

versus

Parushnath Pandey and others (Defendants) *Respondents.*

Baboo Mohinee Mohun Roy for Appellant.

Baboo Mohesh Chunder Chowdhry for Respondents.

A statement made in a case by a pleader on behalf of his client after full consideration and consultation, is admissible as evidence against that client in another case in which he is a party.

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A plaintiff who obtains a decree which is appealed against, is not bound to bring a cross-appeal because the Court of first instance did not accept a portion of the evidence; but it is for the Appellate Court to examine such portion and consider whether it proves plaintiff's case.

Jackson, J.—THE special appellant shows that two of the documents which he relied upon as evidence in support of his case have been improperly rejected by the Judge. One of these is the statement made on the part of Parushnath Pandey by his pleader in a suit by Gudadhur Mundul against him. In that case the pleader stated to the Court, that the parties had come to an arrangement under which the defendant, admitting the justice of the plaintiff's claim, proposed to allow the claim to be satisfied out of profits of this very mouzah which it is alleged Parushnath Pandey held in ijarah. This statement made by the pleader on Parushnath's behalf is, we think, clearly admissible in evidence against him. It appears to have been made after full consideration and consultation between the clients and the pleaders on both sides.

Secondly, in respect of certain accounts prepared, it is said, under the directions and in the presence of Parushnath himself, the Judge observes that it was the business of the plaintiff to have preferred a cross-appeal, because the Court below had discredited those accounts, and for that reason he declared the finding to be final. Now clearly the plaintiff, who had got a decree in the Court of first instance on other grounds, is not compelled to bring a cross-appeal because the Court below has not accepted or relied upon any particular portion of the evidence; but when the whole case was before the Judge, it was for him to take such a view of the whole of the evidence adduced by the parties as he thought fit. It was his business to examine those accounts and consider whether they proved the plaintiff's case.

Then as to the mokurruree pottah, the Judge states that he does not find on it the signature either of the plaintiff or defendant; but it is stated that on inspection it will appear that it was signed by the defendant.

As to this third piece of evidence, I am not clear that standing alone it would be ground of special appeal; but as clearly a new trial is requisite on account of the mistake of the Judge as regards the two first pieces of evidence, I think the Court below in re-trying the case should take the opportunity of re-considering the mokurruree pottah, as well as the oral evidence as to which the Judge has passed an opinion which certainly seems not to be of a thoroughly satisfactory kind. The case must go back to the Lower Appellate Court for a re-trial.

Ainslie, J.—I concur.

The 20th January 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble Onoocool Chunder Mookerjee, *Judge*.

Complaints—Section 145 and 160 Act X of 1859—Suits—Appeal.

Amanutoollah, agent on behalf of Nuseebutoonissa Begum, *Petitioner*,

versus

Russick Chunder Chatterjee and another, *Opposite Party*.

Baboo Romesh Chunder Mitter for Petitioner.

Baboo Umbika Churn Banerjee for Opposite Party.

A complaint or proceeding under Section 145 Act X of 1859 is not a suit within the meaning of Section 23 Clause 7, and does not fall within the description of the suits in which under Section 160 an appeal is given to the Zillah Judge.

Norman, C. J.—THE facts of this case are as follow:—

Nuseebutoonissa Begum attached, under the provisions of Sections 112 and 115 of Act X of 1859, certain crops standing on the lands of a tenure within her *ayma jote* belonging to her under-tenant Kader Buksh Mundal.

Russick Chunder Chatterjee and Jogul Shaha removed the attached crops, on which Nuseebutoonissa preferred a complaint before the Collector of Howrah under Sec-

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tion 145 of Act X, alleging that these persons had illegally and forcibly removed the distrained property.

On the investigation of the complaint, the Deputy Collector, to whom the case was made over by the Collector, found that the value of the crops which had been improperly received by Russick Chunder Chatterjee and Jogul Shaha was rupees 688-6. He ordered them to make good that amount, and each of them to pay a fine of rupees 25; and in default each to be imprisoned in the civil jail for fifteen days.

From that decision Russick Chunder appealed to the Judge, who having entertained the appeal held that the amount of damages was not proved; and he reversed the order of the Deputy Collector so far as it awarded damages.

On the 27th April last an application was was made to myself and Mr. Justice Mitter to set aside the order of the Judge, on the ground that he had no jurisdiction to entertain an appeal from the order of the Collector; and that his order made on appeal setting aside the Collector's order was an order made without jurisdiction.

The matter after standing over for a long time has now come before us for argument. Baboo Romesh Chunder Mitter has appeared in support of the rule, and he shows that a complaint under Section 145 is not a *suit*. Certainly, it is not a suit within the meaning of the 7th Clause of the 23rd Section. It is a complaint against a person who has wrongfully carried off crops which were under distraint. It it not a suit "arising out of the exercise of the power of distraint, or out of any act done under color of such power." Baboo Romesh Chunder pointed out that the procedure in *suits* under Act X is treated of in the Sections from 34 onwards; and the procedure in the case of a complaint under Section 145 is in no way analogous to a civil suit before the Collector; that none of the steps prescribed for the conduct of suits in Section 34 and the following Sections are to be taken upon a complaint under Section 145. He showed that under Section 145 the person against whom the complaint is made is not summoned as in a civil suit, but is *arrested*; he is not treated as a defendant, but as an *offender*; he is not treated as a person against whom a decree passes, but he is convicted; and the judgment against him is not a *decree*, but a sentence of fine or imprisonment.

Baboo Romesh Chunder showed by a careful examination of the Sections of Act X relating to suits arising out of the exercise of the power of distress, that the proceeding under Section 145 was not one of such suits; and we think that he is right in saying that a proceeding under Section 145 is not a suit, and that it does not therefore fall within the description of the suits in which under Section 160 an appeal is given to the Zillah Judge.

I may observe that the Collector's Court is a Revenue Court—the Court of the Zillah Judge is a Civil Court; and unless there is some express power which gives an appeal from proceedings in the Revenue Court to the Judge in the same Court, no appeal lies.

We think it quite clear that no appeal lies in the present case; that the order of the Judge quashing that of the Deputy Collector was made without jurisdiction and is illegal. Therefore, under the provisions of Section 15 of the Charter Act XXIV and XXV Victoria, Chapter 104, we direct that that order of the Judge be quashed.

We express no opinion as to whether the Collector had any jurisdiction to award damages to the complainant under Section 145.

Mookerjee, J.—I concur.

The 31st January 1871.

Present:

The Hon'ble L. S. Jackson and W. Ainslie, *Judges.*

Sale for arrears—Failure to give notice—Section 33 Act XI of 1859.

Case No. 100 of 1869.

Regular Appeal from a decision passed by the Officiating Subordinate Judge of Tirhoot, dated the 22nd December 1868.

Mohabeer Pershad Singh and others (Plaintiffs) *Appellants,*

versus

The Collector of Tirhoot and another (Defendants) *Respondents.*

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Messrs. J. Graham and *C. Gregory* for Appellants.

The Advocate General and *Baboos Unnoda Pershad Banerjee* and *Mohesh Chunder Chowdhry* for Respondents.

To sell an estate for arrears under Act XI of 1859 after lulling the proprietor into a false security by failure to give him a notice which the law prescribes as a condition precedent of a sale, is of itself a very material injury irrespective of the amount of purchase-money realized, and one amply sufficient to warrant a Court in annulling the sale under Section 33.

Ainslie, J.—This appeal was on a former occasion heaad by Mr. Justice Bayley and Mr. Justice Markby, who, on the 3rd May 1870,* made the following order :—

"We think, therefore, that the judgment "of the Lower Court must be reversed, and "the case remanded under Section 354 "Act VIII of 1859, to try the issue whe- "ther or not the plaintiffs have sustained a "substantial injury by reason of the irregu- "larity which we find existing in this case, "that is to say, that no notice was issued "as required by Section 5 Act XI of "1859.

"Each party will be allowed to produce "fresh evidence upon this issue ; and having "found and determined this issue, the "Court below is to return its finding and "the evidence to this Court within two "months of the receipt of this order."

The lower Court has submitted a finding which is by no means clearly expressed, but may be taken to be that the sale by the Collector of the property in suit was effected at a very inadequate price, and that this lowness of price was the consequence of an irregularity in the Collector's proceedings, such irregularity being the one noticed in the order of this Court.

The respondent has taken exception to this finding.

* 13 W. R., p. 423.

The questions before us now are—

1*st.*—Whether, on the evidence, the plaintiff has established that he has sustained substantial injury, and

2*nd.*—Whether such injury has been sustained by reason of the irregularity complained of.

The property in suit was sold at auction by the Collector to the defendant Bunwaree Lall Sahoo for the sum of rupees 1,40,000.

The plaintiffs on the remand examined several witnesses, amongst whom were Mr. M. Lloyd and Mr. T. Lloyd. Both these gentlemen state that Talookas Mullick Alipore and Sonapore are worth four lacs of rupees, and Mr. M. Lloyd assigns three of the four lacs as the value of Mullick Alipore. Baboo Muddun Lall states that this talook is worth more than four lacs of rupees ; and Ram Bhurosa Singh puts it at three lacs. The plaintiffs have also produced village accounts to support their case. It has been said that Mr. M. Lloyd's evidence is either hearsay, or, where he speaks as of his own knowledge, merely the result of calculation from the annual profits, the amount of which he had previously stated from information derived from others. But I do not think his evidence is to be treated as pure hearsay, but rather as an expression of his own belief formed on the data available to him. Such an opinion may be more or less valuable according to the character and position of the witness. The learned Advocate General has admitted that the character of the witness is unimpeachable ; and as to his position it appears that he is an indigo planter occupying lands within this very estate, and consequently in a position to form a correct estimate of its value. I think we ought to attach considerable weight to his evidence.

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The evidence for the plaintiff is very feebly met by evidence on the other side. The respondents rely mainly on the statements in the petition presented to the Civil Court by the plaintiffs, when they sought to save their property from sale by getting a manager appointed under Section 243 Act VIII of 1859. This petition, dated 5th September 1864, sets forth the income of the properties under attachment in the execution suit, and from it the respondents derive by calculation a gross annual profit of about rupees 5,600.

But the statements made in that petition of 1864 do not necessarily determine the value of the property in 1867. It has been pointed out that in 1866 the manager appointed by the Civil Court believed that he could renew expiring leases on better terms; also that on the very same day on which the property in suit was sold, another share of 3 annas 4 gundahs in mouzah Hurdaspore, one of the villages in the talook, was purchased by the defendant Bunwaree Lall Sahoo for rupees 29,200; and that at another time a 2 gundahs share in another village in the talook Bazeedpore was purchased by the witness Bhugeloo for rupees 995 (or at the least for rupees 800, as alleged in the pre-emption suit that followed his purchase), and that at these rates the price of the shares for which plaintiffs sue in these two villages, leaving out of account all the rest of the property, would come to at least 1,54,600 rupees.

It has also been observed that defendant himself filed jummabundees in the Collector's office in December 1868, showing the income of his share in three villages, Hurdaspore, Sursawa, and Jebangeera to be 9,054 rupees.

The evidence of defendant's witness Roop Narain has also been commented on. This man values his own share in the talook, producing an annual profit of 25 or 30 rupees, at rupees 5,000. But although he believes plaintiff's profits to be about 3,000, he only puts the value down as 1½ lacs and upwards.

Looking at the whole of the evidence, I have no hesitation in coming to the conclusion that the estate was sold for below its proper value, which appears to be about 3 lacs of rupees.

In coming to this conclusion, I have not overlooked the provisions of Section 35 Act XI of 1859, which, it is urged, afford to a purchaser at a sale under the Act such ample protection that the risk of the sale being set aside would not materially influence his biddings. The Section, however, offers no protection in respect of costs of litigation and claims for mesne profits, both of which (especially the latter) are formidable items to be taken into account.

Then comes the question whether the injury sustained by the plaintiffs was by reason of the irregularity complained of. It is contended for the respondents that the injury must be directly caused by the irregularity. Appellants, on the other hand, deny that this is necessary. The true construction of Section 33 Act XI of 1859, according to them, is that when no material injury has been sustained, the law does not notice errors of form, but when material injury is proved it is essential to the validity of a sale that every step of procedure should be strictly in form, and that any and every irregularity is fatal.

I do not feel myself called on to express any opinion whether the simple fact of the existence of some irregularity, combined with a sale at a price materially below full value, is sufficient under the terms of Section 33 Act XI of 1859 to invalidate a sale, although there may be no evidence to connect the inadequate price directly with the irregularity as effect and cause; for in this suit there is evidence that the report (which turns out to be well founded in fact), that the proceedings of the Collector had been informal, did operate to make intending purchasers unwilling to bid. It has been contended by the learned Advocate General, that the evidence does not establish that the particular irregularity under Section 5 Act XI of 1859, which occurred in this instance, was the irregularity which deterred bidders; and that the mere suggestion of some undefined irregularity, even if it had the effect of making intending purchasers hold back, is not sufficient to invalidate the sale. But looking to the evidence of Ram Bhurosa Singh, I think that there can be no doubt that the irregularity, which was the subject of remark at the time of sale, was the special irregularity under Section 5; and that there is therefore no ground for saying that the requirements of Section 33, read most strictly, have not been complied with.

Moreover, independently of the evidence recorded in this case, I think the plaintiff's suit may be supported from a consideration of the admitted facts. The property being

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under attachment by order of a Civil Court, the Collector was bound to give the parties interested therein warning of the impending liability to sale by the issue of the notices prescribed in Section 5 Act XI of 1859. This Section does not extend the time allowed for payment of arrears of estates attached by any judicial authority, but it provides that certain steps shall be taken at least 15 clear days before the latest date for payment of arrears, fixed according to Section 3 of the Act to call attention to the existence of arrears and the near approach of the time when the estate will be liable to sale. Clearly the object of the law is to give a special warning to parties who have lost the control of their own estates owing to attachments by judicial authority, and probably also to the attaching Courts and managers that they may make such arrangements, as the circumstances of the case require, to protect the estates against defaults which very often would be (as in this instance) defaults of co-sharers.

When the law says that a certain party's estate shall not be sold for arrears without public notice of the existence of the arrear, the non-issue of notice would naturally induce a belief that the estate is in no danger. A man who lives 50 miles from the Collector's treasury and 1 mile from the Moonsiff's Court may not think it worth while to go all the way to the former, when he knows that he can in the ordinary course of business ascertain at the latter whether there is any danger to his estate; and if when the proper time comes he makes inquiries at the Moonsiff's Court and ascertains that no notice has come from the Collector, surely he may rest at home in peace and take it for granted that the manager of the attached share or some co-sharer has made the estate safe and that there is no arrear due. To sell a man's estate for arrears after lulling him into a false sense of security, by failure to give him a notice which the law prescribes as a condition precedent of a sale, is an injury of itself, wholly irrespective of the amount of purchase-money, and in my opinion a very material injury and one amply sufficient to warrant a Court in annulling a sale under Section 33 Act XI 1859; that such an injury flows directly from the irregularity will hardly be denied.

It certainly is not shewn in this case that the plaintiff was actually misled by the want of the proper notices under Section 5. But I think one is justified in inferring every thing in his favor, when we find that a form prescribed as absolutely essential and without which no sale shall be held (in the special cases noted in Section 5) has been neglected: especially as it is shewn that shortly after the estate had been declared liable to sale, the arrear was tendered to the Collector, who unfortunately refused to exercise the discretion vested in him by Section 18 of the Act.

Consequently, looking either to the nature of the case or to the evidence on the record, I think the plaintiff is entitled to have the sale set aside.

In my opinion there must be a decree for the plaintiffs annulling the sale, and declaring their right to be put into possession of their shares of the talook, as set forth in the plaint, subject to the provisions of Act XI of 1859, with costs in proportion to the established value of the property in suit, *viz.*, rupees 3,00,000 payable by Bunwaree Lall.

As this litigation has arisen entirely out of the error of the Collector in forcing on the sale after the omission to issue notifications under Section 5 had been brought to his notice, there should be no order for the recovery of the stamp duties under Section 309 Act VIII of 1859.

Jackson, J.—I concur generally in this judgment, and I express no decided opinion on the point raised by Mr. Graham, namely, that it is not requisite to connect the injury to the plaintiff with the precise irregularity established, the evidence in this case being sufficient to entitle the plaintiff to a verdict even if this necessity be conceded.

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The 7th February 1871.

Present:

The Hon'ble H. V. Bayley, *Judge.*

Act XI of 1859—Sale certificate—Separate proprietorship—Commissioner's order—Legal rights.

Case No. 114 of 1870.

*Application for review of judgment passed by the Hon'ble Justices H. V. Bayley and W. Markby, on the 1st June 1870, in Special Appeal No. 2927 of 1869.**

Ram Gobind Roy (Plaintiff) *Petitioner,*

versus

Syud Kushuffudoza and another (Defendants) *Opposite Party.*

Mr. J. W. B. Money and *Baboo Mohendro Lall Mitter* for Petitioner.

Baboo Ashootosh Dhur for Opposite Party.

Whatever is sold under Act XI of 1859 can only be sold for arrears of Government revenue, and, unless such arrears can be shewn to have been due, any sale under that law will be void, inoperative, and without legal effect, and the title supposed to be given by the sale certificate will be subject to such defect.

The order of a Commissioner requiring proprietors having separate jummas to pay, for the convenience of the Collector, their shares of revenue through one of their number, cannot override their legal right of separate proprietorship allowed under the settlement law and preserved by express record, or transform such right into a joint tenancy.

A Commissioner's amulnamah cannot destroy legal rights even if no protest or objection be made.

Bayley, J.—This is an application for review upon the following grounds :—

1*stly.*—When the entire estate of Bahadoorpore was hypothecated to Government for its revenue and liable to sale for its arrears, the petitioner, as purchaser at a sale for such arrears, is entitled to the possession of the entire estate by ejecting every person who may refuse to vacate the same, unless his holding is protected under any of the provisions of Act XI of 1859 ; and as the possession of the defendants is not so protected, petitioner is entitled to eject them.

2*ndly.*—That when the defendants were co-proprietors with Akbaroonissa of the estate Bahadoorpore, and equally liable with her for its revenue, the purchase of the same by the petitioner at a sale for non-payment for revenue has conveyed to him the rights of all the proprietors equally.

3*rdly.*—That the provisions of Clause 8 Section 10 Regulation VII of 1822 do not apply to the circumstances of the present case. Even if it be supposed for argument's sake to be so applicable, it did not save the holdings of the defendants from sale, as it was specially provided in the amulnamah that on default of revenue the same should be sold.

The main passages of my judgment of which this review is sought are these—

"The lakherajdar is not only a proprietor "of land, though paying in this case "through another, but actually recorded "here to have all his rights as such reserved, "though Government revenue for convenience (to Government) is paid by Akburoonissa as the largest proprietor.

"Again, the possession of the defendants "as lakherajdars, though paying revenue "through Akburoonissa, is one that could "not be disturbed by the plaintiff so long "as defendants pay the revenue assessed "upon them *under the settlement*, and there "recorded," And further on—"This, in "fact, is a case simply of Badshahee grants "of one large and a number of small rent-"free *proprietors*, who never had. or pretended to have, Puteedaree or Bycharee "rights. Akbaroonissa was one proprietor "and defendants are others. The mode of "paying revenue cannot make that man not "a proprietor who is recorded in a settlement record as a proprietor, and he can "only cease to be such when he does not "pay the revenue assessed by that settlement. In this case defendants do pay the "revenue, or at least it is not shown they "did not. They cannot lose their proprietory rights so secured and expressly received because Akbaroonissa defaulted. "To rule otherwise would render the reservation of proprietor's right in a settlement record a nullity."

The *first* of these grounds is precisely the same as was urged before us by the pleader who appeared in the original special appeal. The learned Counsel, Mr. Money, who *now* appears for the *first time*, merely amplifies the arguments that were addressed

* 14 W. R., p. 1.

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to us by invoking the terms of Sections 28 and 37 Act XI of 1859, that is to say, by urging that as the sale certificate describes the mehal as an area of 520 beegahs with a jumma of 508 rupees, nothing less than the whole mehal could pass to the applicant.

But we are not to read the sale certificate by itself. That is a deed certifying that a certain person is the purchaser of a certain mehal sold under Act XI of 1859. Now, the purview of the law and the terms of the sale notification clearly show that whatever is sold can only be sold under that law for arrears of Government revenue; and unless it can be shewn that arrears of Government revenue are due on account of the estates of the opposite party, any sale would be void, inoperative, and without any legal effect and in fact no sale; and consequently the title supposed to be given by the sale certificate must always be subject to such defect, and would not be an absolute title as against the law by which alone the sale and certificate can be operated.

This leads to the consideration of the *second* plea, which again is a repetition of the argument of Baboo Unnoda Pershad, that the 53 lakherajdars were *co-sharers* of Akburoonissa. Now, the revenue laws *require* that all *co-sharers* shall hold in co-tenancy under one and under the same right, and on one and the same record of that joint right, and as *co-proprietors* of one and the same number of the mehal. But, as observed in our original judgment, there was no such *co-proprietorship* in the present case and no such record of joint tenancy. On the contrary, each of the 53 lakherajdars is allowed separately that 50 per cent. malikana given only in recognition of the proprietory rights of each, and in addition to that, there is a most carefully recorded provision in the words "*malikee sutto bajaye rakhia*"—that each of the proprietor's rights in *their former position* are hereby preserved or secured. Now, there is no question that the former position was that of separate proprietors without any co-parceny whatever with Akburoonissa.

In the face, then, of this separate record of each proprietor's rights in the former state of such rights being reserved and secured, to say that they are joint rights and there is no separate reservation appears to me to be a contradiction in terms. It is true, as argued before us by the learned Counsel, Mr. Money, that the Commissioner's order was to the effect that these 53 parties having separate jummas should pay, for the convenience of the Collector, their shares of revenue through Akburoonissa. Such an administrative order, however, cannot override a legal right of separate proprietorship allowed under the settlement law and carefully preserved by an express record of the same, nor transform such right into a joint tenancy.

In short, I think these 53 parties are legally separate proprietors, and there is no such co-parcenary or joint liability attaching to them by the Sale Law, Act XI of 1859, or any other law, on account of Akburoonissa's personal default; and that therefore their property will not pass to the applicant.

It is said that there is no evidence to show that those parties did not default, that is to say, that they paid their quota of revenue through Akburoonissa as they were ordered to do, and that therefore their estates also passed under Akburoonissa's default. But it is for those who sell and for those who purchase making the averment of a joint tenancy to show that the sale is legal, that is, made under Act XI of 1859 on account of *arrears* of revenue due from estates paying revenue to Government. It is, therefore, not for the parties recorded in the settlement as *separate proprietors* to show that they are now joint or in default; and it is admitted that the applicant cannot show by any evidence on the record that the 53 separate proprietors defaulted to pay to Akburoonissa.

I, therefore, overrule both the above pleas.

It is then urged that the opposite parties should have protested and taken action under Section 11 of Act X of 1859 to protect their interests. But I think that the settlement and Regulations VII of 1822 and IX of 1825 protected their interests by treating them as separate proprietors, and the record of the settlement did the same.

Under such circumstances it is not for them to protest, but those who infringe the legal rights of such separate proprietors must take the consequences. Thus I hold a Commissioner's amulnamah cannot destroy legal rights even if no protest or objection be made. It requires express consent or proof of default to give legal effect to such a sale as this.

As to the *third* plea in reference to Byacharee or Puteedaree rights, my judgment

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is in consonance with the views of the learned Counsel. I may add that although Mr. Justice Markby took a somewhat different view on this point, his decision against the applicant did not rest on that Section.

This application for review is rejected with costs.

The 7th February 1871.

Present:

The Hon'ble L. S. Jackson and W. Ainslie, *Judges.*

Default—Review—Rehearing—Special Appeal — Pleader's neglect — Client's remedy.

Case No. 1681 of 1871.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 5th May 1870, *affirming a decision of the first Subordinate Judge of that District, dated the 14th December* 1869.

Buldeo Misser and another (Defendants) *Appellants,*

versus

Syud Ahmed Hossein (Plaintiff) *Respondent.*

Baboo Kishen Succa Mookerjee for Appellants.

Baboo Romesh Chunder Mitter for Respondent.

Where an appellant is refused postponement and his appeal is dismissed in his absence, the case must be looked upon as one of default even though the Judge looked into the facts with such light as he could obtain from other sources.

The appellant in such a case might apply for a rehearing or for a review of judgment, but is not entitled to a special appeal.

Semble—Where a pleader who has signed the memorandum of appeal refuses to argue the case on the ground of being unable and unprepared, he is liable to be either dealt with by the Court for neglect of duty or sued by the client for neglect of his interests.

Jackson, J.—The special appellant before us was the appellant in the Zillah Court, and his appeal being called on for hearing, it was found that one of his pleaders was absent from illness, and the other who was present in Court refused to proceed with the case. The appellant it seems had put in a petition asking for a postponement of the appeal, with which prayer the Judge did not think fit to comply, and therefore took up the case and dismissed the appeal. But before doing so, he looked into the facts of the case with such light as he could obtain from other sources, and came to the conclusion that the appeal was not a valid one, and he recites this fact in the judgment. But notwithstanding this, the appeal must be looked upon as having been dealt with on default.

Under the circumstances, the special appellant might have come before the Lower Appellate Court and asked either for a rehearing of the appeal or for a review of judgment, but we do not think he is entitled to come before us in special appeal.

It is stated that the pleader who refused to argue this case on the ground of being unable and unprepared is the same person who signed the memorandum of appeal, and who therefore presumably advised the bringing of the appeal. If that be so, it appears to us that he has failed in his duty, and that he is liable to be either dealt with by the Court for neglect of his duty as a pleader, or sued by the client for neglect of his interests.

We throw out this observation, not deciding any thing on the point, but merely as a warning to pleaders that they cannot with impunity neglect their duty, and as a suggestion to parties of the remedy which they have in the case of pleaders who so neglect their duty.

The appeal will be dismissed with costs.

The 7th February 1871.

Present:

The Hon'ble L. S. Jackson and W. Ainslie, *Judges.*

High Court—Privy Council.

Case No. 1698 of 1870.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 19*th May* 1870, *affirming a decision of the Subordinate Judge of that District, dated the* 18*th February* 1869.

Banee Pershad and others (Defendants) *Appellants,*

versus

Radha Pershad Singh (Plaintiff) *Respondent.*

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Baboo Kishen Succa Mookerjee for Appellants.

Baboo Romesh Chunder Mitter for Respondent.

Where the decision of a lower Court follows a view of the law taken by the High Court, and that view is set aside by a ruling of Her Majesty in Council, the judgment-creditor has a right to have his case re-tried upon that ruling.

Jackson, J.—THE decision of the lower Court in this case was given implicitly, following the judgment of the High Court in a similar case which had come before that Court in appeal; and it is now admitted that since the decision of the High Court, the law upon the subject has received an authoritative exposition from the Judicial Committee of the Privy Council, which is at variance with the view which had been taken for some years by this Court.

The defendant, in our opinion, is entitled to have his case considered upon the ruling arrived at by the Judicial Committee; and the decision of the Court below must, therefore, be set aside and the case must go back for re-trial.

The 8th February 1871.

Present:

The Hon'ble L. S. Jackson and W. Ainslie, *Judges.*

Damages—Onus probandi.

Case No. 1705 of 1870.

Special Appeal from a decision passed by the Officiating Judge of Tirhoot, dated the 1st June 1870, *reversing a decision of the Subordinate Judge of that District, dated the 26th February* 1871.

Gour Surun Doss and another (Plaintiffs) *Appellants,*

versus

Mr. W. Scrondey (Defendant) *Respondent.*

Mr. R. T. Allan and *Baboo Mohesh Chunder Chowdhry* for Appellants.

The Advocate General for Respondent.

A party holding a decree for a share of a mouzah brought a suit for possession and damages on the allegation that he found the defendant in occupation of a part of the land on which indigo plants were standing, and permitted him to continue for a time when the plants would be removed, defendant promising then to give over possession, but that when the time came defendant refused to give over possession and was still occupying the land.

HELD that it lay upon the plaintiff to show wrongful occupancy on the part of the defendant.

Jackson, J.—THE plaintiff in this suit recently recovered a decree for a 4 annas share of mouzah Titra Bishenpore. It seems that the party against whom he obtained this decree had let out the lands of the mouzah in ticca to the present defendant, Mr. Scrondy, and this suit is brought against Mr. Scrondy on the allegation that at the time of plaintiff being put into possession of his 4 annas share of the mouzah, he found the defendant in occupation of certain of the lands, amounting to 12 beegahs or thereabouts, on which indigo plant was then standing; and that the defendant obtained the plaintiff's leave to continue in occupation of the ground only for a certain time when the indigo plant would be removed, and promised then to give over possession, and that he refused to give over possession at the time named and is still continuing to occupy the land, whereby the plaintiff has been endamaged.

The Court of first instance, that of the Subordinate Judge, found in plaintiff's favor as to the agreement between the parties alleged by the plaintiff, and also as to the defendant's failure to carry out that agreement. Therefore the Subordinate Judge gave plaintiff a decree for possession of his land, and further ordered that he should recover from the defendant the rent that would have been payable on account of these lands, being of opinion that the plaintiff had failed to prove that he would have been entitled to occupy the land in question as *zeraat*, but that the lands were in fact *ryotee* lands.

Against this decree the defendant appealed to the Zillah Judge. The Zillah Judge in fact seems to have found that there was no such agreement or promise as alleged by the plaintiff; and, as I understand, although the wording of the judgment is not clear, he also found that the wrongful occupancy of the land by the defendant was not made out. He, therefore, ordered the decree of the lower Court to be reversed and the plaintiff's suit to be dismissed *in toto*.

It has been contended before us in special appeal by the plaintiff, in the first place, that

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in the circumstances, so far as they are admitted, it lay upon the defendant to prove that he had given up possession of the plaintiff's land. It was then argued that there had been a defect of investigation, the evidence having been improperly dealt with by the Lower Appellate Court; and we were asked either to remand the case for a new trial between the same parties, or to allow the plaint to be amended by adding as defendants the ryots in occupation of the ground.

It appears to me that we are not at liberty to comply with any of these prayers. I think it is quite clear that when the plaintiff sued the defendant for damages by reason of his wrongful occupancy of the plaintiff's laid, it lay upon the plaintiff to show that such occupation had taken place, and I think it is quite certain that, upon the finding of the Zillah Judge, we must take it that the plaintiff failed.

The shape which the plaintiff seems to have given his case was to set up a distinct and definite promise by the defendant to give up the land at a certain time and the non-delivery thereof at that time; and this, I have no doubt, would partly meet the difficulty in the plaintiff's way, for if it could be shown that the defendant had been allowed, as a matter of indulgence and permission, by the plaintiff to remain on the land up to a certain time, and that the occupancy of the land had continued as before at the expiration of that time, the Court would have been a considerable way on the road to finding that a wrongful possession had in fact continued. But the Zillah Judge expressly negatives any such assumption. He finds that the defendant did not bind himself to such an agreement and to such a promise.

I have had considerable difficulty in understanding throughout the argument why plaintiff brought this action, instead of an action of ejectment, against the defendant, or why he did not sue the ryots who were occupying the lands; and the solution of that question appears to be undoubtedly this, —that the plaintiff desired to obtain from the defendant damages on the basis of the actual outturn or profits of the land. Both Courts have found that he was not entitled to it. I think, therefore, that the plaintiff's suit was properly dismissed.

With advertence to the observation made by Baboo Mohesh Chunder Chowdhry, who followed Mr. Allan on behalf of the special appellant, I think it right to observe that, that portion of the Judge's decree which directs a memorandum to be sent to the Registrar of Assurances must of course not be taken as disaffirming the plaintiff's title to the land as owner. I think that if that observation remains on the record, no injury can arise to him and no reason can exist why the appeal should not be absolutely dismissed. It is, accordingly, dismissed with costs.

Ainslie, J.—I concur.

The 13th February 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Issues—Ex-parte trial—Sections 111 and 139, Code of Civil Procedure.

Case No. 1715 of 1870.

Special Appeal from a decision passed by the Officiating Additional Judge of Chittagong, dated the 2nd July 1870, *affirming a decision of the Moonsiff of Cox Bazaar, dated the 12th December* 1868.

Ameer Ali Sowdagur and others (Plaintiffs) *Appellants,*

versus

Imamooddeen and others (Defendants) *Respondents.*

Baboo Okhil Chunder Sein for Appellants.

Baboo Chunder Madhub Ghose for Respondents.

Issues are to be fixed under Section 188, Code of Civil Procedure, when both parties appear and the Court can ascertain from them what are the points upon which they are at issue. The Court is not bound to fix any issue when the defendant does not appear, but ought to proceed under Section 111 to hear the case *ex-parte.*

Jackson, J.—This was a suit in which the plaintiff claimed possession of 5 gundahs of land with wassilat, alleging that he held this land under an *itmamee* title and that the defendants Nos. 1 and 2 had wrongfully dispossessed him from the beginning of the year 1224. The plaintiff no where stated in his plaint what *itmamee* title he alluded to. The defendants did not appear, and upon their non-appearance the Moonsiff should have acted under Section 111 of the Civil Procedure Code and proceeded to hear the

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case *ex-parte*, that is, call upon the plaintiff to prove his case. The Moonsiff, however, instead of doing that, fixed an issue as to the amount of wassilat and sent an Ameen to make an enquiry about it. The Ameen made his report, and when the case came up for trial before the Moonsiff, he was not satisfied that the plaintiff had proved his title, and he accordingly dismissed the plaintiff's suit.

The plaintiff then appealed to the Judge. The ground of appeal to the Judge was that he had offered to give further evidence before the Moonsiff, but the Moonsiff had refused to take it. In this petition of appeal also, the plaintiff no where alludes to the *itmamee* title under which he claims the land. Upon the record before the Moonsiff there appears to have been nothing whatever to show that the plaintiff did offer to produce any further evidence or that the Moonsiff refused to take further evidence. On the contrary, even before the Appellate Court, the appellant's vakeel could not inform the Judge that any document existed to prove the plaintiff's right. The Judge held under those circumstances that there was nothing whatever to prove that the defendants were trespassers. And what is more remarkable as regards this title-deed is, that the lower Court has distinctly stated that before him it was not alleged that any documentary title existed. Before the Judge again the same fact is stated, that the plaintiff's vakeel was not aware that any documentary title of the plaintiff existed.

On special appeal to this Court, it is said that the plaintiff has been prejudiced by the fact that the Moonsiff fixed no issue on the question of title. It seems to me that the Moonsiff was not bound to fix any issue at all in this case. Issues are to be fixed under Section 139 of the Procedure Code when both parties appear; and when the Court after enquiry from them can ascertain what are the points upon which the parties are at issue, then the Court shall proceed to record the issues. But when the defendant does not appear, it is impossible to ascertain what are the points upon which the parties are at issue.

We are now told that the plaintiff's *itmamee* title under which he claimed was one which was already in contest between the same parties in another suit, and upon which the plaintiff has since obtained a decree. If this is the real case, it is most extraordinary that that fact was not mentioned either in the plaint or in the course of any of the proceedings in the first Court, or in the petition of appeal to the Judge or in any of the proceedings before the Judge. It looks very much as if the plaintiff had been lying by to ascertain what was the result of that other suit, and waiting to put forward what title he pleased according to the result of that suit. It has turned out that he gained his suit in that case, and therefore he now relies upon that *itmamee* title; but had he lost that suit in the Lower Appellate Courts, there is nothing to show that he would have relied upon that title. According to his own case, this is a very stale claim: he admits that for 6 or 7 years the defendants have been in possession—he gives no explanation as to how they got possession. This suit has been pending for two years and a half. It does not seem, therefore, to be a suit in which any indulgence ought to be shown to the plaintiff. We are asked to give him a re-trial of the case on payment of all costs. But we think that the defendants should not be harassed by any further proceedings. Both the Courts were quite right in holding that there was no evidence of the plaintiff's *itmamee* title, and they were therefore quite right in dismissing the plaintiff's suit.

We dismiss the appeal with costs.

Mookerjee, J.—I concur.

The 13th February 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Mahomedan Law—Will—Consent of heirs.

Case No. 1720 of 1870.

Special Appeal from a decision passed by the Officiating Additional Judge of Chittagong, dated the 22nd June 1870, *reversing a decision of the Subordinate Judge of that District, dated the 5th July* 1869.

Nusrut Ali and others (Defendants) *Appellants,*

versus

Zeiunnissa (Plaintiff) *Respondent.*

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Baboo Bhugobutty Churn Ghose for Appellants.

Baboo Kishen Succa Mookerjee for Respondent.

By Mahomedan Law the consent given by heirs to a testator's will before his death is no assent at all: to be valid, it must be given after the testator's death.

Jackson, J.—We think that the decision of the Additional Judge of Chittagong in this case must be set aside, and the case must be remanded to him for a fresh decision. The plaintiff brought this suit to recover possession of certain property, which she alleged she was entitled to partly as the heir of her mother, who was one of the heirs of Ali Hossein, and partly under a gift from her father of another portion of the share inherited by her mother from the same Ali Hossein. It appears that the defendants had set up a will of Ali Hossein, under which it was alleged that he had made a bequest of the whole of his property to certain religious purposes. The plaintiff is entitled to succeed only if this will is not genuine or if it is invalid. On the other hand, if the will is genuine and a valid will, the plaintiff's suit must be dismissed.

The first Court found that the will was genuine, and that it was made with the assent of the testator's heirs; and it also found that there was no sufficient evidence of the gift to the plaintiff by the plaintiff's father. It accordingly dismissed the plaintiff's suit with the exception of certain moveable property.

The plaintiff thereupon appealed to the Additional Judge. He gives no distinct opinion as to whether the will was really executed. But he finds that inasmuch as the wife of the testator did not assent to the will before the testator's death, the will is invalid even though there is some evidence to show that the wife had assented to it subsequent to the testator's death. He holds that such subsequent assent is not sufficient to validate the will. The Judge is wrong on this point of law. Baillie in his book on Mahomedan Law, page 614, points out that "a bequest "to a stranger is valid without the consent "of the heirs, but not beyond a third of the "estate, unless assented to by them *after* "the testator's death." He then goes on to say in the next sentence, alluding to this permission by the heirs and alluding to a bequest to an heir and to a stranger, that—"If "permitted by them, it is lawful; and if not "permitted by them, it is void, no regard "being had to a permission granted in the "lifetime of the testator, so that they may "afterwards retract."

The Hedaya also in page 470, Book 52, Chapter I, says that "where a person makes "a will in favour of part of his heirs, the "same rule holds as in the case of bequeathing "more than a third to a stranger; in other "words, the deed is not valid unless the "other heirs give their consent to the dis-"position after the death of the testator; "and their consent *previous* to his death "will have no effect."

The Judge is, therefore, wrong in finding against the validity of the will only on the ground that the consent was given after the death of the testator, because any assent given to the will before his death would be in fact no assent at all. The assent in order to be valid assent must be one given after the testator's death.

The case must, therefore, go back to the Judge for a fresh decision on the question as to how far the will is genuine and valid.

Costs of this appeal will form costs of the cause.

Mookerjee, J.—I concur.

The 13th February 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Widowed daughter—Reversioner.

Case No. 1790 of 1870.

Special appeal from a decision passed by the Officiating Judge of East Burdwan, dated the 2nd June 1870, *affirming a decision of the Moonsiff of that District, dated the 17th January* 1870.

Pooran Chunder Nundee and another (two of the Defendants) *Appellants,*

versus

Sreeshteedhur Chuckerbutty (Plaintiff) *Respondent.*

Baboos Ashootosh Dhur and *Tarucknath Sein* for Appellants.

Baboo Kalee Mohun Doss for Respondent.

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The possession in right of inheritance of a widowed daughter having sons alive is not adverse to a reversioner.

Kemp, J.—We must observe in this case that the judgment of the Judge is altogether unsatisfactory. He has given no reasons whatever for his decision; he has not noticed the points taken in appeal nor passed any decision on these points. We desire that in future he will be more careful and write his judgments with reference to Section 359 Act VIII of 1859.

The point taken in this special appeal is that the plaintiff's suit is barred, inasmuch as Bhowanee, the daughter of Unnopoorna, when the succession opened out to her, being a childless widow, had no right to inherit; and therefore her possession would be adverse to the plaintiff, and that the cause of action to the plaintiff arose on the death of Unnopoorna and his suit from that date is barred. There can be no doubt that the estate became vested in Bhowanee, and there is evidence to show that at the time of Unnopoorna's death, she, Bhowanee, had sons then alive; and therefore her possession in right of inheritance was a possession not adverse to the plaintiff, and his suit is not barred. We think that having regard to the fact that the defendant filed a genealogical table found by both the lower Courts to be false, and also to the fact that there is evidence showing that Bhowanee had sons alive when the succession opened out to her, the suit of the plaintiff has been rightly decreed.

We dismiss the special appeal with costs.

The 13th February 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Arrears of rent—Liability to enhancement.

Case No. 1836 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 15th July 1870, affirming a decision of the Deputy Collector of that District, dated the 26th February 1870.

Surubjeet Mundul and another (two of the Defendants) *Appellants,*

versus

Mr. Misselback (Plaintiff) *Respondent.*

Baboo Romesh Chunder Mitter for Appellants.

Mr. R. E. Twidale and *Baboo Mohesh Chunder Chowdhry* for Respondent.

In a suit for arrears of rent at an enhanced rate, where a Judge finds that plaintiff is not entitled to the only relief asked for, he has no right to declare defendant's tenure liable to enhancement prospectively.

Mitter, J.—There is no evidence in this case to prove that the rate paid by the defendant, special appellant, is below the rate prevailing amongst the same class of ryots. The Judge has laid great stress upon the jummabundee papers of 1273, and upon what he calls a mass of kubooleuts produced by the plaintiff's agent. But in the first place these papers have not been duly proved, as they ought to have been; and in the next place it is impossible to make out from them that the defendant is a ryot of the same class with the parties mentioned therein. Such being the case, the plaintiff's suit, which was for arrears of rent at enhanced rate for the year 1274 only, ought to have been dismissed at once. Instead of that, the Judge goes on to pass a decree declaring that the defendant's tenure is liable to enhancement, and he has actually fixed the rate at which the defendant shall have to pay rent in the year 1278, which has not yet come.

We think that the Judge had no right to make any declaration regarding the liability of the defendant's tenure to enhancement prospectively, or to give plaintiff a decree for enhanced rent for the future, if he found that the plaintiff was not entitled to the only relief which he asked for in the plaint, *viz.*, a decree for arrears of rent at enhanced rate for the year 1274.

We, therefore, reverse the decisions of both the Courts below, and dismiss the plaintiff's suit with all costs.

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The 13th February 1871.

Present :

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Mourussee jote—Accretions.

Case No. 1846 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Purneah, dated the 11th June 1870, *affirming a decision of the Moonsiff of Arariah, dated the 1st January* 1870.

Attimoollah (Plaintiff) *Appellant,*

versus.

Shaikh Saheboollah and others (Defendants) *Respondents.*

Moonshee Mahomed Yusoof for Appellant.

Mr. C. Gregory for Respondents.

A mourussee jotedar with a right of occupancy has a right to lands which accrete to his jote, and the zemindar cannot take them away and settle them with other parties.

Bayley, J.—THE plaintiff in this case sued for 31 beegahs of land. In the plaint he alleged that those lands were within his jote, and that in a certain pottah given by the zemindar they were mentioned as gangbhuratee.

The defendant's case substantially was that the lands in suit accreted to his mourussee jote, and consequently he was entitled to have them as part of his jote. There may have been some little indistinctness in the answer given by the defendant's pleader to the question put to him, but that indistinctness was not the fault of the defendant but of the Court. The question put was as to how these lands were the defendant's, and whether plaintiff had possession thereof and was dispossessed by the defendant. The answer in substance was that the lands in dispute were lands appertaining by right to the defendant's mourussee kudimee jote, that the plaintiff never had possession thereof and the defendant never dispossessed him.

The issues laid down by the first Court were—

1*stly.*—Whether the disputed land was settled with plaintiff under the pottah of 29th Magh 1274, Moolkee, as alleged by him; and whether the principal defendants forcibly dispossessed him on the 25th Kartick 1275, Moolkee.

2*ndly*—Whether the disputed land is the exclusive right of the principal defendants, and is held by them for a long time from the time of their ancestors.

The first Court found in favour of the defendants and dismissed the plaintiff's suit.

The Lower Appellate Court affirmed the judgment of the first Court, and the special appeal has been preferred before us on three grounds.

1*stly.*—That the Lower Appellate Court should have tried whether the 31 beegahs were included within the 41 beegahs which the defendant alleged to be his mourusee jote.

2*ndly.*—That the defendant's claim was on the ground of re-formation, and in the face of this the Lower Appellate Court was wrong in deciding in his favor on the ground of accretion, and that even if it were an accretion, the zemindar had a right to settle the lands with whomsoever he pleased.

3*rdly.*—That under the very terms of the pottah the plaintiff's title to the land was proved.

Now the finding of the Lower Appellate Court in this case is, that the plaintiff failed to prove by any reliable evidence that the disputed land was formerly his land which had been washed away by the river, and that on re-formation in 1272 the zemindar settled it temporarily till 1274 with the defendants.

The Lower Appellate Court also finds upon the evidence on the record that the disputed land is an accretion to the defendant's jote which is ancestral, and respecting which the defendants had a right of occupancy, and that the accreted lands were what had in part diluviated. In this view, the Lower Appellate Court held that the defendant was entitled to the disputed lands and dismissed the plaintiff's appeal.

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We think the judgment of the Lower Appellate Court is correct in law. There is in fact no new case made by the Lower Appellate Court. As stated above, the defendant's case all along was that the disputed 31 beegahs were part of his jote of 41 beegahs; that these lands had accreted to his jote of which he was a mourussee holder, and therefore it became simply a matter of evidence as to whether, as the defendant stated, the lands were accretions to his mourussee jote, or as the plaintiff alleged they fell within the four corners of his pottah of 1275. We see no error in law in the finding of fact by the Lower Appellate Court upon the evidence that the lands were accretions to the defendant's mourussee jote; and that finding of itself settles the point that in such cases the jotedar with right of occupancy has a right to the lands by virtue of their being accretions to his jote, and that the zemindar has no right to take them away from him and settle them with parties other than the owners of the parent jote: in other words, the zemindar must adhere to the legal principles of accretion connected with the jotedar's rights. It is only necessary to add that the plaintiff has failed to prove his allegation of re-formation on the site of his original jote.

We therefore dismiss the special appeal with costs.

The 13th February 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Civil Procedure Code—Day of hearing — Documentary evidence — Government records—Court of Wards.

Special Appeals from a decision passed by the Subordinate Judge of Purneah, dated the 16th June 1870, affirming a decision of the Moonsiff of that District, dated the 6th February 1870.

Case No. 2015 of 1870.

Sobbee Jha (Plaintiff) *Appellant,*

versus

Shosheenath Jha and others (Defendants) *Respondents.*

Baboo Tarucknath Sein for Appellants.

Baboo Kalee Kishen Sein for Respondents.

Case No. 2016 of 1870.

Sobbee Jha and another (two of the Defendants) *Appellants,*

versus

Shosheenath Jha and another (Plaintiffs) *Respondents.*

The great object of the Procedure Code in requiring a day to be fixed for the hearing of a case and all the evidence to be adduced on that day, is that parties may thus be confronted with each other and the whole evidence on either side be at one and the same time before the Court. Where a party fails to produce his documents at the proper time, a Court commits no error in law in refusing to send for them subsequently, if not satisfied that they are necessary for the ends of justice.

Where records from a Government office are required as evidence, it is for the Court to send for them; but papers required from a Court of Wards, which is not a Government office, must be obtained by the party who needs them, by means of a summons on the proper officer.

Bayley, J.—We think that both these special appeals which, it is admitted, will be governed by one and the same decision, must be dismissed with costs.

The only ground urged is that the first Court declined to send for certain papers, being jumma-khuruch and hustobood papers for 1270 and 1271, from the Court of Wards, agreeably to a petition, dated 20th January 1870, filed by the special appellant.

It appears that issues were settled on the 6th December. The 13th December was fixed for the parties to adduce their evidence. On that date all the evidence was adduced apparently, with the exception of the papers named above.

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On the special appellant's petition of the 20th January 1870, the order recorded on the 9th February was that as the Putwaree had already given his evidence in the matter of the collections, any order on the petition was unnecessary.

Both the Courts below having given the plaintiff a decree, the defendant now comes up in special appeal before us.

Now the great object of the Procedure Code for fixing a day for the hearing and requiring all the evidence to be adduced on that day was that parties might thus be confronted with each other and the whole evidence on either side be at one and the same time before the Court. We cannot say, the day for hearing having been duly fixed, that there was any error in law in the first Court's refusal to send for the papers after the evidence in the case had been recorded. Moreover, it is clear that it is not for the Court to get evidence from a Court of Wards which is not a Government office in the ordinary sense of the term. A Government office has its records under the charge of a Government Officer, and is bound to keep them under its custody as Government property unless its receives a precept from a Civil Court. Thus in such cases it is for the Court itself to send for the records of Government when it considers it necessary. In the present case, it was the duty of the special appellant to serve the proper Officer of the Court of Wards with a summons calling upon him to produce such papers as the special appellant thought necessary to prove his case. In addition to that, it has to be remarked that the papers relied on by the special appellant even when called for would be only corroborative evidence. Without any direct evidence of the fact that the rent had been paid by Bhimroo Misser as ijaradar, those papers would not be direct evidence in the case. But be that as it may, the special appellant not having followed the course indicated by the law in producing his evidence at the proper time, and not having satisfied the Court that for the ends of justice the papers ought to have been sent for subsequently, we think there is no ground for us to interfere in this special appeal.

We, therefore, dismiss these special appeals with costs.

The 14th February 1871.

Present:

The Hon'ble L. S. Jackson and W. Ainslie, *Judges.*

Issues—Procedure—Section 141, Code of Civil Procedure.

Case No. 1638 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 11th May 1870, *affirming a decision of the Moonsiff of Naraingunge, dated the 24th December* 1869.

Kamul Kaminee Dossee (Plaintiff) *Appellant,*

versus

Obhoy Churn Ghose and others (Defendants) *Respondents.*

Mr. Mun Mohun Ghose for Appellant.

Baboo Kalee Mohun Doss for Respondents.

Where a Court, shortly before decision recorded a proceeding declaring its intention to frame additional issues, and reserved the actual framing of the issues for the time of giving judgment, its procedure was held not to be warranted by Section 141 of the Code of Civil Procedure.

Jackson, J.—In this case it seems quite clear that there has been a mis-trial.

The plaintiff, a Hindoo married woman, brought a suit to recover possession of certain immoveable property which she alleged to have belonged to her mother, Nubo Doorgah, who died in 1264. She alleged that she herself was a minor unmarried at the time of her mother's decease.

The defendants' written statement showed that they claimed to hold this property under a conveyance executed, on face of it, by the husband of Nubo Doorgah under a power from her; but the written statement also contained allegations that went to show that the property had originally belonged to the grandfather of the plaintiff in the male line; that this property had been mortgaged by him, but that consequently the mortgagee had re-conveyed the property to the mother; and that the mother, her husband, and the husband's father, had lived together and jointly maintained themselves from this property.

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The Moonsiff, before whom the case originally came, framed only two issues, one of which was whether the suit had been properly valued, and the second, whether the mookhtearnamah set up by the defendant was really made by Nubo Doorgah; but before the case was finally determined, another Moonsiff succeeded the first Moonsiff; and after the whole of the witnesses had been examined on the 23rd December, that Moonsiff recorded a proceeding in which he stated that it appeared to him necessary to alter the issues, and he declared therefore that the issues were to be altered, and then on the following day, the 24th December, he gave judgment in which an entirely new issue is stated, namely, whether the property really belonged to Nubo Doorgah, the plaintiff's mother, or was the property of the husband held in benamee.

Now, we have no evidence before us to show how this announcement was received by the parties in the Moonsiff's Court, but it was made one of the grounds of appeal in the memorandum of regular appeal in the Court of the Judge. They complained that this issue had been framed at the last moment and had taken them by surprise, and that no opportunity had been given them of offering evidence upon it.

The objection appears to have been overruled by the Subordinate Judge, who looked at the evidence and considered that the plaintiffs had offered evidence upon this point, and that it was not necessary to give them any further opportunity of so doing. The same objection is pressed here in special appeal.

I think it is impossible to do otherwise than order a new trial in this case. It has been contended for the respondent that the Court of first instance had a discretion under Section 141 of the Code of Civil Procedure to amend the issues or frame additional issues at any time before decision of the case on such terms as to it shall seem fit.

No doubt, the Court had such discretion, but that which it did was, not to amend the issues or frame additional issues on such terms as it thought fit, but, shortly before the decision to record a proceeding declaring its intention to frame additional issues, and the actual framing of the additional issue was reserved for the time of giving judgment.

This it is quite clear cannot be supported. It was open to the Moonsiff, if he thought that a material issue remained, to frame that issue, and thereupon, upon such terms as to costs and the like as it may think fit, to fix a day for the further hearing of the case upon that issue, so that the parties should have an opportunity of adducing evidence upon it, if necessary. This appears to have been altogether neglected. The case must, therefore, go back to the Court of first instance in order that this procedure may be observed. That being done, the Court will have the power of looking at the case on all the points, and considering the whole of the evidence and coming to a fresh decision.

Ainslie, J.—I concur.

The 14th February 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Right of occupancy—Section 6 Act X of 1859—Transfers.

Case No. 1731 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Dacca, dated the 20*th May* 1870, *affirming a decision of the Deputy Collector of Moonsheegunge, dated the* 11*th August* 1869.

Tara Pershad Roy and others (Defendants) *Appellants,*

versus

Soorjo Kant Acharjee Chowdhry (Plaintiff) *Respondent.*

Baboos Chunder Madhub Ghose and *Romesh Chunder Mitter* for Appellants.

Baboos Hem Chunder Banerjee and *Sreenath Doss* for Respondent.

The right of occupancy stated in Section 6 Act X of 1859 cannot be transferred except as laid down in that Act. When a jote is transferred even with the consent of the zemindar, the transferree merely acquires a new jote on the terms on which the old tenure was held but he is not entitled to make up his right of occupancy by adding the time during which his predecessor held it;

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Jackson, J.—THIS was a suit under Clause 6 Section 23 Act X of 1859. The plaintiff, alleging himself to be the owner of a tenure consisting of 69 beegahs and odd cottahs in the zemindary of the defendants, stated that he had been illegally dispossessed from that tenure by the defendants on the 27th Choit 1274, and he therefore sought to recover possession. The defendants in their answer denied that the plaintiff had been dispossessed in Choit 1274, denied that he had been in possession for three years previous to that time, and urged that consequently the Law of Limitation barred the suit: they urged also that the suit would not lie under Act X of 1859. And the plaintiff having alleged that he held a right of occupancy in this land, the defendants contended that no such right existed in him.

Both the lower Courts have found in favor of the plaintiff on the question of limitation: they have found that he was in possession. The Lower Appellate Court concurring in the decision of the first Court, has found that the plaintiff was dispossessed in Choit 1274; and on the question of the right of occupancy of the plaintiff, the Appellate Court seems to be of opinion that whether he held a right of occupancy or not, still the transfer of the jote to the present plaintiff was a legal transfer, and consequently the plaintiff was entitled to recover.

The first point taken before us in special appeal is, that the Lower Appellate Court has not properly decided the question of limitation. I certainly think that it would be better if the Appellate Court had given its own reasons for coming to the conclusion at which it has arrived. Looking back, however, to the facts found by the Deputy Collector, there seems to have been ample evidence to the effect that the plaintiff had been in possession and that he was dispossessed on the date alleged. The first Court goes very carefully into the evidence on the point, and considers that the dispossession did take place on the date alleged. There is also the fact that a few years before the alleged dispossession, there had been an Act IV decree passed in favor of the plaintiff, and that the plaintiff had actually sought to be put in possession, and orders had been passed to put him in possession. Coupling this fact with the evidence of dispossession subsequently, it seems to me that the Courts were of opinion that the plaintiff had been in possession until he was dispossessed as alleged, and that there was ample evidence to support that finding.

The second point which has been taken before us is that, even taking the plaintiff's statements as detailed in his plaint to be correct, the plaintiff cannot obtain a decree; that it is for the plaintiff who brings a suit of this sort to show that his tenancy was still subsisting when he was dispossessed. The plaintiff claims his tenancy to be subsisting solely on one ground, namely, that he held a right of occupancy: he does not claim to hold under any terminable lease the term of which has not expired; he does not claim for his tenure any particular rights; his claim is that he holds a right of occupancy. It is argued before us for the defendant that this right of occupancy did not exist, and for the plaintiff that the plaintiff had made out such a right. We are not satisfied upon this point that the plaintiff has any right of occupancy. The plaintiff's allegation is that this tenure was formerly held by Mr. Lamb, that he purchased it from Mr. Lamb in the year 1267, and that he was dispossessed in the year 1274. It is admitted then that between the year 1267 and 1274, he himself could not have acquired a right of occupancy, but that right is claimed as having been obtained by transfer from Mr. Lamb. It is argued that as the zemindar consented to the transfer of the rights which Mr. Lamb possessed to the present plaintiff, the conduct of the zemindar in allowing the sale to take place was sufficient evidence of his consent to the transfer of the right of occupancy as well as of the jote. We think that the right of occupancy stated in Section 6 Act X of 1859, is not a right which can be transferred except as laid down in the Act. It is a right which is attended with certain privileges which are stated in Act X of 1859; those privileges can only be acquired under the distinct circumstances stated in that Act. There is nothing to show that in the original jote, which was stated to have been held by Mr. Lamb, there were any such terms as would make the tenure a perpetual one. As far as we can see it was only a yearly holding. Even if the defendant consented to the transfer, it seems to me that the plaintiff thereby merely acquired a new jote on the same terms as the original tenure was held. He might in time acquire a right of occupancy, but he is not entitled to make up his right of occupancy to add the time during which his predecessor, Mr. Lamb, held it.

There is one decision of this Court quoted against this view of the law, which is to be

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found in V Weekly Reporter, page 55, Act X Rulings ; and there is no doubt it is to some extent in point. There is an allusion there to some consent to the transfer having been given ; but whether it was a direct consent, or one presumed only from the receipt of rent, is not very clear upon the facts. In this case now before us there was no direct consent, and consent is only presumed from the receipt of rent by some shareholders of the estate. The two cases may therefore not have been analogous.

There is a subsequent Full Bench decision of this Court to be found in VII Weekly Reporter, page 529, which to some extent sets aside that former decision. It may be said that that also is not directly in point. It was there contended that every tenure in which a right of occupancy was acquired became a transferable tenure ; but it was held that "there is nothing in Section 6 Act "X of 1859 which shows that it was the "intention of the Legislature to alter the "nature of a jote and to convert a non-trans-"ferable jote into a transferable one, merely "because a ryot who held it for 12 years "had thereby gained a right of occupancy "under Act X of 1859."

I am of opinion, then, that the plaintiff has not acquired in this jote by his 7 years holding or by the transfer from Mr. Lamb any right of occupancy, and the plaintiff's tenure must, therefore, be held to be a yearly tenure subsisting from year to year, and he is liable accordingly to be dispossessed at the end of each year when his tenure is liable to be determined.

There was at one time some question whether a Court should, in trying a case under Clause 6 Section 23 Act X of 1859, go into the question as to the plaintiff's tenure being still subsisting or not. But this has been set at rest by the Full Bench Decision of this Court to be found in IX Weekly Reporter, page 513. It was there held in a suit under Clause 6 Section 23 Act X of 1869, where a ryot alleged that he had been illegally ejected, it was a proper issue for determination whether the tenancy was at an end or not ; "the question is open as "to whether the tenancy was at an end or "not ; and if at an end, the ryot must fail "in his suit."

Looking then to the plaintiff's case as regards his own tenancy, it seems to us that he has altogether failed to make out his right of occupancy. He was, therefore, only a yearly tenant. His own statement that he was dispossessed at the end of the year is, under these circumstances, sufficient to throw him out of Court. The dispossession was on the 27th Choit 1274. It is true that two or three days existed beyond that up to the end of the year. But we think in fact that the dispossession was at the end of the year, and at a time when the defendant was entitled to dispossess him, because his yearly tenure has ceased. The plaintiff, therefore, upon the facts stated in the plaint and upon the facts found in this case, cannot, we think, recover his jote. The only point upon which there might be some case made out for him is, if the original jote was a perpetual jote. But there is no allegation of that sort. It is only alleged here that the plaintiff has a right of occupancy and that the jote is transferable. That it is transferable with the consent of the zemindar is undoubted, and such consent has been made out in this case ; but there is no evidence and indeed no allegation that the original tenure of Mr. Lamb was of a perpetual nature.

We reverse the decisions of the lower Courts, and dismiss the plaintiff's suit with costs in all the Courts.

Mookerjee, J.—I concur in dismissing the suit of the plaintiff with costs.

The 14th February 1871.

Present :

The Hon'ble L. S. Jackson and W. Ainslie, *Judges.*

Water-course—Rights.

Case No. 1752 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Gya, dated the 30th May 1870, *reversing a decision of the Moonsiff of that District, dated the 29th September* 1869.

Nund Kishore Singh and others (Defendants) *Appellants,*

versus

Lalla Burjun Lall (Plaintiff) *Respondent.*

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Mr. R. E. Twidale for Appellants.

Baboo Nil Madhub Sein for Respondent.

In a suit to compel the filling up of a *pyne* which ran over plaintiff's land and conveyed water to defendant's estate, where defendant denied having done any thing beyond his own rights or anything which was injurious to the plaintiff, plaintiff obtained a decree.

HELD that before giving judgment for plaintiff, the Court ought to have shewn in what manner his right had been infringed, and then to give a definite decree as to what defendant was bound to do.

Jackson, J.—WE think that the decision of the Lower Appellate Court as it stands cannot be supported.

The plaintiff's suit was to compel the filling up a certain pyne which ran over the plaintiff's land for the purpose of conveying water to the defendant's estate, and in the course of that pyne was a certain *dangah* through which the water had been accustomed to flow out of the pyne on to the plaintiff's land.

The defendant denied that he had done any thing beyond his own rights or injurious to the plaintiff; he alleged that he had merely repaired the bed of the *pyne* in order that the water should flow along it in the accustomed way.

The Moonsiff went fully into the case, and considered that the evidence of the witnesses for the plaintiff was discrepant and contradictory and that the plaintiff had not made out the right that he claimed, and also that he had sustained no damage. He, therefore, dismissed the suit.

The Subordinate Judge on appeal has very summarily overruled the opinion of the Moonsiff upon the evidence, and has declared that the survey map produced by the plaintiff conclusively establishes that he was entitled to have his land irrigated from the defendant's *pyne*; and although he does not show in what precise way plaintiff has been endamaged, he orders that the defendant is to fill up the *pyne* again as it was formerly; or, as an alternative, that if the defendant should open the plaintiff's *dangah* in such a manner as to allow the flow of water through it, so that the plaintiff should not sustain any damage, then the plaintiff is to be content therewith.

Now, that is a decree impossible to be executed, because a contest would of course arise when it came to the plaintiff availing himself of it, as to what depth the pyne had been: and it is noticeable that the Moonsiff shows the evidence of the witnesses on this point to have been very contradictory, some saying that it was of the depth of a cubit, some of a yard, some that it came up to a man's breast, and others the full height of a man, and so on. I think it clear that the Court below, before giving judgment for the plaintiff, ought to have shown in what manner the right of the plaintiff had been infringed; and having found on that point, it should then have given a definite decree as to what defendant was bound to do, that is to say, to define what the depth of the defendant's *pyne* had been relatively to plaintiff's *dangah*, and to what height it was necessary to restore it again.

I think, therefore, the case must go back to the Subordinate Judge in order that he may determine these points, and in doing so to re-consider the evidence and attribute, at any rate, to the judgment of the Moonsiff that weight which it fairly deserves from the circumstance of his having had the witnesses before him, and having gone with great care and attention into the facts of the case.

Ainslie, J.—I concur.

The 14th February 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Section 246, Code of Civil Procedure—Collusion—Onus probandi—Conveyance by judgment-debtor—Attachment.

Case No. 1858 of 1870.

Special Appeal from a decision passed by the Additional Judge of Hooghly, dated the 16th July 1870, reversing a decision of the Moonsiff of Serampore, dated the 23rd February 1870.

Digumburee Dossee (one of the Defendants) *Appellant,*

versus

Banee Madhub Ghose (Plaintiff) *Respondent.*

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Baboos Bhuggobutty Churn Ghose and *Kalee Prosunno Roy* for Appellant.

Baboos Sham Lall Mitter and *Mohendro Lall Seal* for Respondent.

If a plaintiff coming into Court under Section 246 of the Code of Civil Procedure to set aside an attachment and sale shows, in proof of his title, that a deed of sale has been executed in his favor by the judgment-debtors, and that consideration-money has passed and possession has been given him, he starts his case sufficiently. If the defendant alleges notwithstanding that the sale was collusive and fictitious, it is for him to show that it was so.

It is not illegal for a judgment-debtor to dispose of all his property before attachment, provided the transaction is an *actual* conveyance and not merely nominal.

Glover, J.—THE defendant No. 1 in this case, Digamburee Dossee, got a decree against the other two defendants on the original side of the High Court, and in execution attached certain properties as belonging to the judgment-debtors, whereupon the plaintiff put in a petition under Section 246 of the Code of Civil Procedure, claiming the property under a bill of sale said to have been executed by the judgment-debtors. This petition was rejected on the 28th of April 1868, and the property brought to sale in satisfaction of the decree. Upon this the plaintiff brought a regular suit to establish his title both as against the decree-holder, that is, the present defendant No. 1, and as against the auction-purchaser. It appears, however, that the only party upon whom summons was served was the auction-purchaser, and the result of the litigation was that the plaintiff got a decree as against the auction-purchaser only. At the same time the sale was quashed for irregularity. On the property being thus released, the judgment-creditor again attached it in satisfaction of her original decree against the defendants Nos. 2 and 3. The plaintiff again intervened, claiming the property on the same ground as he did before, namely, by purchase from the defendants. His claim was again disallowed, and he brought a fresh suit (the present one) this time as against the decree-holder.

The defence is that the suit is barred by limitation, not having been brought within one year from the 28th of April 1868; and second, that the sale to the plaintiff was collusive and fraudulent, made only a few days before the attachment.

The first Court held that the suit was not barred, but on the merits dismissed the plaintiff's case, finding that the sale was collusive.

The Judge on appeal reversed that decision, holding that there was no proof that the sale of the property which was proved to have been made was a collusive transaction, although there might be suspicious circumstances arising from the admitted connection between the parties.

In special appeal it is contended that the Judge placed the onus improperly on the defendants, that it was for the plaintiff to prove that the sale to him was genuine, and that in coming to his decision the Judge overlooked all the various circumstances which swayed the judgment of the first Court, and did not give weight to the various presumptions which induced the Moonsiff to hold that the sale was collusive and fraudulent.

As regards the onus, it seems to us that the onus was not on the plaintiff but on the defendant. The plaintiff coming into Court under Section 246 to set aside an attachment and sale, was bound, no doubt, to prove his own title; and this he could only prove by showing that there had been a sale-document executed, that possession had been given to him by the vendor, and that the consideration of that sale had passed. *Primâ facie* this was a sufficient starting of the plaintiff's case, and if the defendant wished to show that notwithstanding that the sale had been made (as both the lower Courts have found on the evidence that it was made) that sale was collusive and fictitious, it was for the defendant to show that it was so.

A great deal has been made in the course of the argument of the fact that the vendor and the vendee are relatives, and that the judgment-debtor has successfully contrived to get rid of the whole of his property to one party or the other, so as entirely to defeat his judgment-creditors; and that this sale in particular was made only within 5 days of the attachment by the judgment-creditor, defendant. It may very well be that the judgment-debtor did dispose of all his property with the intention of keeping his judgment-creditors out of their money, but if he did *actually* dispose of all his property and if he did so before there was any attachment upon that property, however immoral his conduct may have been, it was not illegal. To make a transaction of this sort illegal, it would be necessary for the defendant to show that the alleged conveyance was a nominal one only, and that the

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judgment-debtor, although he pretended to sell, did in fact retain possession of the property himself. On this point it has been found by the Judge that the defendant has failed to prove that the judgment-debtor, and not the plaintiff, was in actual possession of the property. Here again it is said that the onus has been wrongly placed, and that it was not for the defendant to show that the judgment-debtor was in possession. For the same reasons given above, it appears to us that, under the circumstances of this case, the onus was on the defendant, and that the Judge was right in so placing it.

We have been referred in the course of the argument to a decision published at page 422 Volume XI Weekly Reporter, in the case of Mohima Chunder Koondoo *versus* Noorooddeen and another, to show that where there is an allegation of illegality, it is for the plaintiff to prove the illegality. But that case has nothing to do with the present one. That was a suit to set aside a summary order under Section 246 on the ground that the summary order was illegal, but here there is no question as to the legality or otherwise of the summary order; the only question is whether the sale was actually made at a time when the judgment-debtor had still the right to convey, or not.

There seem, therefore, to be no grounds for interfering with the decision of the Court below, and, this special appeal must be dismissed with costs.

The 14th February 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Agent's evidence—Enhancement of rent—Excess land—Section 4 Act X. 1859.

Cases Nos. 1904 to 1908 of 1870 under Act X of 1859.

Special Appeals from a decision passed by the Judge of Bhaugulpore, dated the 6th June 1870, *reversing a decision of the Deputy Collector of Moodhapoora, dated the 26th November* 1869.

Mr. Richard DeCourcy (Plaintiff) *Appellant,*

versus

Meghnath Jha and others (Defendants) *Respondents.*

Mr. R. T. Allan and *Baboo Khettur Mohun Mookerjee* for Appellant.

No one for Respondents.

The evidence of a defendant's agent in the absence of defendant's own deposition though not full and complete is legal evidence.

The rent of a tenure protected from enhancement under the provisions of Section 4 Act X of 1859 cannot be increased on the ground of excess land.

Mitter, J.—This was a suit for arrears of rent at enhanced rates.

The Lower Appellate Court has found that the tenure held by the defendant is protected from enhancement under the provisions of Section 4 Act X of 1859.

It is urged in special appeal that the only evidence to prove the farkhuttees and dakhilahs produced by the defendant consists of the deposition of his karpurdauz or agent, and that this evidence ought not to have been accepted by the Judge as good and sufficient in the absence of the depositions of the defendant himself.

We are of opinion that this objection is not tenable. Although the evidence of the defendant's karpurdauz is not full and complete, there can be no doubt whatever that it was legal evidence. He produces the dakhilahs and farkhutees, and says they were the dakhilahs and farkhutees obtained by his principal from the previous owners of the land. What means of knowledge the witness possessed does not appear on the face of his depositions, but if there was any doubt to be cleared upon this point, it was open to, and the duty of, the plaintiff to cross-examine the witnesses on the matter, and as he did not choose to do so, we cannot hold that the Judge has committed an error in law in believing that evidence. We wish further to remark that a strong corroboration of this evidence is afforded by the papers filed by the plaintiff himself; and although the Deputy Collector came to a different conclusion from that arrived at by the Lower Appellate Court, he was obliged to admit that the jummabundee papers put in by the plaintiff himself did not show much variation in the rent payable by the defendant.

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The next objection relates to excess lands. With regard to these lands, the Judge held that the plaintiff has failed to show that he ever received or collected any rent from the defendant on account of them. But be that as it may, it is quite clear that the rent of the original tenure held by the defendant, which tenure has been expressly found by the Judge to be protected from enhancement, cannot be altered or increased on the ground of any excess lands. If those excess lands were included within the original tenure from the beginning, the plaintiff's claim for assessment of those lands must share the same fate as his claim for the enhancement of the rent of the original tenure, for whatever quantity of land might be in the possession of the defendant, if he has been paying at a uniform rate for those lands from the time of the permanent settlement. the plaintiff's claim for enhancement of rent must fall to the ground under the express provisions of Section 4. If, on the other hand, the so-called excess lands have been unjustly taken possession of by the defendant subsequent to the creation of the original tenure, the plaintiff cannot maintain *this* action in the Revenue Court without proving that the relation of landlord and tenant exists between him and the defendant with regard to those lands; for then his only remedy would be to sue the defendant in the Civil Court, either for ejectment as a trespasser or for use and occupation. The view taken by us is fully supported by a judgment delivered by the late Chief Justice in the case of Roushun Bibee, reported at page 57 Act X Rulings Volume VI Weekly Reporter. That there was a mourosee pottah in that case does not, in our opinion, make any difference whatever. Whether the original tenure is covered by a mourosee pottah, or it is protected from enhancement under the provisions of Section 4, the consequenees would be precisely the same; for to make any addition to the rent payable on account of the lands so protected on the ground that the defendant has taken possession of other lands which were not originally leased to him would be in fact to destroy the permanent mokururee tenure which the law has given to him. It was for plaintiff to rebut the presumption under Section 4, if he could, by showing a variation; but this he did not do, and there is nothing to show that the agreement between the parties was for the payment of so much perbeegah.

For the above reasons we modify the decision of the Lower Appellate Court, by awarding to the plaintiff a decree for the amount admitted by the defendant to be due from him.

The result of our decision is that a decree will be entered in the plaintiff's favor for rupees 6-10 annas in special appeal No. 1904; for rupees 5-11 annas in special appeal No. 1905; for rupees 2-4½ annas in special appeal No. 1907; and for rupees 11-3 annas in special appeal No. 1908, the plaintiffs paying all the costs incurred by the defendants in the lower Courts, but no costs in this Court as the respondent did not appear. Special appeal No. 1906 should be dismissed with costs.

The 15th February 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Attachment — Judgment-creditor's claims—Judgment-debtor's right.

Case No. 425 of 1870.

Miscellaneous Appeal from an order passed by the Judicial Commissioner of Chota-Nagpore, dated the 13th August 1870, affirming an order of the Deputy Commissioner of Lohurdugga, dated the 5th April 1870.

Shunkur Sahoo (Decree-holder) *Appellant,*

versus

Mungul Singh (Judgment-debtor) *Respondent.*

Moonshee Mahomed Ismail for Appellant.
No one for Respondent.

Where one judgment-creditor has been diligent and has secured attachment of certain property, his judgment must be satisfied before the proceeds can be available in satisfaction of a later attachment by another creditor.

The mere fact of a property being attached does not destroy a judgment-debtor's right in that property.

Kemp, J.—THE decree-holder is the special appellant in this case.

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It appears that in the province of Chota-Nagpore, a special rule obtains in reference to the execution of decrees. In that province no execution can be taken without the sanction of the Commissioner. This is under orders of the Government of Bengal.

The Deputy Commissioner in this case applied to the Commissioner for leave to sell certain properties in execution of the special appellant's decree. The Commissioner replied that it appeared to him that the judgment-debtor had no right in the property; and as it had already been attached in satisfaction of a decree previously obtained by Ruttun Singh, and that attachment was likely to last for 13 years, he refused to sanction the sale.

The first Court held that attachment of the property might be issued, but as the property was under attachment in execution of a prior decree, the present order for attachment should not, looking to Section 270 of the Code, be allowed to commence to take effect until the former decree is satisfied.

It is now contended in special appeal that the special appellant was entitled to share rateably in the proceeds of the property attached; and secondly, that the view of the law taken by the lower Court is erroneous.

The first ground is manifestly untenable. This is not a case of right to share rateably in sale-proceeds. This is a case where one judgment-creditor has been diligent and has secured attachment of the property in satisfaction of a judgment; and, therefore, until his judgment is satisfied, there are no proceeds which can be rateably distributed.

On the second point, we think that the Commissioner was wrong in supposing that the mere fact of the property being attached destroyed the right of the judgment-debtor in that property. It follows, therefore, that upon the expiration of the present attachment by satisfaction of the prior decree, the present decree-holder will be entitled to recover the amount of his decree. Section 2 Act VIII of 1859 will not apply to a case of this description.

The present decree-holder will be at liberty to apply to the Commissioner for sanction of the sale on the expiration of the attachment taken out in execution of the prior decree.

The special appeal is dismissed without costs, nobody appearing on the other side.

The 15th February 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Joint decree—Execution—Section 207, Code of Civil Procedure.

Case No. 449 of 1870.

Miscellaneous Appeal from an order passed by the Judge of Sylhet, dated the 2nd September 1870.

Indro Coomar Doss (Decree-holder) *Appellant,*

versus

Mohinee Mohun Roy and another (Judgment-debtors) *Respondents.*

Baboo Bama Churn Banerjee for Appellant.

No one for Respondents.

Where one of several holders of the same decree wishes to take out execution, his proper course is to apply under Section 207 Act VIII of 1859 to execute the whole decree, and the Court, if it sees sufficient cause, may admit the application, passing such order as may be necessary for protecting the interests of the other decree-holders.

Jackson, J.—We think the Judge was quite correct in the decision which he has passed in this case. There are many decisions of this Court which have ruled that one of several decree-holders cannot be allowed to take out execution of a part of the decree only to the extent of his own interest. If he wishes to execute the decree, he may, under Section 207 Act VIII of 1859, make an application to execute the whole decree, and the Court, if it shall see sufficient cause to allow him to do so, may admit the application, passing such order at the time as may be necessary for protecting the interests of the decree-holders. The proper course for the applicant is to make such an application to the Court whose duty it is to execute the decree. There is nothing wrong in law in the decision of the Judge.

We dismiss the appeal, but without costs, as the respondent has not appeared.

Mookerjee, J.—I concur.

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The 16th February 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Execution—Excess payments—Section 11 Act XXIII of 1861.

Cases Nos. 1507 to 1510 of 1870.

Special Appeals from a decision passed by the Officiating Judge of Mymensingh, dated the 30th April 1870, reversing a decision of the Sudder Moonsiff of that District, dated the 10th June 1869.

Kashee Kishore Roy Chowdhry and another (Plaintiffs) *Appellants,*

versus

Kishen Chunder Sandyal and another (Defendants) *Respondents.*

Baboos Sreenath Dass and *Romesh Chunder Mitter* for Appellants.

Baboos Hem Chunder Banerjee and *Kalee Mohun Doss* for Respondents.

Sums paid in execution in excess of what was due under the decree can only be recovered by application to the Court which executed the decree, not by a separate suit.

Jackson, J.—THESE are all suits to recover from the defendants certain sums of money, which it is alleged that the plaintiff overpaid to each of the defendants in execution of decree which the defendants had obtained against the plaintiff for costs in a previous suit. The defendants denied that they were liable to reimburse the money which they had received—they alleged that the money was jointly due to them ; and they also pleaded that the plaintiff had made a voluntary payment.

Both the lower Courts have dismissed the plaintiff's suit, the Appellate Court holding that the suit was not rightly brought as a separate suit, and also holding that the payment was voluntary and could not be recovered. From these decisions the plaintiff has appealed to this Court.

We think that the lower Courts have been right in the view which they have taken that no separate suit can be brought for the recovery of these sums. All questions regarding costs and the amount of costs which have to be paid under the decree must, as declared by Section 11 Act XXIII of 1861, be settled by the Court which has to execute the decree. Even, however, if there was jurisdiction in the lower Courts to entertain the appeal on the ground that these special sums were not directly mentioned in the decree, and that so far it was not an order which was passed exactly in execution of the decree, still we think that the Lower Appellate Court was right in dismissing the suit. Before the plaintiff can recover this sum, he must show that he is justly entitled to recover and that the defendants are not entitled to retain the money. It is quite possible that although those amounts were not stated in the decree, still the defendants were justly entitled to receive them. The suit appears to have been one for confirmation of possession and to recover wassilat to the amount of 30 000 rupees. The defendants in the case were very numerous, and it is clear that they had separate vakeels, and there is nothing shown upon these proceedings and not even an allegation in the plaint that they were not entitled to separate vakeel's fees. It is quite possible, if the plaintiff had refused to pay them the money which they demanded, that the defendants might have recovered the sum by making an application to the Court which had passed the decree. The plaintiff nowhere states under what circumstances he paid the money which was due from him. His only ground for this suit is that these sums were not contained in the decree and therefore he is entitled to recover. But it by no means follows that because they were not stated in the decree, he will be entitled to recover them :—he will still have, before he can obtain any decree, to prove that the defendants were not justly entitled to what they received.

Looking into all the circumstances of the former suit, we think that the lower Courts were right in dismissing the plaintiff's claim, and we also dismiss these appeals with costs.

Mookerjee, J.—I concur in dismissing these appeals with costs. I hold that questions relating to sums alleged to have been paid in discharge or satisfaction of the decree or the like, as well as questions arising between the parties to the suit in which the decree was passed and relating to the execution thereof, shall be determined by order of the Court executing the decree and not by separate suit. This is exactly the case in these suits. Money is alleged to have

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been paid in satisfaction of the decree against the plaintiffs. I am of opinion that even if the plaintiffs have paid more than what was due by them under the decree, they should have applied to the Court which was executing the decree, and cannot seek to recover sums so paid by them by separate suit.

The 15th February 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. C. Paul, *Judge.*

Calcutta Small Cause Court—New trial—Evidence—Affidavit.

Case submitted for the opinion of the High Court by the 1st and 2nd Judges of the Court of Small Causes at Calcutta.

Modhoosoodun Koondoo and others, *Plaintiffs,*

versus

Madhubram Sewloll and another, *Defendants.*

Mr. Macrae for the Plaintiffs.

Mr. Phillips for the Defendants.

A party who applies for a rule for a new trial and obtains it on particular materials, ought not to be allowed to go into fresh evidence with a view to strengthen his case when the rule comes on for hearing. If on hearing both parties the Court thinks further inquiry necessary, it can of course make such inquiry in such manner as seems most fit to it.

When new trials are moved for on allegation of facts, it would be very convenient that a practice should be introduced of requiring the facts to be stated by affidavit, and in like manner the answer to be supported by affidavit.

Case.—THE plaintiffs, Modhoosoodun Koondoo, Pauchkowree Koondoo, Nobin Chunder Dutt and Bonomally Dass, carrying on business at Burra Bazar, applied on the 25th November 1870 for the issue of a summons returnable on the same day against Madhubram Sewloll and Goolzareemull, who, as they alleged, were also carrying on business at Burra Bazar under the firm of Madhubram, on an affidavit that the said defendants being indebted to the plaintiffs in a sum of rupees 834-5-6 were about to withdraw their persons from the jurisdiction of the Court, and were removing their goods from their shop. Under No. 2 of the Rules of Practice of the Court a summons was issued accordingly. At the hearing the summons was proved to have been served, by being posted on the door of the defendant's shop which was then closed; and the claim, which was for goods sold and delivered, was decreed *ex-parte* in favor of the plaintiffs.

Rule No. 6 of the Rules of Practice of the Court.

A copy of the decree was taken by the plaintiffs on the same day to enable them to obtain execution against the defendants in the Mofussil.

Section 78 Act IX of 1850.

On the 13th December the defendant, Goolzareemull, for himself and for the defendant Sewloll, appeared with his attorney, Baboo Ongsho Prokash Gangooly, and applied to have the time enlarged to the 17th December to move for a rule calling upon the plaintiffs to show cause why the judgment obtained by the plaintiffs, and all subsequent proceedings, should not be set aside on the ground that the summons had not been served.

On the 17th December the defendant, Goolzareemull, was examined on solemn affirmation, and stated that he and the defendant Sewloll were not carrying on business in Burra Bazar at the time when the summons was served, and were not partners of the firm of Madhubram, and that they were not indebted to the plaintiffs and had received no notice of the plaintiffs' action until his property was attached in execution at Cawnpore. On this statement a rule was issued calling on the plaintiffs to show cause why the proceedings should not be set aside. The rule was made returnable on the 7th January, which day being a holiday the case stood over to the 14th January.

On the 14th January Baboo Ongsho Prokash Gangooly, the defendants' attorney, asked that before the plaintiffs were called upon to show cause against the rule, he should be permitted to give further evidence in support of it. The plaintiff's pleader objected that it was not open to the defendants after they had obtained their rule to support it by further evidence.

The Court was of the same opinion and declined to admit the evidence tendered, subject to the opinion of the Judges of the High Court as to whether it should be received or not.

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The case stands adjourned until the opinion of the Judges of the High Court on this point has been obtained.

The judgment of the High Court was delivered as follows by—

Norman, C. J.—We think that the party who applies for a rule for a new trial and obtains it on particular materials, ought not to be allowed to go into fresh evidence with a view to strengthen his case when the rule comes on for hearing.

If, on hearing both parties, the Court thinks further inquiry necessary, they can of course make such inquiry in such manner as seems most fit to them.

We desire to add that when new trials are moved for on allegation of facts, it would be very convenient that a practice should be introduced of requiring the facts to be stated by affidavit, and in like manner the answer to be supported by affidavit.

Defendants must pay costs on scale 2.

The 15th February 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Execution—Bona-fides.

Case No. 391 of 1870.

Miscellaneous Appeal from an order passed by the Judge of East Burdwan, dated the 16th July 1870, *reversing an order of the Moonsiff of that District, dated the 28th January* 1870.

Maharajah Dheraj Mahatab Chand Bahadoor (Decree-holder) *Appellant,*

versus

Modhoo Soodun Banerjee and others (Judgment-debtors) *Respondents.*

Baboo Ashootosh Mookerjee for Appellant.

Baboo Rama Churn Banerjee and *Moulvie Murhumut Hossein* for Respondents.

Where a decree-holder pays into Court sums of money for the purpose of issuing notices of attachment and sale, his intention must be supposed to be *bonâ-fide.*

Where the finding of the first Court tended to show that the proceedings of the decree-holder were *bonâ fide*, and the Lower Appellate Court found otherwise without giving any reasons whatever, the High Court held itself bound to interfere and restore the judgment of the first Court.

Glover, J.—We think that the decision of the Judge in this case cannot be sustained.

It appears that the decree was originally obtained on the 22nd November 1861. The first application for execution was made in May 1863, and on this application notice was served on the judgment-debtor and his property was attached. After attachment a third party intervened and claimed the property, and his claim was allowed. The execution case was then struck off the file in April 1864. A second execution was taken out on the 2nd October 1866, and in December of that year notice was again served on the judgment-debtor and his property attached. Sale proclamation was issued in February 1867, and an officer was appointed to proceed to the spot and carry out the usual proceedings. But then a third party intervened claiming the property, and that claim was disallowed on the 30th April 1867. On the same date it appears from the endorsement on the back of one of the papers on the record, that the execution case was struck off by the Moonsiff on the ground that the decree-holder professed himself unable to carry on proceedings at that time. The present execution was taken out on the 28th September 1869.

The first Court found that this execution was within time; but the Judge considered it barred, because none of the early proceedings were taken with intent to realize the amount of the decree. How he comes to this conclusion it is not easy to see; for when a decree-holder pays into Court sums of money for the purpose of issuing notice of proclamation of attachment and sale, it must be supposed that he does so with the intention of executing his decree and recovering the money due to him.

In this case it appears that the decree-holder, both in 1863 and 1864 and again in 1866 and 1867, did pay money into the Moonsiff's Court for the purpose of getting his decree executed.

If the Judge had given any reasons for deciding that these proceedings, though apparently made with the object of executing a decree, were in reality mere shams, and that there was no intention on the part of the decree-holder of proceeding with the

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execution, it might have been impossible for us to interfere in special appeal. But as he has given no reasons whatever, and as the finding of the lower Court tends to show that the proceedings by the decree-holder were *bonâ fide* and taken for the purpose of executing his decree, we think we ought to restore the judgment of the first Court in favor of the decree-holder.

We think it also right to mention that the Judge is not exactly correct when he says that the decree-holder was asked whether he would carry on the decree, and his representative in Court said "no," and the case was accordingly struck off on the 30th April 1867. We have looked at the record and find that what the decree-holder's representative said on that occasion was, that on that particular day he was not prepared to go on with the case. There was nothing in this statement to lead any one to suppose that he intended to give up his decree altogether.

The appeal is allowed and the decree of the Lower Appellate Court is reversed with costs, which we assess at 20 rupees.

The 15th February 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Section 246 Act VIII. 1859—Procedure—Jurisdiction.

Case No. 458 of 1870.

Miscellaneous Appeal from an order passed by the Judge of Dacca, dated the 7th September 1870, *reversing an order of the Moonsiff of Naraingunge, dated* 31*st March* 1870.

Hurish Chunder Goopto (Decree-holder) *Appellant,*

versus

Shushee Malla Gooptia (Judgment-debtor) *Respondent.*

Baboo Huree Mohun Chuckerbutty for Appellant.

Baboo Nuleet Chunder Sein for Respondent.

A decree-holder having attached certain property in execution, the judgment-debtor objected under Section 246 Act VIII of 1859 that, as the original decree had been passed against her mother, the property could not be sold in execution as it had been inherited by her from her father:

HELD that the defendant so intervening should have been held to be a third party, and that a decision under that Section would not be appealable to the Judge.

Mookerjee, J.—IN this case the decree-holder having attached a certain property in execution of a decree that he had against the opposite party, the judgment-debtor objected under Section 246 Act VIII of 1859 that that property should not be sold in execution of this decree inasmuch as that property was inherited by her from her father; and that the original decree having been passed for a debt incurred by her mother, properties inherited from the mother were only liable to be sold in execution. This objection was not, however, tried by the first Court under Section 246 under which it should have been tried. The objector, though a judgment-debtor, combined in her person two sorts of rights. She might have been in possession of property belonging to the mother, who was the original judgment-debtor, but she was also in possession of properties belonging to the father. The Moonsiff was therefore bound to decide this objection under Section 246. But he does not try the objection under that Section; he merely says—"The petitioner has brought "this suit on the allegation that her mother "has no right whatever to the properties "under attachment, and when it is not un-"known that under the terms of the decree, "the right, title, and interest of the late "Gooroo Soonduree to and in the attach-"ed properties shall only be put up to sale; "consequently such sale would in no way "prejudice the right of any other party. "Hence, there is no necessity of entering "into any enquiry regarding the disposal of "the objection advanced by the female objec-"tor. It is, therefore, ordered that this be "put up with the record."

On appeal by the claimant to the Judge, the Judge has reversed the Moonsiff's decision on the ground that the decree-holder has failed to prove a certain will, by which he wanted to show that the property belonged to the mother.

The judgment-creditor appeals to this Court, urging that the Lower Appellate Court had no right to entertain an appeal against an order passed by the Moonsiff under Section 246, and asks us to quash the order of the Judge, as having been passed without juris-

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diction. We think that if the first Court had passed a decision under Section 246, the Judge would have had no jurisdiction to entertain an appeal, but the parties aggrieved by that order should have resorted to the Civil Court for redress. But we find that though the objection was brought under Section 246, the Moonsiff has declined to exercise his jurisdiction under that Section, and has not decided the case at all under it. But though the Moonsiff has not decided this case under Section 246, he has passed an order between parties, who are, legally speaking, not parties to the suit in which the decree was passed; and therefore even under Section 11 Act XXIII of 1861, the Judge had no right to entertain the appeal. The decision of the Judge must under either of these Sections be set aside, as having been passed without jurisdiction.

Then, we have to see whether the decision of the Moonsiff is a decision under Section 246, and is a proper decision under that Section. We see that it is not a decision under that Section, and is not at all a proper decision in the case. He has refused to exercise jurisdiction given to him by law in these matters under Section 246. He ought to have proceeded to enquire whether the judgment-debtor or this claimant was in possession of the property by right of inheritance from the father, or was in possession as an heir of the mother, and ought to have passed a proper decision under Section 246. It is not sufficient to say that because the right, title, and interest of Gooroo Soonduree are put up for sale, that therefore a claim by a party, who contends that the property belongs to her and that she is in possession of it by a different right, should not be investigated at all. But as the claim appears to be a claim properly preferred under Section 246, the procedure of that Section ought to have been strictly followed. Although, therefore, we are bound to set aside the decision of the Judge as having been passed without jurisdiction, we also set aside the decision of the first Court, and direct him to try this case as between these parties under the provisions of Section 246.

Each party will bear his own costs of this appeal.

Jackson, J.—I would point out to the Judge that the mistake he seems to have fallen into, is owing to his not being aware that a defendant intervening in the manner in which the present claimant did, has been held in several decisions of this Court to be in fact a third party. The Judge will find this view of the law in XII Weekly Reporter, page 333, and VI Weekly Reporter, page 61, Miscellaneous Rulings.

The 15th February 1871.

Present:

The Hon'ble L. S. Jackson and W. Ainslie, *Judges.*

High Court—Right of Appeal.

Case No. 380 of 1870.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Tirhoot, dated the 22nd August 1870.

Ramanoogra Sahoy and another (Judgment-debtors) *Appellants,*

versus

Byjnath Lall (Decree-holder) *Respondent.*

Baboo Khettro Nath Bose for Appellants.

Baboo Mokesh Chunder Chowdhry for Respondent.

The circumstance of the High Court calling up an appeal from the Court below and trying it as a regular appeal, does not entitle the parties to appeal directly to the High Court in the proceedings in execution.

Jackson, J.—THE appeal in this case lay to the Zillah Judge. The circumstance of this Court having for special reasons thought proper of calling up the appeal in the original case from the Court below and trying it here as a regular appeal, will not entitle the parties to prefer an appeal directly to this Court in the proceedings in execution of the decree passed in that case. The proceedings will be remitted to the Zillah Judge, who will admit the appeal and proceed to dispose of it in the same manner as if it had been originally presented in his Court.

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The 15th February 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Jurisdiction—Clauses 4 and 5 Section 23 Act X. 1859.

Case No. 1776 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Officiating Judge of Chittagong, dated the 1st June 1870, *affirming a decision of the Deputy Collector of that District, dated the* 31*st March* 1870.

Kishen Chunder Goopto (Plaintiff) *Appellant,*

versus

Dewan Ali and others (Defendants) *Respondents.*

Baboos Grija Sunkur Mojoomdar and *Okhil Chunder Sein* for Appellant.

Baboo Issur Chunder Chuckerbutty for Respondents.

A Judge has jurisdiction to try an appeal in a suit for arrears of rent under Clause 4 Section 23 Act X of 1859, where plaintiff also sued for ejectment under Clause 5 of the same Section.

Jackson, J.—We think this case must go back to the Judge. He had jurisdiction to try the appeal. This was a suit for arrears of rent under Clause 4 Section 23, and also for ejectment under Clause 5 Section 23 of Act X of 1859. The Judge says that the plaintiff's claim for ejectment is preposterous on the very face of it, and therefore he has no jurisdiction to try the appeal. The question of jurisdiction cannot, however, depend upon the decision of the Judge whether the claim is correct or not. The question of jurisdiction depends on the terms of the law; and it will be for the Judge, after hearing the appeal, to decide whether the plaintiff is entitled to arrears of rent and is entitled to ejectment.

There is a decision which shows that in some former cases a Division Bench of this Court held that, although in a suit which was substantially a suit for arrears of rent a claim for ejectment had also been made, the mere fact of the insertion of such a claim in the plaint would not have the effect of shifting the jurisdiction of the Court of appeal; because looking to that part of that particular case such a claim was a mere nominal claim, and which in fact was never intended to be pressed as a real substantial claim, and which never had been pressed in fact in the lower Courts. But there is no reason whatever for saying in this case that the plaintiff did not claim ejectment.

It appears to us also that the Deputy Collector has gone into questions of title.

The case must, therefore, go back to the Judge who will take up the case and decide it. Costs of this appeal will abide the final result of the suit.

Mookerjee, J.—I concur.

The 15th February 1871.

Present:

The Hon'ble L. S. Jackson and W. Ainslie, *Judges.*

Private partition—Butwarrah.

Case No. 1802 of 1870.

Special Appeal from a decision passed by the Judge of Sarun, dated the 24*th June* 1870, *affirming a decision of the Moonsiff of Pursa, dated the* 16*th September* 1869.

Ajoodhya Pershad and others (Defendants) *Appellants,*

versus.

Kristo Dyal and another (Plaintiffs) *Respondents.*

Baboo Tarnck Nath Sein for Appellants.

Baboo Kalee Kishen Sein for Respondents.

Parties holding separate portions of an estate according to private arrangement previously made, are not in a condition to apply to the Collector for butwarrah when unable afterwards to agree among themselves.

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Jackson, J.—We think the decision of the Court below was right. The parties were not in a condition to apply to the Collector for a butwarrah, inasmuch as the land was not held in common, but by private arrangement previously made the parties were holding separate portions of the mouzah. The position into which they are brought by the previous arrangement, and inability now to agree among themselves in consequence of which the whole of the co-sharers are liable to be sold out in consequence of default by one or more of them, is unfortunate, but it cannot be helped.

The special appeal will be dismissed with costs.

The 15th February 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Certificate of administration—Objections—Act XL of 1858.

Case No. 463 of 1870.

Miscellaneous Appeal from an order passed by the Judge of Tipperah, dated the 20th September 1870.

Kisto Kishore Roy (Objector) *Appellant,*

versus

Issur Chunder Roy (Petitioner) *Respondent.*

Baboos Nuleet Chunder Sein and *Kashee Kant Sein* for Appellant.

Baboos Romesh Chunder Mitter and *Doorga Mohun Doss* for Respondent.

A certificate under Act XL of 1858 having been granted to a party as guardian of an adopted minor, it was objected that the minor's adoption had not been legal:

Held that as there was no doubt of the fact of adoption, whether the adoption should on enquiry prove legal or not, the certificate was rightly given; and as the objector did not claim to be appointed guardian, he had no *locus standi* to object to the appointment of another person.

Jackson, J.—The Judge seems to have been quite right to give the plaintiff a certificate of administration to the property as guardian under Act XL of 1858. The petitioner to this Court objected to his doing so on the ground that the minor said to have been adopted has not been legally adopted. There seems to be no doubt, whether the adoption should turn out on enquiry a legal one or not, that he was in fact adopted; and if adopted, it is not denied that he is entitled to some property. It is possible that he may have to bring a suit for the property, but it seems to me that whether he is in possession of it or he may have to bring a suit, it is equally important that there should be some guardian appointed to represent the minor's interests. The present applicant does not claim to be appointed guardian. He therefore has no *locus standi* in the Civil Court to object to the appointment of another person as guardian of the minor. The appointment of the guardian cannot injure him in any way. We dismiss the appeal with costs, sixteen rupees being allowed for pleader's fees.

Mookerjee, J.—I entirely concur.

The 17th February 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Small Cause Courts — Jurisdiction — Questions of title — Incidental issues.

Case No. 1821 of 1870.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 2nd June 1870, *affirming a decision of the Moonsiff of that District, dated the 11th February* 1870.

Radha Churn Gangooly (Defendant) *Appellant,*

versus

Gudadhur Bahadoor (Plaintiff) *Respondent.*

Baboos Chunder Madhub Ghose and *Khettur Mohun Mookerjee* for Appellant.

Baboo Bungshee Dhur Sein for Respondent.

A Court of Small Causes may try incidental questions of title which are indispensable to the decision of the claim before it, *e. g.*, a right to land on which depends a party's right to cut trees.

A decision thus come to on a question of title, is not conclusive except as regards the claim in that suit.

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Glover, J.—This was a suit to recover rupees 200, the value of certain trees cut and carried by the defendant.

The defendant pleaded that the trees were his property and grew on the land of his putnee talook.

Both lower Courts found that the decision of a former civil suit between the present plaintiff and the party through whom the present defendant claims, settled the question of title to the land in favor of the plaintiff, who got a decree for the whole amount sued for. The defendant now appeals specially.

A preliminary objection is taken by the special respondent's pleader to the effect that, as the suit was of a nature cognizable by a Court of Small Causes, no special appeal lies.

It is quite clear from the record that the point at issue between the parties in this case, and which point was decided by both lower Courts, was the title to the land on which the trees grew; and the amended plaint filed by the special respondent expressly asks for an adjudication of his title as against that set up by the defendant.

The suit was not, therefore, of a nature cognizable by the Court of Small Causes, and the objection is overruled.

For the defendant, special appellant, it is contended—

(1).—That there was no adjudication of title in the civil suit No. 33.

(2).—That if there were such adjudication the Judge had no right to make it, inasmuch as the suit was one of a Small Cause Court nature.

And (3).—That in any case the decision would be no conclusive evidence of the plaintiff's title. The Judge should have decided on the whole of the evidence on the record.

With regard to the first objection, it is clear that, although the Moonsiff in the original suit did not consider the question of title, the Judge on appeal did, and decided against the claim put forward by the Burdwan Rajah, through whom the defendant claims, and who had caused himself to be made a party to the suit under Section 73 of the Civil Procedure Code.

The second objection is untenable. It has been ruled more than once by this Court, that a Court of Small Causes may try incidental questions of title which are indispensable to the decision of the claim before them. In the case in question, the right to cut the trees depended on the right to the land, and the Judge had power to try the question.

But, and this brings us to the special appellant's last objection, the decision thus come to would not be conclusive, except as regards the damages claimed in that suit. It could not be taken, as the Moonsiff and Judge have taken in this case, as absolutely concluding the defendant from putting forward his evidence, or as absolving the plaintiff from showing his title. It might probably be taken as evidence, but certainly not as conclusive evidence.

And as the decisions of both the Courts below have proceeded substantially on the fact that the question of title had already been decided by the judgment in the original suit, we think that those decisions must be reversed, and the case remanded for trial on the merits on all the evidence recorded by either party. Costs to follow the result.

The 17th February 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Remission to landlord—Remission to tenants.

Case No. 1885 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Officiating Judge of Midnapore, dated the 20th May 1870, *affirming a decision of the Deputy Collector of that District, dated the 29th September* 1869.

Goluck Chunder Mytee (Plaintiff) *Appellant,*

versus

Parbutty Churn Doss (Defendant) *Respondent.*

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Baboos Mohendro Lall Shome and *Bhowanee Churn Dutt* for Appellant.

Mr. R. T. Allan and *Baboo Kamola Kant Sein* for Respondent.

A landlord receiving remission from Government on account of damage done to his estate by a cyclone, is not on that account bound to allow a remission to his under-tenants, unless he received the former on the understanding or agreement that he would allow it in turn.

Glover, J.—This was a suit for arrears of rent due for the years 1272 and 1273, B. S., laid at rupees 116-13-8.

For the defence it was pleaded that a 6 annas portion of the jote had been transferred with the landlord's consent to the late proprietor's widowed daughter, from whose representative the plaintiff had received the rent of the years in question; and that on the remaining 10 annas portion, a part of the rent had been paid and part remitted.

Both Lower Courts decided in favor of the defendant. They allowed him a deduction of rupees 43-12-6 on account of the 6 annas share of rupees 27-5-10 for remission, and rupees 31-6 for rent actually paid, giving the plaintiff a decree for the balance only.

It is contended in special appeal, that as the defendant succeeded in a Civil suit against the representative of the deceased widow in getting a decree for the 6 annas share together with mesne profits from the year 1270, B. S., he is clearly liable for the rents of 1272 and 1273, B. S; and that with regard to the claim for abatement of rent, the plaintiff had the right either to grant or to withhold the concession.

The first objection is disposed of by the Judge's finding of fact. He finds it proved by the evidence that the plaintiff continued to receive the rent of the 6 annas portion from the party in possession of that share, *viz.*, the representative of the widow, for the years 1272 and 1273, so that he can have no claim to take the rent over again from the present defendant; and it matters not whether the defendant has or has not, so far as this suit is concerned, got a decree for the gross mesne profits of the land.

But as regards the remission of rent for those years, we think that the Judge was wrong. The document, which recites the circumstances under which the plaintiff received a remission from Government on account of the damage done to his estate by the cyclone, leaves it entirely to his discretion to grant his under-tenants similar benifits, or to withhold them. The only thing he was bound to do was to register the names of all those tenants to whom he allowed remission. The Judge says that "as the landlord seeks equity he must do equity;" but this has really nothing to do with the present case. For the defendant to succeed he must show that the plaintiff in getting a remission from Government did so on the understanding or agreement that he was in his turn to grant remission to his under-tenants. So far from this being the case, it is clear that the action of the plaintiff was left entirely unfettered. If the defendant wishes to have an abatement of his rent on any of the grounds allowed by Act X of 1859, he must bring a suit for the purpose.

So much, therefore, of the Judge's decision as allows remission of rent for the years in suit must be reversed. The rest of the judgment will stand, and costs will be in proportion.

The 17th February 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Section 227, Code of Civil Procedure—Res adjudicata—Estoppel.

Case No. 1889 of 1870.

Special Appeal from a decision passed by the Judge of Dinagepore, dated the 10*th June* 1870, *affirming a decision of the Moonsiff of Thakoorgaon, dated the* 26*th March* 1870.

Dudsar Bibee (Plaintiff) *Appellant,*

versus

Shakir Burkundaz and others (Defendants) *Respondents.*

Baboo Huree Mohun Chuckerbutty for Appellant.

Baboo Issur Chunder Chuckerbutty for Respondents.

Held (Mitter, J., *dubitante*) that a suit claiming property by a title on inheritance, is barred by Sections 2 and 7, Code of Civil Procedure, where plaintiff's claim on a title derived by gift has already been adjudicated.

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A plaintiff is bound to put forward all the titles which he has existing at the time of his suit; failing to do so, he is estopped from adducing in a future suit a title which he ought to have urged in a former.

Bayley, J.—In this case the plaintiff sued for 2 annas 6 pie share in 4 jotes in mouzah Chaputteanna, and for the same share in a jote at Monee Moheshpore.

In regard to the first claim, the co-sharers whom the plaintiff made defendants did not appear; but in regard to the claim in the jote at Monee Moheshpore, one Shakir Burkundaz, *claiming* a right under a deed of sale from the plaintiff's mother, appeared and defended the suit.

The Moonsiff gave the plaintiff a decree for the share claimed in the 4 jotes minus ⅛th, and dismissed his suit as to the 2nd jote at Monee Moheshpore. The Lower Appellate Court affirmed the judgment of the Moonsiff and dismissed the plaintiff's appeal. The Lower Appellate Court held that the plaintiff's claim in regard to the jote at Monee Moheshpore had on a former occasion been decided against him by a competent Court, and therefore it was now barred by Section 2 Act VIII of 1859, and that the rest of the plaintiff's claim was barred by limitation.

Against this judgment the plaintiff appeals specially, and urges that the Lower Appellate Court is wrong in having applied the provisions of Section 2 to the plaintiff's claim as to the jote at Monee Moheshpore, inasmuch as the cause of action and the title in the former suit were different from those in the present suit.

It appears, however, that in the former case the plaintiff sued the co-sharer defendants on the strength of a title. That title was said to be derived from a gift from plaintiff's mother. Again, a similar claim on title is set up. But this time it is by title on inheritance. I concur with that Court in holding that the plaintiff's claim of title has in fact been adjudicated by a competent Court, and cannot with reference to Sections 2 and 7 of the Code of Civil Procedure combined be re-opened in the present case.

The second ground pressed before us on special appeal is, that the Lower Appellate Court has wrongly applied limitation to the plaintiff's claim as to the 4 other jotes, without investigating whether the plaintiff's mother was not in possession of the plaintiff's share as his trustee. The answer to this objection can be found in the judgment of the Lower Appellate Court, where it records this finding of fact, *viz.*, "There is "no proof worthy of the least reliance as "to the plaintiff's age. She never pleaded "minority in her plaint, and it seems only "to have been an after-thought of her plea-"der at the time when the issues were "framed." It is not shown to us that there was any evidence other than what the Lower Appellate Court refers to as not reliable, and the sufficiency or otherwise of evidence is no legal ground for a special appeal. The alleged minority then not having been proved, the plaintiff's plea of her right on account of her mother's possession on her behalf as trustee entirely fails. I would dismiss the special appeal with costs.

Mitter, J.—I am of the same opinion. I am not quite prepared to say that the provisions of Section 2 Act VIII of 1859, strictly speaking, are applicable to this case, inasmuch as the cause of action on which the present suit is brought may be distinguished from the cause of action on which the former suit was instituted. But it is perfectly clear that the title on which the plaintiff has brought the present suit was in existence at the time when the former suit was brought, and she was bound to bring the latter suit on all the titles that were then in existence. She for reasons best known to herself did not chose to do so, and it follows therefore that the decision in the former case, so far as it relates to the ownership of the jote in Monee Moheshpore, must operate against her as an estoppel in this case. This principle has been applied by the Privy Council against a defendant, and I see no reason either in justice or equity why it should not be applied against a plaintiff. No special reason has been assigned by the present plaintiff to explain why she did not in the former case sue upon the title of inheritance now brought forward by her; and in the absence of such an explanation it would be obviously unjust and improper to harrass the defendant by a second suit for the same property, merely because the plaintiff has now come forward upon a different title—a title which she could have and ought to have brought forward in the former suit without any difficulty whatever.

The other objection is altogether without foundation. The plaintiff's mother might

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have been in possession jointly with her co-sharers, but the plaintiff was bound to show that that possession was held by her mother as her guardian, and this in fact was the only allegation by which she attempted to evade the operation of the law of limitation. The Lower Appellate Court has distinctly found that the evidence on this point is altogether unreliable; and it follows therefore that the possession of the plaintiff's mother, even if it were admitted as a fact, would not be sufficient to save her claim from the operation of that law.

This special appeal must, therefore, be dismissed with costs.

The 15th January 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Decree—Execution against mortgaged property—High Court's powers—Section 15 Charter Act.

Khorshed Ali and another, *Petitioners,*

versus

Chowdhry Wahid Ali and others, *Opposite Party.*

Mr. A. F. Lingham and *Baboo Chunder Madhub Ghose* for Petitioners.

Messrs. R. E. Twidale and *C. Gregory* and *Moonshee Mahomed Yusoof* for Opposite Party.

A party who obtains a decree enabling him to recover a mortgage debt by sale of two mortgaged premises, is entitled in law to proceed against both or either of the properties as he thinks proper.

The High Court cannot interfere under Section 15 of the Charter Act, where the lower Court has not acted without jurisdiction or where there is a remedy by a regular suit.

Kemp, J.—This is an application to this Court to exercise its powers under Section 15 of the Charter.

We have heard the Counsel for the petitioner, Mr. Lingham, at considerable length. It is unnecessary to go into the merits, for we may by doing so be pre-judging the case.

The only question we have to decide is whether this is a case in which we ought to exercise the powers vested in us by Section 15 of the Charter.

We are of opinion that neither of the Subordinate Judges by any order passed by them has divided the mortgage debt. It is very clear that they could not do so, and in fact they have not done so.

The decree-holder having obtained a decree enabling him to recover the mortgage debt by sale of the mortgaged premises, he was in law entitled to proceed against both or either of those properties as he thought proper. There has been no order passed in this case without jurisdiction, and therefore we ought not, under the precedent to be found in Volume VII, page 520 of the Weekly Reporter, to interfere.

We also observe in this case that the opposite party is the auction-purchaser. It may be that he is an innocent purchaser for a valuable consideration.

The petitioner has his remedy in a regular suit. Not being a party to the original decree, he cannot appeal under Section 11 Act XXIII of 1861, but a regular suit is open to him.

It has been ruled by this Court that where there is a remedy by a regular suit, this Court cannot interfere by the exercise of its extraordinary powers under Section 15 of the Charter Act. We, therefore, discharge this rule with costs, five gold mohurs being allowed as vakeel's fees.

The 17th February 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Registration—Kubooleut—Evidence.

Case No. 1952 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Officiating Judge of Rungpore, dated the 4th August 1870, *reversing a decision of the Deputy Collector of that District, dated the 21st January* 1870.

Kisto Kalee Moonshee (Plaintiff) *Appellant,*

versus

Agemona Bewa (Defendant) and another (Objector) *Respondents.*

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Baboo Debendro Narain Bose for Appellant.

Baboo Kishen Succa Mookerjee for Respondents.

Where a kubooleut for one year contains a provision extending its term to more than that period, it cannot be admitted in evidence without registration.

Bayley, J.—THERE is no ground for this special appeal. The kubooleut is one for 1274, and therefore it could not form the basis of an action for rent for 1275; but if, as is now contended by the pleader for the special appellant, there was a provision in the kubooleut extending its term to more than one year, the document cannot be admissible as evidence without registration. The suit, therefore, on the basis of the kubooleut entirely fails.

It is next contended that the plaintiff ought to have gained a decree for the amount of rupees 70 admitted by Bunikoollah.

It appears that Bunikoollah was not made a defendant in the present suit, which the plaintiff brought upon the kubooleut for rupees 126. Bunikoollah only appeared as an objector in the case, and said that he held land by a transfer, and was liable for rupees 70 only as rent. In this action therefore, upon a kubooleut not alleged to be given by Bunikoollah, but by the principal defendant, no decree could be given against Bunikoollah at all.

We dismiss the special appeal with costs.

The 18th February 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Mookhtear — Suspension — Charge—Notice—Section 16 Act XX of 1866.

Golab Khan, Mookhtear, *Petitioner.*

Mr. S. Vertannes for Petitioner.

Before a Magistrate can suspend a mookhtear from practice, he must observe the requirements of Section 16 Act XX of 1866, and furnish the mookhtear with a copy of the charge against him and a notice fixing a day on which such charge will be taken into consideration.

Kemp, J.—IT appears that the Officiating Magistrate of Midnapore has suspended Golab Khan from practice in his Court or in any Court subordinate to him in that Zillah. The Judge forwards the letter of the Magistrate with the remark that he thinks the Mookhtear deserves to lose his sunnud. Mr. Vertannes, who appears for Golab Khan, has drawn the attention of the Court to Section 16 Act XX of 1865, and he urges that under that Section it was necessary for the Magistrate to send a copy of the charge to his client and also a notice that, on a day to be therein appointed, such charge would be taken into consideration.

It appears from the record that the only notice Golab Khan received was one, dated the 16th November 1870, in which he is directed to show cause why he ought not to be suspended from practising as a mookhtear. No charge was set out in this notice, and therefore the requirements of Section 16 have not been complied with. We therefore direct that the Magistrate will proceed according to law, and send a copy of any charge he may wish to make, or that may be made against the Mookhtear, to the Mookhtear, and also a notice fixing the day on which such charge will be taken into consideration. The day appointed to be within a reasonable time, so as to give the Mookhtear an opportunity to prepare his defence. In the meantime, pending the investigation, Golab Khan will remain under suspension.

The 20th February 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Jurisdiction—Ejectment—Mesne profits.

Case No. 1789 of 1870.

Special Appeal from a decision passed by the Additional Judge of Chittagong, dated the 24th June 1870, *reversing a decision of the Moonsiff of that District, dated the 26th August* 1869.

Huree Nath Doss (Plaintiff) *Appellant,*

versus

Sheikh Asmut Ali (Defendant) *Respondent.*

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Baboo Okhil Chunder Sein for Appellant.

Mr. G. A. Twidale for Respondent.

A suit for possession with mesne profits on the allegation that defendant, who had once been a tenant, was, notwithstanding the determination of his tenancy, holding on as a trespasser, does not lie under Act X of 1859.

Jackson, J.—THE decision of the Judge seems altogether wrong. The suit is properly brought in the Civil Court. It does not lie under Act X of 1859. It is a suit not only for ejectment, but also for mesne profits; and on this ground alone the suit could not be brought in the Revenue Court, as has been frequently held by this Court. The case will go back to the Judge for a decision. Costs of this appeal will abide the ultimate result of the suit.

Mookerjee, J.—I concur. The suit was brought for possession of land with wassilat. The defence was that defendant is in possession as a mortgagee of the whole plot of land, and that as regards a portion of it only defendant has a permanent ryotee tenure; and that therefore on both these grounds the plaintiff cannot succeed in obtaining possession. No objection was raised as to the jurisdiction of the Court.

The Moonsiff decreed the claim of the plaintiff, finding that the defendant's allegations of an usufructuary mortgage and permanent ryotee tenure was not at all established, while the plaintiff has proved his case.

On appeal to the Judge, the same pleas were again urged by the defendant as were raised in the Court of the Moonsiff. The Judge, however, takes the objection *suo motu* to the jurisdiction of the Civil Court, and dismisses the suit of the plaintiff, holding that the action should have been brought in the Collector's Court under Act X of 1859. Now, the question of jurisdiction should be determined from the allegations contained in the plaint, if the question is raised *in limine* before the merits of the case are gone through. Looking to the plaint, I find the plaintiff states that the defendant was a kursa ryot of the plaintiff; that his tenancy had been determined three years ago; and that as, notwithstanding the determination, the defendant has retained possession as a trespasser, the plaintiff seeks to get possession with wassilat.

If these allegations are correct, as the Court of first instance has found them to be, I cannot understand how the plaintiff could have gone to the Revenue Court. After the determination of the lease, and according to the allegations contained in the plaint, the defendant was no longer a tenant of the plaintiff. There is no relationship of landlord and tenant between the parties, and the plaintiff is right in coming to the Civil Court, which is the only Court that can give him full redress and is competent to decide all the pleas raised by the defendant. The plaintiff is not to be at the mercy of the defendant, and it it not competent to the defendant to oust the Civil Court of its jurisdiction, simply by stating that he is a ryot with permanent rights. The plaintiff also asks for wassilat which a Revenue Court cannot award. For that reason also, the plaintiff was right in seeking the assistance of a Civil Court. I would also remand the case for an adjudication on the merits.

The 20th February 1871.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Arbitrators—Jurisdiction.

Case No. 2095 of 1870.

Special Appeal from a decision passed by the Officiating Judicial Commissioner of Assam, dated the 1st June 1870, *affirming a decision of the Deputy Commissioner of Nowgong, dated the 22nd March* 1870.

Moshahel Singh (Plaintiff) *Appellant,*

versus

Konomutty Bewa and another (Defendants) *Respondents.*

Baboos Rajendronath Misser and *Chunder Madhub Ghose* for Appellant.

No one for Respondents.

The decision of arbitrators on a matter not in difference between the parties nor referred to them, is null and void for want of jurisdiction.

Mitter, J.—THE question whether the widow Konomutty was entitled to main-

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tenance or not was not a matter in difference between the parties to this suit, nor was that question referred to the arbitrators for decision. Admitting, therefore, that the decision of the arbitrators on the questions which were expressly referred to them, and the judgment of the Court, so far as it was passed in accordance with that decision, is final and conclusive, the decision of the arbitrators on the question of maintenance must still be considered as null and void for want of jurisdiction, and the decision of the first Court so far as it confirms that portion of the award must necessarily fall to the ground.

We therefore, reverse that portion of the decision passed by the Court of first instance, by which a sum of rupees 1,800 was allowed to the defendant Konomutty and her daughters. The remainder of the judgment must stand good, as being in strict conformity to an award which was passed upon matters duly referred to the arbitrators. The result is that the plaintiff will be entitled to recover from the defendant, Konomutty, the sum of rupees 1,800 in addition to the property already decreed to him by the first Court.

Each party must bear his own costs of this appeal and of the lower Courts.

The 20th February 1871.

Present :

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble L. S. Jackson and W. Ainslie, *Judges*.

Duty of Pleaders—Cazee's books—Sections 138 and 355, Act VIII of 1859.

Case No. 32 of 1870.

Regular Appeal from a decision passed by the Subordinate Judge of Tirhoot, dated the 4th December 1869.

Juggernath Sahoo and others (some of the Defendants) *Appellants*,

versus

Syud Mahomed Hossein and others (Plaintiffs) *Respondents*.

Mr. J. W. B. Money for Appellants.

Baboo Chynder Madhub Ghose for Respondents.

Order on the application by Mr. Money to be allowed to put in the Cazee's book, it not having been tendered in evidence in the Court below.

It is improper for a pleader to endeavour to influence a Court by reference to a course which another Court might think fit to adopt, or to the view which the Appellate Court might take of its proceedings.

A Cazee's book is not strictly an official record within the meaning of Section 355 of the Code of Civil Procedure. Before a document can be inspected under the provisions of Section 138, Code of Civil Procedure, the Court must see whether it comes under the description of a public record.

Norman, C. J.—I HAVE no hesitation in saying that we should not be exercising a proper discretion, if we were to admit the Cazee's book in evidence at this stage of the proceedings,

While the trial was proceeding before the Subordinate Judge, the book appears to have been sent for on the application of the plaintiffs, under the provisions of Section 138 of the Code of Civil Procedure. The book was in the Court of the Subordinate Judge, and it might have been used or referred to by the Court or put in evidence by either party at the time. The plaintiffs did not think fit to refer to it or to use it in any way, for what reason I do not know; but I can understand that the plaintiff's pleader might not have felt himself sufficiently strong to take up that book and to prove that the entries in it are false.

On the other hand, the defendant's pleader knew that the document had been sent for and was in Court. If he desired to make use of it, it was his duty to have referred to it and directed the attention of the Court to it. He had the fullest opportunity of doing so.

It has been suggested that the book was put in evidence. But we find that the book is not marked as having been admitted as required by law. No reference is made to the Cazee's book anywhere in the judgment.

We have little doubt but that the defendent's pleader deliberately abstained from referring to the book, or using it in any way whatever in the lower Court. He had a difficult case to support, and it is possible that the defendant's pleader knew well that his difficulties would have been increased, if the book had been used and referred to in the Court below. The Court was presided over by a Mahomedan Judge of considerable experience. If the book had been then put forward, a full and careful enquiry into the

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genuineness of the entries in August 1842 would have taken place before a Judge most competent to form an opinion on such a question, and in a place where evidence might have been within reach.

The case was tried on the materials which the defendants thought fit to make use of, and it is clear from the judgment of the Subordinate Judge that the Cazee's book was never referred to by the defendant's vakeel.

On the application of Mr. Money the book was sent for, and we find on referring to it that the entries relating to this transaction are the last entries at the end of the book, followed by a number of blank sheets. It is plain from the appearance of the book that, if put in, it would give rise to an enquiry as to the mode in which that book has been kept, which we are not in a position to make.

On the face of the book matters are apparent which, if we receive the book now, would give occasion to an enquiry upon which the Appellate Court ought not to be asked to enter, but which ought to have been entered upon before the Lower Court.

Mr. Money has alluded to what may take place if this case goes before the Privy Council.

I trust that this Court will do its duty, and that without reference to any person out of doors, or to any other Court to which its decisions may go upon appeal, I desire to say that I think it improper to endeavour to influence this tribunal by any reference to the course which another Court might think fit to adopt. I have no doubt that the Privy Council will do what they think fit, and if they think fit and proper to send for the Cazee's book, they will exercise their discretion and judgment and will send for it. I desire to say that this Court ought not to be told that some other Court will take any particular view of its proceedings, or even that there is a likelihood of the case being appealed.

It is not a legitimate argument to use before any Court that the Appellate Court will take a different view of the case, and I mention this because it is not the first time that Mr. Money has made a similar observation.

Jackson, J.—I desire to express my concurrence in the rejection of this book. There seems to be two ways of looking at the application for its being now received and annexed to the record—one, that it was used and dealt with by the Court below, possibly in some such way as that hinted at by Mr. Money; but it is clear that it was not so used. The second is that we should make use of the discretion vested in the Appellate Court under Section 355 of the Code of Civil Procedure, and allow the appellant to put it in as an additional exhibit. But I do not think we ought to do so, and chiefly for this reason that the book in question is not strictly an official record, and before we should be in a position to refer to it or to use it with any effect, it would have to be established by the evidence either of the Cazee who kept it, or of some other person who has been responsible for its custody. It would be extremely unsafe to take up a book of this description, which purports to have been kept and used 30 years ago by a person not in the service of the Government or responsible to the Government, and afterwards deposited in the office of the Judge, and to deal with it as if it were undoubtedly an authentic record. I do not think, therefore, we ought to deal with it under Section 355.

Then we are asked to send for the book and inspect it under the provisions of Section 138 of the Code, which I have no doubt applies to Appellate Courts as well as to Courts of Original Jurisdiction. But before doing so, we should have in some way to see whether it was a document which comes under the description of a public record. Now this book does not bear that character at all, and upon such cursory inspection of the book as we have given to it, it appears to me that it would be extremely unsafe to use it as a public record. The appearance of the book suggests a doubt as to whether it contained an entry of the document in question in the way in which it now shows it. Under this Section, also, I think the application ought to be refused.

As to Mr. Money's allusions to the probability of an appeal to the Privy Council, I concur in the observations made by the Chief Justice, having myself not unfrequently been witness to the use of language of the same kind by Mr. Money.

Ainslie, J.—I concur.

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The 20th February 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Review of ex-parte judgment—Appeal—Jurisdiction.

Case No. 1701 of 1870.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 16th May 1870, *reversing a decision of the Officiating Moonsiff of Bancoorah, dated 31st January* 1870.

Toolsee Dossee (*Proformâ* Defendant) *Appellant,*

versus

Doorga Churn Paul and others (Plaintiffs) *Respondents.*

Baboo Nil Madhub Sein for Appellant.

Baboo Mohinee Mohun Roy for Respondents.

An order setting aside an *ex-parte* judgment is final, where the defendant proves that he was prevented from appearing by sufficient cause, and applies within 30 days after attempt to execute process. But an appeal will lie if the order has been made without jurisdiction, or if the application was admitted after the prescribed time.

Kemp. J.—THE special appellant in this case is Toolsee Dossee. She was made a *pro-formâ* defendant in a suit brought by Doorga Churn Paul and others to obtain their respective shares in certain monies and also in certain decrees.

The main object of this suit, though it was ostensibly brought to recover the shares of the plaintiffs which had been appropriated by the principal defendant in the case, Modhoo Soodun, the managing member of the joint family, was to exclude Toolsee Dossee from the share she inherited from her husband, one of the members of the joint family, under the improbable averment that she had given up all right and title in her husband's estate, which was of a considerable value, for a consideration of a few maunds of paddy to be given to her yearly in lieu of maintenance. Modhoo Soodun alone defended the suit, Toolsee Dossee not appearing. Judgment went against Modhoo Soodun, and Toolsee Dossee was made liable with Modhoo Soodun for the costs only.

Toolsee Dossee then applied under Section 119 of Act VIII of 1859, and having proved to the satisfaction of the Court that she was prevented by sufficient cause from appearing in the suit, the Moonsiff ordered a re-hearing of the suit inasfar as Toolsee Dossee was concerned. The order was passed on the 29th December 1869.

The issues raised were, 1*st.*—Whether Toolsee Dossee had relinquished her husband's share or not. 2*nd.*—If such relinquishment be not proved, how far can the former judgment be reversed?

On the first issue, the Moonsiff found that there was no proof that Toolsee Dossee relinquished her husband's share. The evidence of the witnesses of the plaintiff were considered to be tutored. The Moonsiff also dwelt on the improbability of Toolsee Dossee, who had a daughter and grandson, consenting to any such arrangement for the paltry consideration of a few maunds of paddy. The clear presumption in the opinion of the Moonsiff was, that the suit was brought in collusion with the male co-sharers of the plaintiffs to make away with the rights of Toolsee Dossee. Toolsee Dossee was therefore declared not to be liable for the plaintiff's costs in modification of the former decree.

On appeal the Judge, Mr. W. Tucker, reversed this decision. He observes that although no appeal lies from an order admitting a review of judgment, yet when the case has been decided in review, any irregularities in admitting the review may be urged (Section 363 Act VIII of 1859). The Judge then says—"In this case the application for review was made fifteen months "after the decree, and the applicant's statement that she was not aware of the decree "was not proved, but was found to be false "by copy of a petition presented by the "applicant in another Court. The acting "Moonsiff, Baboo Thakoor Dass, had, therefore, no power to admit a review of the "judgment of his predecessor, Moulvie "Bootul Tumkin. The order admitting "the review was, therefore, without jurisdiction and cannot stand."

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The judgment of the first Court was reversed with costs.

In special appeal the grounds taken are—

1*st.*—That the order of the first Court passed under Section 119 Act VIII of 1859 was final.

2*nd.*—That Section 363 Act VIII of 1859 is not applicable to this case.

3*rd.*—That the Judge should have determined whether the petition alluded to was really filed by the special appellant or with her knowledge.

4*th.*—That there was no appeal against the order, and the reasons assigned by the Judge for setting it aside are not in accordance with the provisions of Section 119; moreover, the order appears to have been passed by the first Court upon good and sufficient grounds.

An appeal will lie against an order setting aside an *ex-parte* judgment under Section 119, if the order has been made without jurisdiction, or where an application has been admitted after the prescribed time.—Volume VI Weekly Reporter, page 500.

Section 363, quoted by the Judge, does not in our opinion apply. In this case the Moonsiff gave excellent reasons for admitting the review. He found that the special appellant, whom he examined, had satisfactorily proved that she knew nothing of the fact of a suit having been brought against her, until the opposite party took out execution. The petition alluded to by the Judge, the Moonsiff found on the evidence of the special appellant and the probabilities of the case, had never been presented by her or with her knowledge or sanction.

It appears to us very clear that the suit was brought with the view of obtaining a decree to the effect that the special appellant had relinquished her right to her husband's estate, which is of considerable value, for the paltry consideration of a few maunds of paddy. She was made a *pro formâ* defendant, and although the decree obtained as against her did not declare that she had made any such relinquishment, she was saddled with the costs of the suit.

This, therefore, was a judgment passed *ex-parte* against a defendant who had not appeared, and Section 119 of Act VIII of 1859 is applicable. The Moonsiff having given reasons, and, in our opinion, good reasons for being satisfied that the special appellant had proved that she was prevented by a sufficient cause from appearing in the suit, and her application being within 30 days after process for enforcing the judgment was attempted to be executed, his order under Section 119 was final.

We reverse the decision of the Judge and remand the case for trial.

Costs to follow the result.

The 21st February 1871.

Present:

The Hon'ble F. B Kemp and F. A. Glover, *Judges.*

Section 159, Act VIII. 1859—Procedure.

Case No. 44 of 1870.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 16*th September* 1869, *affirming a decision of the Subordinate Judge of that District, dated the* 15*th April* 1869.

Ajoodhya Doss and others (Plaintiffs) *Appellants,*

versus

Bibee Misrun (Defendant) *Respondent.*

Baboos Romesh Chunder Mitter and *Bama Churn Banerjee* for Appellants.

Mr. R. E. Twidale for Respondent.

Where an application was made at a very late stage of a case to enforce the provisions of Section 159 of the Code of Civil Procedure without proffer of any proof that the witness was absconding or keeping out of the way for the purpose of avoiding the service of the summons, the Lower Appellate Court was held to have been justified in not postponing the case to secure the attendance of the witness, although material.

Kemp, J.—This is a suit against the respondent, Mussamut Misrun, to recover a sum of rupees 2,998-5 annas, principal and interest, being the balance alleged to be due by her on a buhee khatta to the plaintiff, who was the proprietor of a banking firm in Mozufferpore, and who alleges that Mussamut Misrun had an account current with his bank, and that the son of the aforesaid

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Mussamut Misrun carried on transactions on her behalf from the year 1270 to Magh 1274 Fuslee. Mussamut Misrun admitted dealings with the plaintiff's bank, but takes exception to two of the items in the accounts of the plaintiff, namely, to a sum of rupees 3,000 and to another of rupees 800. Her objection was that her son, Moulvie Wullee Alum, had received these sums on his own account.

In the first instance, the Courts below decreed the plaintiff's case.

On appeal to this Court on the 18th November 1868, the case was remanded* by Justices Kemp and Elphinstone Jackson to the lower Court. We then observed that it does not follow that even if the defendant Mussamut Misrun's son was acting as her man of business, and was in the habit of drawing small sums for current expenses, that such a course of dealing would of itself authorize the plaintiff, a banker, to advance to him, that is, to Moulvie Wullee Alum, such large sums as rupees 3,000 on one occasion, and rupees 800 on another, on bonds. We observed also that the very circumstance that these sums were advanced on bonds, lent some weight to the presumption that they were advanced on the son's account but that however that was, it ought to be proved by the plaintiff that they were advanced on account of the mother; and we directed that the banker, the plaintiff, should be called upon to depose to the circumstances under which these two sums of money were advanced, for, as observed by us, the mother's statement was that the son had drawn these sums without any authority from her, and that the banker who had been advancing them being unable to realize them from the son, had in collusion with him charged them to the mother's account.

On remand, the Judge found on the whole of the evidence that these sums were advanced to the son of Mussamut Misrun on his own account, and not on account of his mother.

We may observe before proceeding to judgment, that the plaintiff died very shortly after or before the remand order—it is not certain which; at all events he has not been examined and could not be examined. The gomashta, however, has been examined. The order of remand says that either the plaintiff or his gomastah, or some body acquainted with the transactions, should be examined; and so far the plaintiff or his successor have acted up to the order of remand by examining the gomastah.

The grounds taken in special appeal are, first, that the Lower Appellate Court has misconstrued the remand order in holding that it lays down that it is not sufficient to show that Wullee Alum was his mother's general manager, and that this fact at least establishes a *primâ facie* case for the special appellant; second, that the Lower Appellate Court has misconstrued the evidence of the gomastah, and has not considered whether his evidence and the khatta-book do not establish the plaintiff's case; and third and lastly, that as the order of remand distinctly directed the lower Court to enforce the production of the buhee chittee or pass book from Wullee Alum, the lower Court was wrong in refusing to enforce his attendance on the application of the special appellant, merely because the application was not presented at the time of the first hearing but after the remand; and that the Lower Appellate Court was therefore wrong in presuming against the *bona fides* of the plaintiff's claim from the non-attendance of Wullee Alum.

On the first point, it is very clear that the order of remand has been properly construed by the Lower Appellate Court. We directed the Judge most distinctly on this point, namely, that it was not sufficient for the plaintiff to show that Wullee Alum was his mother's general manager, a fact which is not denied by his mother; but it is contended in the latter part of the first ground of special appeal, that the fact of his being his mother's general manager was sufficient at all events to establish a *primâ facie* case for the special appellant.

Now, it is admitted that no general power of attorney appointing Wullee Alum as his mother's attorney is forthcoming, though it has been proved and the Judge has found on the evidence of respectable people that he was her general attorney. It appears, as remarked in the judgment of Mr. Justice Kemp remanding the case, that this lady, Mussamut Misrun, who resides at Patna and is a secluded female, had estates in Zillah Mozufferpore, and that for the purpose of securing the punctual payment of the Government revenue and preventing all chance of these estates being sold for arrears, she had opened an account current with the plaintiff's banking firm, and her son was her attorney or manager for the purpose of

* 10 W. R., p. 376.

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seeing that these sums where paid through the banking-house into the Collector's Court. But it is said that in his capacity as her attorney, her son granted leases which were subsequenty accepted by the mother, and that therefore he was from that circumstance above shown to have been her accredited agent, and that he had the power to raise money on bonds and to bind her by his contract. We think that this argument is wholly untenable. It might be that he had the power to get from the banking-house certain sums on account of Government revenue, and it is also clear that he did so and that his mother has not objected to the other items in the account which were expended for that purpose; but, as already observed in our order of remand, the fact that the son had already overdrawn the account of his mother in the payment of Government revenue, ought to have made the banker more cautious in advancing large sums of money to the son, and charging the same to the mother without being in a position to prove that, at the time he made these advances to the son, he knew or had reason to know that the son was receiving this money on account of the mother. This he has altogether failed to prove, and therefore the first ground of special appeal is decided against him.

The second ground, namely, the mis-construction by the Lower Appellate Court of the evidence of the gomastah, has been shown in the course of the argument to have proceeded from a mis-construction of the Lower Appellate Court's judgment on the part of the pleader who drew the grounds of appeal, and this point was not pressed further by Baboo Romesh Chunder Mitter who conducted the case as pleader for the special appellant.

On the last point, with reference to the enforcement of the attendance of Moulvie Wullee Alum with the bulee chittee or pass book, we may observe that this Court in remanding the case did lay considerable stress, and very properly so, on the attendance of this party with the pass book in question. It appears that on the 13th of April 1869, after the remand, the special appellant did apply to the Court to enforce the attendance of Wullee Alum. It was said in the course of the argument that this application was made under Section 159 of the Code of Civil Procedure.

Now, under that Section the party applying to enforce its provisions must prove that the evidence of such witness or the production of such document is material, and that the witness or other person absconds or keeps out of the way for the purpose of avoiding the service of the summons. Now, that the attendance of this witness was material has already been decided by this Court in its order of remand, and no doubt his attendance was material; but we find that no evidence whatever was given or attempted to be given in proof of the fact that Wullee Alum was absconding or keeping out of the way for the purpose of avoiding the service of the summons, a simple petition being put in when the arguments were commenced and at a very late stage of the case without proffer of any proof that Wullee Alum was absconding or keeping out of the way for the purpose of avoiding the service of the summons. We, therefore, think that under the Section quoted, the Lower Appellate Court was justified in not postponing the case at that late stage and was quite right in proceeding to trial.

All the grounds taken in special appeal therefore fail, and the special appeal must be dismissed with costs.

The 21st February 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Limitation—Dispossession—Grounds of dismissal.

Case No. 2355 of 1870.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 11*th July* 1870, *reversing a decision of the Moonsiff of that District, dated the* 15*th February* 1870.

Huro Chunder Chowdhry (one of the Plaintiffs) *Appellant,*

versus

Gobind Chunder Moitro and others (Defendants) *Respondents.*

Mr. J. S. Rochfort and *Baboo Nuleet Chunder Sein* for Appellant.

Baboo Grija Sunkur Mojoomdar for Respondents.

A plaintiff's failure to prove dispossession on the particular date mentioned in the plaint, is not a sufficient ground for the dismissal of the suit.

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Mitter, J.—We think the ground on which the Subordinate Judge has decided this case is a very narrow one. The mere failure of the plaintiff to prove that he was dispossessed on the particular date mentioned in the plaint, is not of itself a sufficient ground to justify the dismissal of the suit. If the plaintiff can prove that he has a title to the property in dispute, and that that title is not extinguished by the operation of the statute of limitation, he would be entitled to a decree notwithstanding his failure to establish the allegation that he was dispossessed on the date referred to above.

We, therefore, reverse the decision of the Lower Appellate Court, and remand the case to that Court with directions to try—

1*stly.*—Whether the plaintiff, or the person from whom he derived his title, had been in possession of the land in dispute within 12 years prior to the institution of this suit.

2*ndly.*—Whether the plaintiff has a title to that property, and

3*rdly.*—Whether the defendants are entitled to a verdict on the ground of their title.

The costs of this appeal and of the Lower Appellate Court will abide the ultimate result.

The 21st February 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Special Appeal — Damages—Section 6 Act XI. 1865—Section 23 Act XXIII. 1861.

Case No. 1865 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Rajshahye, dated the 28th June 1870, *reversing a decision of the Moonsiff of Serajgunge, dated the 29th July* 1869.

Brojo Soondur Bhadooree (Plaintiff) *Appellant,*

versus

Eshan Chunder Roy (Defendant) *Respondent.*

Baboos Sreenath Banerjee and *Nulleet Chunder Sein* for Appellant.

Baboo Romesh Chunder Mitter for Respondent.

A suit for damages not exceeding Rs. 500 on account partly for injury to reputation, and partly for loss in business and professional position, comes within the provisions of Section 6 Act XI of 1865 and is not open to special appeal.

Bayley, J.—We think that no special appeal lies in this case under the provisions of Section 23 Act XXIII of 1861.

We have carefully read the plaint, and we find that the plaintiff there not only pleaded injury to reputation, but also consequent loss in business and in professional position, he being a mooktear in the Criminal Court. The case, therefore, not exceeding Rs. 500 in value, comes within the provisions of Section 6 Act XI of 1865.

The special appeal is dismissed with costs.

The 21st February 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Special Appeal — Stamps — Section 350, Code of Civil Procedure — High Court.

Case No. 2082 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Rajshahye, dated the 6th August 1870, *reversing a decision of the Moonsiff of Nattore, dated the* 19*th May* 1870.

Khan Mahomed Shaha (Defendant) *Appellant,*

versus

Lall Mahomed and another (Plaintiffs) *Respondents.*

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Baboo Nulleet Chunder Sein for Appellant.

Baboo Ashootosh Dhur for Respondents.

Under Section 350 Act VIII of 1859, it is not for the High Court to interfere when the decision of the Lower Appellate Court on the question of stamps does not affect the case on the merits.

Bayley, J.—We think this special appeal must be dismissed with costs.

The first objection is one which does not affect the decision on the merits. It appears that the first Court dismissed the plaintiff's case on the ground that the hoondee on which he based his suit was a fabrication.

The Lower Appellate Court, however, accepted the hoondee as genuine.

We think that under the provisions of Section 350 Act VIII of 1859, when the decision of the Lower Appellate Court on the question of stamps does not affect the case on the merits, it is not for us to interfere.

The second plea is that the hoondee and the receipt of money not being duly attested, the plaintiff's suit based thereon must fail.

Now, the Lower Appellate Court has found as a fact that the special appellant did receive the money. We see no such error in law as requires our interference in special appeal, and we therefore dismiss the special appeal with costs.

The 21st February 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Maps—Evidence—Stamps.

Case No. 2111 of 1870.

Special Appeal from a decision passed by the Judge of Dinagepore, dated the 18th July 1870, *affirming a decision of the Moonsiff of Maldah, dated the 12th March* 1870.

Kanuck Monee Dossee (one of the Defendants) *Appellant,*

versus

Gopee Mundul and others (Plaintiffs) *Respondents.*

Baboo Rajendro Nath Bose for Appellant.

Baboo Taruck Nath Sein for Respondents.

A map is not admissible as evidence unless it is stamped.

Mitter, J.—We see no reason to interfere with the judgment of the Lower Courts. Both the Courts below have found that the plaintiff has proved his possession as well as his title. As this is a finding of fact, we cannot distrub it in special appeal.

With reference to the map which was produced by the defendant, we entirely concur with the Lower Appellate Court in thinking that the defendant was not competent to produce fresh evidence at that late stage of the proceedings. Moreover, the document was not admissible as evidence, inasmuch as it was not stamped as it ought to have been.

The special appeal is dismissed with costs.

The 22nd February 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Putnees—Kists—Sale for arrears—Clause 3 Section 8 Regulation VIII. 1819—Special Appeal—Pleadings.

Case No. 205 of 1870.

Regular Appeal from a decision passed by the Officiating Deputy Commissioner of Maunbhoom, dated the 20th June 1870.

Darimba Debia (Defendant) *Appellant,*

versus

Nil Monee Singh Deo (Plaintiff) *Respondent.*

Baboos Hem Chunder Banerjee and *Mohendronath Mitter* for Appellant.

Mr. R. T. Allan and *Baboo Bhowanee Churn Dutt* for Respondent.

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Where a putneedar's possession is disturbed by the zemindar, and he is prevented from collecting the rents of certain kists, he is not liable for those kists. Where a talook is sold for arrears, the putneedar who is sold out is not liable for the rent of the month in which the zemindar presented the petition, enjoined by Clause 3 Section 8 Regulation VIII of 1819.

The High Court is bound to notice an argument on a point of law raised in special appeal, even though it was not raised before that Court on a previous occasion when it passed an order of remand.

Kemp, J.—THE defendant is the appellant in this case. The plaintiff, who is the *zemindar*, sued the defendant to recover a sum of rupees 7,981.

The defendant is the putneedar under the zemindar, and her talook was sold on the 2nd Aghran 1275 for arrears of rent. The plaintiff sets out at the foot of his plaint the kists payable for the year 1275 by the defendant. They amount on the aggregate to rupees 25,233-5-6-2-2. The amount realized by the sale was rupees 18,500. Then there was a sum of rupees 185 for costs of the sale under Regulation VIII of 1819, so that after crediting the sale proceeds minus the sale expenses, there remained a balance of rupees 7,486-11-4-2-2, with interest amounting to rupees 494-5-3-1-1, making a total of rupees 7,981-5.

The plaintiff having obtained a decree, the defendant then appealed to this Court, and this Court on the 7th March 1870 remanded the case. We found that the lower Court had not tried the right issue in the case, and we therefore directed the said Court to find whether the plaintiff did appoint a krook-sezawal, and whether he collected the rents direct from the ryots through the agency of of that krook-sezawal, and if so to what amount. We also directed the lower Court to find whether, according to the kistbundee, the defendant is liable for the one day's rent of the month of Aghran, that being also in dispute.

After remand, the Officiating Deputy Commissioner finds that the defendant's allegation of dispossession is unsupported by the evidence, and the objection to pay the one day's rent of Aghran unreasonable and invalid. He, therefore, gave the plaintiff a decree in full. Against this decision the defendant again appeals.

We think that the decision of the lower Court must be reversed and this appeal decreed. It appears to us very clear, from the documentary evidence in particular put in by the defendant, that the zemindar after the sale made arrangements with other putneedars on the footing that they were to pay to him and to receive from the ryots seven kists, and that the remaining five kists were to be received by the defendant, the former putneedar, who had been sold out on the 2nd of Aghran 1275. There can be no doubt of this, looking to the pottahs and kubooleuts to which our attention was drawn during the course of the argument by Baboo Hem Chunder Banerjee, the pleader for the appellant. Looking to these kubooleuts and pottahs, and to the deductions made from the jumma payable by the present putneedars and the amount to be received by the former putneedar, the defendant, it is clear that the new lessees had to pay the seven months' kists, and not the five months' kists as contended by the plaintiff. Moreover, we find from the kuboolent of the tehsildar appointed by the plaintiff after the sale to collect the rents from that portion of the putnee which the plaintiff held khas, that the tehsildar was directed to collect seven kists and not five kists.

Again, there is the oral evidence to the effect that the plaintiff did send his jemadar, Soodut Khan, and that he did issue a proclamation or otherwise instruct the ryots of the putnee that they were not to pay to the defendant, the former putneedar, more than the five months' kists, and that they were to pay the kists of the remaining seven months to the new putneedars or lessees.

We also think that it is clear that under no circumstances can the defendant be liable for the kist of the month of Kartick, for under Clause 3 Section 8 Regulation VIII of 1819, it is enacted that on the first day of Kartick in the middle of the year, the zemindar shall be at liberty to present a petition with a statement of any balances that may be due on account of the rent of the current year up to the end of the month of Assin. Now, in this case, the zemindar did present such petition and the sale took place accordingly. It is true that this argument was not raised on the former occasion when this appeal was heard before the remand order, but as it is clearly a point of law, we think that we are bound to take notice of it.

We, therefore, hold for the above reasons that it is clear from the evidence, oral and documentary, that the possession of the defendant was disturbed by the act of the zemindar; that she was prevented from collecting the rents of the kists of Assin and Kartick; and therefore that she

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is on that account, and also because she is not under the Regulation above quoted liable for the kist of Kartick at all, entitled to a decree in her favor.

If we were to hold otherwise, it is clear that the ryots of this mehal would have to pay twice over, that is to say, that they would have to pay the two kists of Assin and Kartick to the defendant if the zemindar's contention be correct; and they would also have to pay the same kists to the new putneedars according to the "bundobust" of the zemindar, and therefore they would have to pay twice over.

With reference to the one day of the kist of Aghran, it is unnecessary, as the kists of Assin and Kartick have been found to be not due, to express any opinion on this point; but we may say that it is not an arrear which would be due by the defendant, according to the terms of her kistbundee and of Section 20 Act X of 1859.

We, therefore, reverse the decision of the Lower Court, and decree this appeal with costs of all the Courts and interest, in favor of the defendant, appellant.

The 22nd February 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Proceedings to keep alive a decree—Section 20 Act XIV. 1859—Construction.

Case No. 387 of 1870.

Miscellaneous Appeal from an order passed by the Additional Judge of Hooghly, dated the 30th July 1870, affirming an order of the Subordinate Judge of that District, dated the 15th January 1870.

Rajeshuree Debia and others (Decree-holders) *Appellants,*

versus

Raj Coomaree Dossee and others (Judgment-debtors) *Respondents.*

Baboo Anund Chunder Ghossal for Appellants.

Baboo Umbika Churn Bose for Respondents.

The rule approved by the Privy Council, that any act done by a Court or an officer thereof, or *bonâ fide* by the applicant, for enforcing or keeping in force a decree, satisfies the term "some proceeding" in Section 20 Act XIV of 1859, was held to apply to the act of a Nazir in conducting a sale and remitting the proceeds to the Collector, and to the act of the decree-holder in applying for and drawing out a portion of those proceeds.

Kemp, J.—We think that in this case the decision of the lower Court must be reversed. The sale in execution of the decree obtained by the plaintiff took place on the 25th of September 1866. This sale was conducted by the Nazir in the mofussil, and it is clear from the Nazir's report, dated the 2nd of October 1866, which is on the file and which we have perused, that after certain deductions made by the Nazir for the expenses of conducting the sale and his own barburdaree expenses, he remitted on that date to the Collector the balance of the sale proceeds. Now, it is admitted that the decree-holder took out the proceeds on the 4th and 6th of October 1866, and the present application to execute the decree is made on the 2nd of October 1869. There is, as shewn to us, a conflict of decisions as to whether the mere taking out of sale proceeds is a proceeding to enforce a judgment, decree, or order, or to keep the same in force within the purview of Section 20 Act XIV of 1859; but there is a decision (which has been pointed out to us in the course of the argument) of the Privy Council to be found in Volume V Bengal Law Reports, in the case of the Maharajah of Burdwan *versus* Buloram Singh Baboo and others,* in which their Lordships, referring to a case decided by this Court, approve of the rule laid down in that decision,—the rule being that all acts done by the Court or by an officer of the Court, or *bonâ fide* by the applicant, for enforcing a decree or keeping it in force would satisfy the term "some proceeding" in the 20th Section. Now, here we have the act of the officer of the Court who conducted the sale, and who, by his report of the 2nd of October 1866, remitted the sale proceeds on that day to the Collector; and we have the decree-holder within reasonable time applying for and actually drawing out on the 4th of October a portion, and on the 6th of October another portion, of the sale proceeds.

* 14 W. R., P. C., p. 21.

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We, therefore, think that these proceedings were proceedings to enforce the decree, or to keep it alive within the meaning of Section 20 Act XIV of 1859.

We reverse the decision of the lower Court and decree this appeal with costs.

The 22nd February 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Onus probandi—Procedure.

Cases Nos. 1915 to 1918 of 1870.

Special Appeals from a decision passed by the Subordinate Judge of Midnapore, dated the 17th June 1870, *reversing a decision of the Moonsiff of Tumlook, dated the 26th September* 1869.

Sreemuttee Dossee (Plaintiff) *Appellant,*

versus

Ram Nidhee Koondoo (Defendant) *Respondent.*

The Advocate General and *Baboos Ashootosh Dhur* and *Ram Chunder Mitter* for Appellant.

Baboos Romesh Chunder Mitter, Kalee Mohun Doss and *Huree Mohun Chuckerbutty* for Respondent.

In a suit in which plaintiff claimed 4 plots of land as belonging to his putnee, and defendant alleged that they formed part of the resumed land of a jote for which he had obtained a decree in a resumption suit and of which he had ever since been in possession, the parties went to trial on the issue whether the land was mál as beyond the limits of the decree, or lakheraj as included in the chittahs according to which possession was given to the defendant in execution. On a consideration of what the latter had received under the decree, the first Court held that he was not entitled to retain the disputed land. The Appellate Court did not look beyond the plaintiff's chittahs.

HELD that the circumstances justified the first Court in deviating somewhat from the usual rule of law as regards the *onus probandi*, and that the course taken by it was most consonant with justice.

Glover, J.—The plaintiff in these suits claimed four separate plots of land, as belonging to his putnee estates Doobachuttee and Boistub Chuck. The defendant alleged that they formed part of the resumed land of Khyra jote in mehal Gojae, for which he (defendant) obtained a decree in 1865 and of which he has ever since been in possession.

It appears that in 1868, the plaintiff sued the occupants of the land in question under Act X of 1859, but lost his case in consequence of the intervention under Section 77 of the defendant; and it is to get rid of the effect of that decision, and to establish his title, that the present suits are brought.

The first Court found that the lands were not the same as those given to the defendant by the resumption suit, and that the plaintiff had proved his title to them. But the Subordinate Judge, on appeal, went on the general ground that the plaintiff had not been able to prove that the plots appertained to Doobachuttee; that the onus was upon him; and that he had failed to support it.

The objection taken in special appeal is, that the Subordinate Judge has taken an entirely wrong view of the case; that he has paid no attention to the evidence on which the Moonsiff founded his decision, but has decided the appeal on an issue which was not raised in the Court below.

We think that this case has not been properly considered by the Subordinate Judge. As a general rule, no doubt, a plaintiff coming into Court to prove his title would have the onus distinctly upon himself, and it would be for him to prove his case. But there were circumstances in this case which necessarily altered somewhat the usual rule of law, and made the course taken by the Moonsiff the one most consonant with justice. It appears that when the defendant got his decree for resumption, and got possession of the lands awarded on the 25th of September 1865, he gave a receipt specifying that he had received possession as per chittas, which give the area and boundaries of the lands covered by the decree, so that there could be no difficulty whatever in finding out by a local enquiry whether the land now sued for did or did

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not come within the area of that obtained by the defendant in the resumption suit. When the rent suits were brought by the plaintiff, the Collector made a local enquiry (with a view to intervening on the part of Government), the result of which was that the lands on which rent was demanded were found not to be the defendant's resumed lands. Nothing came of this enquiry, and it may be said that the report of the Ameen would not be evidence against the defendant in this case; but if this be put aside, there still remains a considerable body of the very best possible evidence to show what the defendant received, and on a consideration of which the Moonsiff held that he was not entitled to retain the disputed land.

It appears to us that as the issue was framed and decided by the first Court, it was not competent to the Subordinate Judge to make an entirely new case between the parties, and to call upon the plaintiff to prove his own case without reference to the evidence, which from the nature of the defence was brought prominently forward at the commencement of the suit. There was no objection taken in the appeal to the Subordinate Judge, as to the way in which the Moonsiff had drawn the issues; and we think, therefore, that the Appellate Court should have heard and decided the case upon the whole of the recorded evidence, as the Moonsiff did. and not have thrown out the plaintiff's case without looking to the facts on which the judgment of the first Court had mainly depended.

We may also observe that, on turning to the written statement of the defendants, we find that they rested their defence mainly upon the plea that the disputed lands were included within the lands for which they got a decree, and of which they got possession in execution of that decree. The defendants say—"the disputed land is not beyond the decree, and that they are in possession in execution of that decree." So that the parties went to trial on the issue whether the land was mâl as beyond the limits of the decree, or lakheraj as included in the chittahs according to which possession was given to the defendant in execution of the decree.

And the course taken by the Subordinate Judge is the more to be regretted, as the dispute could to all appearance have been most satisfactorily disposed of by using the evidence on the record. The plaintiff is the admitted owner of Doobachuttee and Boistub Chuck, and the defence is that the particular land in question was made over to the defendant in execution of his resumption decree. Nothing could be easier than to prove this by a comparison of the daghs and chittahs, which were made at the time of execution, with the disputed land. There is no doubt whatever as to what the defendant was entitled to get under his resumption decree, and if the land now claimed is not included in the schedule of that decree and in the receipt of the 25th of September 1865, it clearly cannot belong to the defendant. It is contended that however that may be, the plaintiff cannot take possession of any surplus without establishing his own title, and that the failure of the defendant to prove that the disputed plots were included in the decree will not give the plaintiff a title; but there is no question in this case of any third party's right, and the issue which was settled and tried was whether the land belonged to the plaintiff's mouzah, or whether it formed part of the land given to the defendant by the decree of 1865.

The Moonsiff, after considering the whole of the evidence adduced on either side, held that the land was not included in the decree and that the plaintiff had established his title. The Subordinate Judge did not look beyond the plaintiff's chittahs. He appears to have ignored entirely the large quantity of documentary evidence on which the Moonsiff came to his decision, and to have dismissed the plaintiff's suit because he disbelieved his chittahs. We do not think that this was the right way to dispose of the appeal. The Moonsiff had gone into the evidence on both sides, and the Appellate Court should have done the same. The peculiar circumstances of this case called in a more especial manner for such a treatment of the case, inasmuch as an examination of all the recorded evidence would have shown incontestably whether or not the defendant had any just claim to the land, and that would under the circumstances have given the greatest possible corroboration to the plaintiff's evidence.

We think that this case, as well as the other three cognate ones, must be remanded to the Subordinate Judge in order that he may take the whole of the recorded evidence into consideration and pass a fresh decision in accordance therewith. Costs will follow the result.

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The 23rd February 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge.*

Sureties — Withdrawal of security.

Case No. 167 of 1870.

Regular Appeal from a decision passed by the Recorder of Moulmein, dated the 27th June 1870.

Woon Chit Poe (Plaintiff) *Appellant,*

versus

Wee Chang and another (Defendants) *Respondents.*

Mr. C. Piffard for Appellant.

Mr. J. W. B. Money for Respondents.

Where a surety without taking precautions to see to its proper application permits the party for whom he is surety to get possession of money, which by an arrangement with that party and the co-sureties had been placed in his (the surety's) hands for the purpose of indemnifying the co-sureties, he loses his remedy against the co-sureties to the extent of the security thus allowed to be withdrawn.

Where money is permitted to remain in the hands of sureties in order to its being applied to the purpose to secure which they became sureties, it is the duty of each as between himself and co-sureties to see that the money is not misapplied.

Norman, C. J.—This is a suit which was brought in the Court of the Recorder of Moulmein, by one Woon Chit Poe against two persons Wee Chang and Ahyan Shoke, to recover contribution in respect of money paid by the plaintiff. as surety for one Awkin Fee, from the defendants his co-sureties. By a bond, dated the 21st of December 1865, the plaintiff and defendants bound themselves to be answerable for, and to make good, any sums realized by Awkin Fee, and for which he might fail to account pursuant to the order of Court granting to him a certificate under the provisions of Act XXVII of 1860, empowering him to collect the debts due to the estate of one Mewsoon.

Mewsoon's estate seems to have been considerable, and a large number of bonds and other securities came to the hands of Awkin Fee, who proceeded to collect in the assets of the estate. On the 19th of January 1870, the Court directed Awkin Fee to pay into Court the sum of rupees 14,804. Awkin Fee failed to pay, was committed to prison for contempt, and on the 21st of March 1870 the plaintiff and defendants, as the sureties of Awkin Fee, were ordered to pay the sum of rupees 14,804 into Court.

On the 4th of May the plaintiff paid that sum of money, and immediately afterwards brought this suit against his co-sureties for contribution.

The defendants by their Counsel contended that the plaintiff Chit Poe had received monies belonging to the estate amounting to rupees 9,325 and 12 annas. No written statement appears to have been called for, but upon this allegation an issue was fixed which was as follows :—

" Has the plaintiff since entering into the " surety bond received or retained out of " the estate of the late Mewsoon, a sum " equal to that which he has paid under the " Court's order, or any other, and what " sum ?"

At the trial the Recorder found that the defendants were liable each for one-third of the difference between rupees 14,804 and rupees 9,325-12 annas, namely, rupees 5,478-4 annas ; and he made a decree against each of the defendants for rupees 1,826-1 anna with costs in proportion.

From that decision the plaintiff appeals to this Court, and he contends " that the " facts of the case, as disclosed upon the " evidence, do not constitute a valid defence " in law or in equity to the suit of the " plaintiff (appellant), or an answer to the " whole or any part of the claim made by " the plaintiff against the defendants his co-" sureties."

The facts of the case, as we understand them, appears to be simple enough. We think there is very little real dispute or doubt on the evidence as to what those facts are.

We have a witness who speaks to a conversation between the parties at the time when the bond was entered into.

A person of the name of Bormiew says he " heard a conversation between Awkin Fee " and Chit Poe about the latter's security.

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"There were four or five persons present at "the time the conversation took place. "Chit Poe said—'The old man can do "nothing. We will take care of the money, "documents, and other things.' We were "then outside the Court. The parties went "inside the Court after that. That is all "I know about the matter."

Another witness, Kayn, takes up the story at this point. He says that he heard the conversation when Awkin Fee asked Wee Chang and Chit Poe to be his securities. The conversation which he heard took place inside the Court: it was in Mr. Macrae's Court (Mr. Macrae is the Judge of the Small Cause Court). The witness says—I "was present. Ahyan Shoke said there "are two long jackets and one short jacket. "Let the long jackets be securities. Wee "Chang and Chit Poe said—'There are do- "'cuments, let them take that.' Chit Poe "and Wee Chang said to Ahyan Shoke— "Do not fear, we will take all the docu- "ments.'"

The next event in point of time is spoken to by Chysoo, who is the brother of Chit Poe and his partner. He says—"I remem- "ber when the parties to this suit became "security to the Court for Awkin Fee. It "was not long ago Awkin Fee gave me "some documents connected with Mewsoon's "estate. I made no list of the documents, "or note of their receipt. I know Tomkin. "I cannot read English. I do not know "what the contents of the documents were. "I merely made a note in Chinese of the "number of the documents. I returned "some of the documents to Awkin Fee. I "returned all of them to him. He took "them one or two at a time. He did not "say what he wanted the documents for. "Sometimes he brought the documents "back. When he did not bring back the "documents he deposited cash. I made "a note when Awkin Fee took a document "and brought back money. Awkin Fee "gave me a list similar to No. 10 when he "gave the documents over to Chit Poe. "That list Awkin Fee took away long ago "when he took away the documents. That "was about 9 or 10 months ago."

Now, the evidence of these witnesses leaves no doubt whatever upon our minds, that at the time when it was proposed that the several parties should become sureties for Awkin Fee, it was arranged that Awkin Fee should deposit the bonds, papers, and other documents of title belonging to Mewsoon's estate with the sureties. Awkin Fee himself says in speaking of Mewsoon's estate—"I collected some mo- "ney due to the estate * * * I gave "it to Soobwa (Soobwa is another name for "Chysoo), the brother and partner of Chit "Poe * * * I deposited rupees 8,000 "or rupees 9,000 belonging to the estate "of Mewsoon with the plaintiff after I got "the certificate. I think I got rupees 2,000 "odd from Tomkin. I have an account of "the same. I gave the amount to Chit "Poe's partner * * * * I gave all the "bonds and securities to Soobwa and Wee "Chang when I came back from Rangoon. "I had no chest to keep them in. I gave "No. 10 (which is a list of securities de- "posited with Wee Chang) to Wee Chang. "I do not recollect how long it was after I "got the certificate. I think 15 days or a "month. I gave some documents to Soobwa "the same day I gave the others to Wee "Chang. I think I gave them the docu- "ments 10 or 15 days after I got them "from the Court. I filed my accounts in "Court."

Though he says that he had no chest, he does not say that that was the reason why he made over the documents to Wee Chang and Soobwa.

Not only did he deposit the documents, but, as stated by the witness Chysoo, when he took away any documents to collect money due upon them, he brought back the money and deposited it with the plaintiff, Chit Poe. When money was realized by Awkin Fee by means of documents in the possession of Chit Poe or Wee Chang, the monies collected were evidently brought to them to be held on the same terms as those on which the documents had been deposited.

A considerable sum of money, amounting to rupees 9,325, was paid by Awkin Fee to Chysoo as money belonging to Mewsoon's estate. The items appear at page 11 of the printed paper-book. Of these items Awkin Fee says—"I made seven payments to Soobwa "of monies belonging to Mewsoon's estate. "No. 11 contains the items." He says afterwards—"When I paid the money to "Chit Poe, I did not tell him what it was "for." It is clear that this last statement must be taken with a considerable amount of qualification. In the first place, a sum of rupees 2,000 was realized in this way.

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Chysoo says—"I remember giving to Awkin "Fee a document connected with Tomkin. "He brought me money but did not say on "what account. He brought me rupees "2,000. I gave the document to Awkin Fee "the same day I got the money."

We do not think any reasonable person can doubt that that money was the produce of Tomkin's bond. Then there is a sum of rupees 2,067, which was the proceeds of a cheque given by Awkin Fee to Chit Poe. That cheque was a cheque for money deposited with Wee Chang, drawn by Wee Chang in favor of Awkin Fee, and forthwith handed by Awkin Fee to Chysoo. Both these sums consisted of monies belonging to the estate of Mewsoon.

We have no doubt, notwithstanding the disclaimer by Awkin Fee, that the monies paid by Awkin Fee and received by Chit Poe were monies handed over as of Mewsoon's estate, representing securities which, by the arrangement between the parties when they undertook the suretyship, were to be deposited with Chit Poe, the plaintiff, by way of indemnity to him. That being so, we have to see, the surety having in his hands money for the purpose of keeping him indemnified,—what became of that money.

Now, as to two sums, one of rupees 2,000 and the other of rupees 1,000, it is quite clear that they were with the knowledge of the plaintiff applied, not to the purposes of the estate of Mewsoon, but to the private purposes of Awkin Fee in connection with a certain Anack Farm in which he was interested. As regards the rest, the position of the plaintiff is this. He had monies belonging to the estate of Mewsoon in his hands—monies which if he had chosen to act as a prudent man, and taken the steps which it was open to him to take as a prudent man for the protection of his own interests and that of his co-sureties, he might have applied or have seen applied specifically to the purposes of the estate. He might have refused to part with the money except for the payment of the debts, or the expenses attending the administration of the estate of Mewsoon, and if there was surplus he might have seen that such surplus was paid to the persons entitled to it.

The plaintiff, however, permitted Awkin Fee to misappropriate and apply to his own private purpose 3,000 rupees out of the estate of Mewsoon. He permitted him to get possession of other sums without taking any sort of precaution to see that they were properly applied. He thereby lost security which was in his hands, and which by the arrangement with Awkin Fee and the co-sureties was placed in his hands for indemnifying the co-sureties. According to the rule which governs the liabilities of sureties under the law as administered in England (See 2 White and Tudor, page 907), he would lose his remedy against the co-sureties to the extent to which he allowed these securities to be withdrawn from him. The rule is one founded on equity and good sense. But apart from the general rule as applied in England, upon the circumstances of this case, on the facts as they appear on the evidence in this case, we think that the meaning and intention of the parties in permitting the money to remain in the hands of the surety was that the money should be applied by the surety to the purposes of Mewsoon's estate; and it became the duty of each surety with whom money was deposited, as between himself and his co-sureties, to see that the money was not misapplied.

The result of that conclusion is that, as regards the rupees 9,325 referred to above, the plaintiff by parting with it has lost his remedy as against his co-sureties.

But a point has been ingeniously put by the plaintiff's Counsel, Mr. Piffard, on the appeal before us, that plaintiff has a similar complaint against the defendant Wee Chang as regards the money which had been deposited with him.

Securities were deposited with Wee Chang. Wee Chang received and paid over various monies, the accounts of which appear on the record. Of the monies collected on account of the estate during the two years preceding, there was in his hands in October 1868 a balance of rupees 4,397, and on the 3rd of October 1868 Awkin Fee appears to have written a letter to Wee Chang, of which the following is a copy.

"*Moulmein, 3rd October* 1868.

"To

"WEE CHANG,

"Moulmein.

"Gentleman,

"I beg to call upon you for the return "to me of the monies I deposited with you

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"at different times during the last two "years as per detail at foot.

"As I have already informed you, this "money is immediately and most urgently "required for the purposes of the estate, "to counteract the proceedings of Mah "May, and to dispossess her of the greater "portion of the estate of the late Mewsoon ; "and if not furnished within a short time, "there will in all probability be a heavy and "irretrievable loss which must fall upon "yourself as you are my security.

"The balance due by you is rupees 4,397. "I cannot do more than again warn you, "which I do now, of the consequences of "your non-compliance with this demand; and "I also beg to give you notice, that if within "three days the money is not paid, I will "be compelled to ask the assistance of the "Court against you, and perhaps sue you for "breach of trust.

"By complying with this demand, &c., "you will be simply protecting yourself from "that heavy loss, which the contrary line "of conduct (hitherto pursued by you) if "continued in will most certainly bring upon "yourself.

"Your immediate and particular attention "to this, and the favor of a reply, is request-"ed.

"I remain,

"Gentleman,

"Your obedient servant,

"AWKIN FEE."

Rather more than two months after this, namely, on the 16th December following, a letter was addressed to Wee Chang by Mr. De Wet, an Advocate at Moulmein, intimating that if immedate payment of the sum of rupees 4,397, being money in his hand belonging to Awkin Fee, was not made, legal proceedings would be commenced against him.

The result of these letters was that on the 22nd of December the whole sum of rupees 4,397 was paid by Wee Chang, and it is important to see how that money was paid.

Two sums of rupees 580 and rupees 1,700 respectively were paid to Mr. De Wet, apparently—for there is not a particle of evidence to the contrary, and the letter above-quoted would show this—for the purpose of carrying on a litigation and conducting other business connected with the estate of Mewsoon. As regards rupees 2,067, that sum was transferred and paid to Awkin Fee. and taken immediately from the house of Wee Chang to the house of Chit Poe, the other surety, where it was to remain, as we have no doubt, for the purpose of keeping the sureties indemnified.

Therefore, as regards Wee Chang, he seems to have done every thing that a surety could reasonably do to see that the money was correctly applied for the protection of the co-sureties, and for the purposes of the estate to which it should properly have been applied. There is no imputation whatever upon the conduct of Wee Chang.

The result is that the judgment of the Recorder is correct, and we affirm his decree with costs.

The 23rd February 1871.

Present :

The Hon'ble L. S. Jackson and W. Ainslie, *Judges.*

Execution — Attachment — Maintenance.

Case No. 405 of 1870.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Sarun, dated the 12th September 1870.

Monessur Doss (Plaintiff) *Appellant,*

versus

Beer Protap Sahee (Defendant) *Respondent.*

Mr. R. T. Allan for Appellant.

Baboo Mohesh Chunder Chowdhry for Respondent.

An order cannot legally be made for the prospective attachment and sale of a judgment-debtor's right to maintenance allowed by a decree ; but in view of an instalment of such maintenance being about to become due, the Court may make an order for the non-payment of such instalment by the party chargeable and its non-receipt by the judgment-debtor.

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Jackson, J.—THE question which arises in this case is, whether a creditor holding a decree against a party, who is entitled to an allowance by way of maintenance under a decree of Court, can proceed against such maintenance as a fund out of which his debt may be satisfied.

It is clear, on the one hand, that such sums as have already become due on account of maintenance may be attached and applied to the payment of debts by order of Court. It is also clear upon the decided cases, that an order to attach and sell prospectively a right to maintenance could not be sustained.

It appears to me, however, that there is a means of making an allowance available in conformity with the Code of Procedure without making the order which I have stated cannot legally be made.

The execution creditor's difficulty in this case is, that the debtor never allows the sum to become available, that is, to remain due; but by receiving it promptly from the Maharajah, on whose estate the maintenance is a charge, defeats the judgment-creditor and prevents his taking the sums accruing due. It seems to me, under those circumstances, that the Court may properly make an order in view of any instalment of allowance about to become due under the decree, that the Maharajah should not pay such sum to the judgment debtor and may forbid the judgment-debtor to receive such sum, so that the amount may either be paid to such person as the Court may direct, or an arrangement be made under Section 243 for the collection or administration, if necessary, of the amount of the maintenance.

Of course in making any such order, the Court would have to be guided both by a consideration of the reasons for which the maintenance was accorded, so that the party entitled to it may not be deprived altogether of the means of supporting himself and his family, and also to the claims of other creditors.

I think, therefore, that the decision of the Subordinate Judge must be set aside, and that he should be directed to take up the case *de novo*, and pass such order as the circumstances may render desirable with advertence to these considerations. Each party must pay his own costs.

Ainslie, J.—I concur.

The 23rd February 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Retention of a deed of sale—Right of suit—Joinder of causes.

Case No. 1877 of 1870.

Special Appeal from a decision passed by the Officiating Judge of Chittagong, dated the 2nd April 1870, *reversing a decision of the Moonsiff of Howla, dated the* 16*th February* 1870.

Tripoora Soonduree (Plaintiff) *Appellant,*

versus

Russick Chunder Kanoongoe (Defendant) *Respondent.*

Mr. R. T. Allan and *Baboo Okhil Chunder Sein* for Appellant.

Baboos Chunder Madhub Ghose and *Bama Churn Banerjee* for Respondent.

Where a party contracting to execute a bill of sale takes an advance of a part of the consideration-money, and retains in his own possession the deed which he had taken away for registration, the other party is entitled to bring a suit to recover the deed or to compel the defendant to execute a fresh document.

HELD (Mookerjee, J., dissentiente) that plaintiff could not sue for possession in the same suit.

Mookerjee, J.—IN this case the plaintiff states that the defendant had contracted to sell to him a certain piece of land; that the plaintiff advanced a sum of 99 rupees, as part of the consideration-money which was fixed at 111 rupees, and he promised to pay the balance of the consideration-money after the registration of the bill of sale. The plaintiff also states that the defendant kept the kobala with him for the purposes of registering the same, but that he did not present the deed, as he agreed to do, to the registry office and has not got it registered. He therefore sues for a specific performance of the contract which the defendant had entered into with him.

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The defendant denies the contract, denies the execution of the kobala, and in fact denies all the allegations set up by the plaintiff in his plaint.

The Court of first instance held that under the Full Bench Ruling, reported in page 51, X Weekly Reporter, the plaintiff was not entitled to possession; but it gave a decree to the plaintiff for specific performance of the contract, namely, that the defendant should execute to the plaintiff a kobala as he contracted to do. On appeal by the defendant, the Judge dismissed the entire claim of the plaintiff. He seems to consider that the Full Bench Ruling alluded to above applies entirely to the circumstances of the case. He says—"It has been urged by respondent's "pleader that the circumstances of this case "are peculiar; that plaintiff actually obtain-"ed a kobala or deed of sale from defend-"ant; and that it was fetched fraudulently "from her relation by defendant, when the "said relation was endeavouring to have it re-"gistered at the registry office. Under such "circumstances the pleader urges that, even "if the Full Bench Ruling bars the obtaining "of a decree for possession and declaration of "right on specific performance, there is no "reason why a decree should not issue for the "restitution of the document fetched from "her with a view to a renewed attempt at "registration."

The Judge goes on to say—"This Court "is clear that there was no such relief "sought by the plaintiff in the lower Court, "and that the asking of such relief was "never contemplated till the hearing of the "Full Bench Ruling came to light in this "Court." He, therefore, thinks that under the enunciation of the law in the decision of the Full Bench, he can give no relief to the plaintiff.

On referring to the plaint in this case, we find that although the plaintiff seeks to recover possession of the land which the defendant had contracted to sell, he also prays that the Court will be pleased to order a specific performance of the contract by requiring the defendant to execute a bill of sale. He does not sue upon the unregistered document, which cannot be under the registration law adduced in evidence before a Court of Justice. But the main gist of his action appears to be that the defendant having contracted to execute a bill of sale of this property to him has not done so, namely, that he has not given him a proper bill of sale as he had promised to do. I do not see that a claim like this falls within the purview of the principle laid down in the Full Bench Ruling. I consider that although it is stated in this case that the defendant had executed a deed of sale, what the plaintiff really means to say is that the defendant not having delivered that deed to him and not having registered it, he has not carried out the terms of the contract he entered into with him. He is therefore, I think, at liberty to prove the contract which was originally made by the defendant with him, and on proof of that contract, I think, he is entitled to a relief. If we consider the law to be otherwise and say, that because a document had been executed by the defendant which he has not however delivered to the plaintiff, that the plaintiff from the mere fact of the defendant having put his signature to a document cannot say that the defendant has not performed his part of the contract, we would be opening a door to fraud of all sorts, and assisting a party guilty of fraud in depriving an innocent man of his remedy. The case appears to me to be a clear one. It is a case of non-fulfilment of contract entered into by the defendant with the plaintiff; and I am of opinion that under Act VIII of 1859, the plaintiff is fully entitled to ask the Court to compel the defendant to fulfill his part of the contract, namely, by requiring the defendant to give him a proper bill of sale. The mere execution by defendant of a deed which he has retained in his possession, is no fulfilment of the contract that he has entered into with the plaintiff.

I would, therefore, remand the case to the Court of second instance in order that the other issue in this case, *viz.*, as to whether there was a contract or not, may be tried, and the case decided according to the result of that enquiry. I cannot see why in such a case as this, the plaintiff cannot also ask for possession to be given to him along with the kobala. It cannot be denied that after obtaining a kobala from the defendant, the plaintiff will be at liberty to sue for possession of the land covered by that deed. Looking to Section 8 of Act VIII of 1859, I cannot understand why then plaintiff cannot ask for possession and specific performance in the same suit, and why it should be necessary for him to institute a separate suit for possession.

Costs to abide the final result.

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Jackson, J.—I also think that this case ought to be remanded. The suit was on two grounds. One was to recover back a document, which the plaintiff alleges that the defendant took away from him for a certain purpose, but which he now falsely says is lost. The claim is either to recover that document, or if that document has been lost by the defendant to require the defendant to execute a similar document. The other prayer was for possession. I quite agree with the lower Court in thinking that the suit for possession cannot at present be decided. But I do not see why the plaintiff should not recover the document. This document is most valuable to him. It was in his possession, but it was taken away by the defendant for a certain purpose. It seems to me quite immaterial whether it was taken away for registration or taken away for any other purpose. The defendant having taken it away for a certain specific purpose, is bound to restore it, and the plaintiff is entitled to bring a suit to recover it. Under these circumstances, I would remand this case to the Lower Appellate Court in order that it may try the question, whether the defendant did take away the document or not. If on enquiry it is found that he did take away the document, it will order the defendant to restore it, or, if necessary, to execute a fresh document.

The argument which has been used in this case, that by doing so the Court would be using a document in evidence which is not registered, is wholly unsound. The document itself is not used in any way whatever.

The 23rd February 1871.

Present:

The Hon'ble L. S. Jackson and W. Ainslie,

Judges.

Limitation—Intermediate tenures.

Case No. 1892 of 1870.

Special Appeal from a decision passed by the Judge of Sarun, dated the 1st June 1870, affirming a decision of the Moonsiff of Pursa, dated the 20th January 1870.

Dhunookdharee Singh (Plaintiff) *Appellant,*

versus

Gopee Singh (Defendant) *Respondent.*

Baboo Tarucknath Dutt for Appellant.

Baboo Khetternath Bose for Respondent.

The purchaser of certain land claiming to receive the rents directly from the ryots sued to get rid of an alleged mokururee intermediate tenure of 1257. It appeared also that plaintiff had been previously in occupation under a ticca lease extending to 1263:

HELD that before defendant could successfully plead limitation, it would be for him to show that the plaintiff had notice of his claim to hold under a mokururee tenure.

Jackson, J.—THE law of limitation appears to have been erroneously applied to this case.

The plaintiff is a purchaser from the owner of the land, and he claimed to be entitled to receive directly the rents payable by the ryots; and for that purpose he sought to get rid of an alleged mokururee intermediate tenure set up by the defendant.

The date of the mokururee so set up was in the year 1257.

The Judge finds that the plaintiff had not shown that he was in possession of the land in dispute at any time within 12 years next before the commencement of the suit.

It appears, however, that the plaintiff had been previously in occupation of this and some other land under a ticca lease, of which the term extended down to 1263, because his kubooleut to that effect was put in and was admitted by the defendant to be genuine. Now, it would be for the defendant under those circumstances to show that the plaintiff had notice that he held or claimed to hold under a mokururee title set up before he could successfully plead limitation. The Judge will find the observations applicable to this subject in the case of Rajah Saheb Perladh Sein,* reported in XII Moore's Indian appeals, page 330 of the judgment. It is not contended that there was any such evidence, and this being so the decision of the Judge must be set aside. The case will have to go back to the Lower Appellate Court in order that it may try whether the defendant had a real valid mokururee title or not.

Ainslie, J.—I concur.

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* 12 W. R., P. C., p. 6.

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The 23rd February 1871.

Present:

The Hon'ble E Jackson and Onoocool Chunder Mookerjee, *Judges.*

Joint decree—Heirs—Guardian—Liability.

Case No. 2088 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Mymensingh, dated the 13th July 1869, *reversing a decision of the Sudder Moonsiff of that District, dated the 20th March* 1869.

Brojo Mohun Mojoomdar (one of the Defendants) *Appellant,*

versus

Roodronath Surmah Mojoomdar (Plaintiff) *Respondent.*

Baboo Kalee Prosunno Roy for Appellant.

Baboo Nuleet Chunder Sein for Respondent.

In a suit against heirs inheriting equally, a joint decree may be passed without determining the liability of each.

A widow defending a suit as guardian of her minor son cannot he made liable in her own person as well as representing the heirs of her husband.

Mookerjee, J.—In this case the plaintiff, who was a co-debtor with the defendants in a certain decree for costs passed against them, seeks to reimburse himself for what he had been obliged to pay in execution over and in excess of his share of the liability under the decree. The suit is brought against the heirs of one Ram Mohun, who are four in number. The first Court gave a decree for 100 rupees in favor of the plaintiff to be paid by the four sons of Ram Mohun jointly, and as regards the rest of the claim dismissed the plaintiff's suit. The plaintiff alone appealed to the Subordinate Judge, who confirmed that portion of the decree passed by the first Court. The Subordinate Judge also decreed the rest of the claim against Brojo Mohun.

Brojo Mohun appeals specially to this Court, and urges, firstly, that a joint decree should not have been passed against him and his brothers for 100 rupees, but that the liability of each of the four brothers should have been determined in this suit. We are of opinion that this objection, even if there is any force in it, not having been urged in the Lower Appellate Court, for there was no appeal on the part of Brojo Mohun or his brothers, the defendant Brojo Mohun has no right to urge before us. We are also of opinion that there is no force in this contention, even if it had been urged in the Lower Appelate Court. These four persons are the sons of Kristo Pria, and being Hindoos there is no question that all of them inherited equally, if they inherited any thing, from the mother.

Another objection has been taken to the decision of the Subordinate Judge, namely, that he was wrong in making Brojo Mohun alone liable for the rest of the amount claimed in this suit. On reading the decree, we find that it makes the heirs of Ram Mohun and Roop Ram liable for costs. But in that case the mother, Kristo Pria, appeared as the guardian of Brojo Mohun alone; and therefore the right construction of that decree appears to us to be that the heirs of Roop Ram and Ram Mohun were the only persons that were made liable. But of the heirs of Ram Mohun only Brojo Mohun was the defendant in that case, and therefore Brojo Mohun was the person who along with the other heir or heirs of Roop Ram was made liable for the costs. According to this contruction of the decree, Brojo Mohun would have been liable to to make good the whole of the amount claimed in this suit; whereas by the order of the Subordinate Judge he is made liable as regards 100 rupees along with his brothers, and made solely liable for the rest of the claim. We, therefore, find that there is no ground on which Brojo Mohun can impeach the order of the Subordinate Judge, which is advantageous to him inasmuch as he is made liable for an amount less than that for which he would have been liable. We confess, however, we cannot make out what the Subordinate Judge means by holding the four defendants liable as to 100 rupees as heirs of Kristo Pria defendant, and Brojo Mohun responsible for the rest of the claim as the son of Ram Mohun. Kristo Pria appeared in the former suit as mother and guardian of Brojo Mohun, a minor son of Ram Mohun. Kristo Pria, therefore, was either liable as representing the estate of Ram Mohun or was personally responsible. She

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cannot be liable in her own person, as well as representing the heirs of her husband. There is nothing in the decree making her personally liable, for she was no heir of Ram Mohun. But the other heirs of Ram Mohun, who have been made jointly liable with the appellant, have not chosen to appeal to us; and we, therefore, cannot interfere with the order passed against them.

The appeal is dismissed with costs.

The 24th February 1871.

Present:

The Hon'ble E Jackson and Onoocool Chunder Mookerjee, *Judges.*

Enhancement of rent—Presumption—Section 4 Act X of 1859.

Cases No 1044 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 3rd March 1870, *affirming a decision of the Deputy Collector of that District, dated the 11th November* 1869.

Kunda Misser and others (Plaintiffs) *Appellants,*

versus

Gunesh Singh and others (Defendants) *Respondents.*

Baboo Luckhee Churn Bose for Appellants.

Mr. R. E. Twidale for Respondents.

In a suit for enhancement of rent the defendant is not entitled to the presumption arising under Section 4 Act X of 1359, where it appears that his tenure commenced from a date later than the permanent settlement, even if he proves payment at an uniform rate for 20 years.

Mookerjee, J.—This is a suit for arrears of rent at an enhanced rate for 3 beegahs and 6 biswas of land. The plaintiff states that he served a notice on the defendant at the end of Choit 1272, requiring him to pay rent at the rate of 4 rupees per beegah. The defendant pleaded that no notice was served upon him and that he held a pottah, dated 1259, from Kadir Khan and Nadir Khan, the former proprietors of this land, and that he has been paying rent according to that pottah from that time downwards; and that the plaintiff in 1270 admitted the pottah and received rent accordingly.

This case was once before this Court in special appeal, and it was remanded in order that the witnesses to the pottah who were in attendance in the Deputy Collector's Court might be examined. On remand, the Judge has examined those witnesses, and has changed his opinion and has now found that the pottah is a genuine document. He then remanded the case to the Deputy Collector to ascertain what was the rate prevalent in the mouzah, and also suggested that the defendant might have an opportunity to show whether on any other ground the enhancement was barred. On remand, the Deputy Collector allowed the defendant to file several other dakhillas extending beyond 1259, and on proof of those dakhillas found that, inasmuch as the defendant has proved that the rent has been paid at an uniform rent for the last 20 years previous to the suit, the enhancement was barred under Section 4 Act X of 1859.

On appeal, the Judge affirmed the decision of the Deputy Collector, and the plaintiff comes up to this Court in special appeal urging that from the written statement of the defendant and from the pottah produced by him, it is clear that the defendant's tenure commenced only in 1259, so that he is not entitled according to his own showing to a presumption under Section 4, that the land has been held at the rent which he now pays from the time of the permanent settlement.

On a careful perusal of the written statement filed by the defendant as well as of the pottah, we find that this contention is good. The defendant no where alleges that his tenure was in existence previous to 1259: on the contrary, there are words which convey a clear and distinct meaning that he obtained the pottah in 1259 for the first time. The defendant's case, therefore, being that he has been in possession from 1259 under the pottah set up by him, we do not think that he is entitled to a presumption under Section 4. The latter portion of Section 4 says that "unless it be proved that such rent was fixed at some latter period." Now the pottah and the written statement show that the rent which the defendant has been paying has been fixed

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at some period later than the date of the permanent settlement. Therefore, the defendant cannot claim any such presumption in his favor: his own title-deeds and his own admissions show that his tenure commenced in 1259. The intention of the legislature appears to us to be that where a ryot states that his tenure dates so far back as the date of the permanent settlement, and pleads that he has been paying rent at an uniform rate from that time, he is entitled to the benefit of a presumption under Act X, if he can show that he has been paying rent at the same rate for 20 years next preceding the year of suit. But it is merely a presumption which the legislature thought it necessary to give to a ryot, because the permanent settlement had been made at a very early period, and because it would be impossible at this distance of time for a ryot to show, by any strict proof, that he has been paying rent at the same rate from that time. But when from the defendant's own statement and his title-deeds it is apparent that his tenure commenced from a date later than the permanent settlement, surely he is not entitled to any presumption that the tenure existed from before.

The case must, therefore, go back to the Court of first instance for a determination of the other issues in this case.

Costs of this appeal will abide the final determination of the suit.

The 24th February 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Rent-suit — Receipts—Cause of action.

Case No. 1658 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Judge of 24-Pergunnahs, dated the 12th May 1870, affirming a decision of the Collector of that District, dated the 4th January 1870.

Huro Pershad Roy Chowdhry (Plaintiff) *Appellant*,

versus

Wooma Tara Debee (Defendant) *Respondent.*

Baboo Bhowanee Churn Dutt for Appellant.

Baboos Anund Chunder Ghossal and *Ram Chunder Mitter* for Respondent.

Where rents are not sued for within 3 years from the end of the year for which they are alleged to be due, the fact that damages were awarded against the plaintiff in a former suit for not giving receipts for that year will not create a cause of action.

Norman, C. J.—It appears clear that the plaintiff's claim is barred so far as regards the rents of 1272 for chucks 15 and 16. The Judge, on appeal, has shown that the plaintiff is in a dilemma, namely this, either the rents for chucks 15 and 16 have been paid, or not. If the rent has never been paid, there was never any thing to prevent the plaintiff from suing for the rents of those chucks at any time within three years from the end of 1272, and there is no pretence therefore for saying that the suit can now be maintained. If the rent of these two chucks has been paid, there is an end of the matter. The mere fact that damages were awarded against the plaintiff in a former suit for not giving receipts for the year 1272, will not create a cause of action or revive that which has been extinguished by payment. If that decision was erroneous—if the damages awarded for not giving receipts were calculated on a wrong principle and involved a refund of rents paid, it may have been a ground of appeal from the Collector's decision.

The appeal is dismissed with costs.

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The 24th February 1871.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Money-decree—Execution sale—Prior mortgage.

Case No. 2112 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of East Burdwan, dated the 29th July 1870, *reversing a decision of the Moonsiff of Mungulcote, dated the 28th January* 1870.

Kuseemoonissa Bibee and others (Plaintiffs) *Appellants,*

versus

Hurronnissa Bibee (Defendant) *Respondent.*

Baboo Umbika Churn Banerjee for Appellants.

Baboo Debendro Narain Bose for Respondent.

Property having been mortgaged as security for money lent, the mortgagee sued on his bond and elected to take a simple decree for money, in execution of which he sold the mortgaged land entering up satisfaction on his decree, became the purchaser, and got possession. He was afterwards ejected on a suit by a party claiming to hold on a prior conveyance from the judgment-debtor.

HELD that having purchased with full knowledge, he could not afterwards bring a suit to have the mortgaged property declared liable, or saddle it with the money due on his decree at the expense of an innocent third party.

Glover, J.—WE think that this special appeal must be dismissed with costs. The plaintiff's ancestor got a mortgage of the disputed property from the defendant No. 2, as security for money lent, on the 24th Assar 1266. He sued on his bond and got a simple money-decree on the 5th of April 1865. This decree he executed in 1866 against the judgment-debtor's land—the same as had been mortgaged—and himself became the purchaser of the property and got possession, entering up at the same time satisfaction of his decree. After getting into possession, a claim was set up by the defendant No. 1 to the property under a foreclosed mortgage from the defendant No. 2, the deed of conditional sale being dated the 2nd Bysack 1268. This claim was decreed in favor of the mortgagee defendant, and the decision of the Court below was eventually confirmed by this Court, on the 17th December 1868, by Justices Bayley and Macpherson. The case is to be found reported in the 10th Weekly Reporter, page 468. On this decision being given against him, the plaintiff brought the present suit to have the mortgaged property declared liable for his claim. The Subordinate Judge has decided this point against him.

We do not dispute the contention put forward by the special appellant's pleader that plaintiff had authority to bring a suit of this nature. Many decisions of this Court have settled that a party getting a money decree upon a deed of mortgage hypothecating lands for the payment of the money due, can bring a subsequent suit to declare that property liable under his mortgage; but in this case the facts are different. The plaintiff, having the option either to elect a decree binding the property or to take a simple decree for money, chose the latter. In execution he got possession of the property as belonging to his judgment-debtor and entered satisfaction of the decree. If, after that, he, having had full knowledge of what he was about and knowing what it was he was purchasing, is afterwards ejected on a suit by a party claiming to hold the mortgaged property on a prior conveyance by the judgment-debtor, we think that he cannot then bring a suit to have that mortgaged property declared liable or saddle it with the money due on his decree at the expense of an innocent third party. A similar view has been taken by a Division Bench of this Court in the case of Shaikh Mahomed Basiroollah *versus* Shaikh Abdoollah and

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others, reported in Volume IV, Bengal Law Reports, page 35 of the Appendix,* in which the judgment of the Court affirms the principle that a decree-holder must abide by the consequences of steps deliberately taken by him, that he cannot afterwards urge the plea of a mistake on his part, and that the principle of *caveat emptor* applies. We see no reason to dissent from this principle, the less so in the case now before us as the plaintiff's bond is more than 10 years old and his decree more than six.

The appeal is dismissed with costs.

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* The 24th January 1870.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Case No. 396 of 1869.

Miscellaneous Appeal from an order passed by the Officiating Additional Judge of Chittagong, dated the 12th June 1869, *affirming an order of the Subordinate Judge of that District, dated the 30th December* 1868.

Shaikh Mahomed Bassiroollah (Decree-holder) *Appellant,*

versus

Shaikh Abdoollah and others (Judgment-debtors) *Respondents.*

Baboo Luckhee Churn Bose for Appellant.

Baboo Nulleet Chunder Sein for Respondents.

Loch, J.—WE think the judgment of the Court below is right. The decree-holder is not in a better position than any other auction-purchaser, a stranger. In this case if the auction-purchaser had been a stranger, he would not have been entitled to recover his purchase-money, and this must be the case where the auction-purchaser is the decree-holder. We, therefore, reject this appeal with costs, sixteen rupees being allowed for pleader's fees.

Mitter, J.—I concur.

The 24th February 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Lessor—Lessee—Mesne profits.

Case No. 1893 of 1870.

Special Appeal from a decision passed by the Judicial Commissioner of Chota-Nagpore, dated the 10th June 1870, *affirming a decision of the Moonsiff of Manbazar, dated the 7th September* 1869.

Bheekumbur Singh and others (Defendants) *Appellants,*

versus

Raj Chunder Ghose (Plaintiff) *Respondent.*

Mr. G. A. Twidale for Appellants.

Baboo Gopeenath Mookerjee for Respondent.

A lessor who prevents ryots from paying rent to the lessee when the latter comes to take possession, is liable for mesne profits even though he may not himself collect the rents.

Kemp, J.—THERE are no grounds for this special appeal. The defendants are the grantors of the lease to the plaintiff, and the plaintiff's case is that on his attempting to take possession of the property leased to him by the defendants, the defendants induced the ryots to withhold the rents, and that the defendants appropriated the mangoes and fish and dispossessed him.

Both Courts have found that the defendants did induce the ryots not to come to a settlement with the grantee, the plaintiff; that they turned off his ploughs when he attempted to cultivate the land and prevented the ryots paying rent to him, and therefore gave the plaintiff a decree with wasilat to be ascertained in execution of that decree.

The defendants now appeal specially, urging that they ought not to be made liable for wasilat unless it be clearly shown that they collected the rents. The lower Courts having found that the defendants granted a lease

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of this property to the plaintiff, and after doing so, when the plaintiff come to take possession, that they prevented the ryots paying rent to him, they have been rightly charged with wasilat.

The wasilat will be, as directed by the lower Courts, ascertained in execution of this decree; and such amount of wasilat will be awarded as may be found on that enquiry to have been appropriated by the defendants.

The special appeal will be dismissed with costs.

The 24th February 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Hindoo Law—Inheritance—Byragees — Kept mistresses — Marfutwaree payment of rent.

Case No. 2142 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of East Burdwan, dated the 7th September 1870, *reversing a decision of the Moonsiff of Mungulcote, dated the 22nd January* 1870.

Khoodeeram Chatterjee (Plaintiff) *Appellant,*

versus

Rookhinee Boistobee (Defendant) *Respondent.*

Baboo Umbika Churn Banerjee for Appellant.

Baboo Motee Lall Mookerjee for Respondent.

A Hindoo by becoming a byragee does not divest himself of all title in his family estate, which on his death devolves on his heirs, and not on a kept mistress, although she may have performed his funeral rites on account of his being an out-cast.

Payment of rent marfutwaree confers no ryotee title on the marfutwar.

Kemp, J.—The plaintiff in this case, the special appellant, purchased from Gunga Narain his malikee rights in certain lakheraj lands, and also his rights in a certain jummaie tenure. Gunga Narain, the plaintiff's vendor, purchased from Shiboo, who was the heir, as alleged by the plaintiff, of Nobo Krishto. The dispute before the Court refers to the jummaie land only, it having been found that Gunga Narain was the proprietor of the malikee rights by the Judge, and that decision has become final. In the first Court the Moonsiff held that Nobo Krishto was succeeded by his nephew Shiboo, that Shiboo sold his jummaie rights which he inherited from Nobo to Gunga Narain, and that Gunga Narain sold to the plaintiff; that Rookhinee was the kept mistress of Nobo; that she was not entitled to succeed as his heiress; and that therefore the plaintiff being the purchaser of the jummaie holding of Nobo Krishto was entitled to direct possession of the same, and he therefore gave the plaintiff a decree. There was no appeal, we may observe, by the plaintiff's vendors, who were the parties principally concerned; the appeal was on the part of Rookhinee alone. Rookhinee did not in any way impugn the genuineness of the bill of sale to the plaintiff. Her contention appears to have been, as shewn in her petition of appeal, as to whether Shiboo was the heir of Nobo Krishto, and as his heir had any right to sell to Gunga Narain. Rookhinee appears to have been examined in the Court below, and in her examination she says that "I, as "heiress of Nobo Krishto, am dwelling in "the house; if the plaintiff's purchase be "good, he can receive rent from me but he "is not entitled to eject me." The Lower Appellate Court has found that Shiboo is not the heir of Nobo Krishto, but gives no reason whatever for coming to that finding. The Subordinate Judge says that Rookhinee is the heiress of Nobo, and he apparently comes to this conclusion because she performed the funeral rites of Nobo who was an out-cast. The Subordinate Judge also finds that the house in dispute was built by Nobo Krishto and Rookhinee jointly, and Rookhinee has been paying rent for the same. He, therefore, dismissed the plaintiff's claim with reference to the jummaie tenure.

We think that the decision of the first Court is a right decision, and that the decision of the Subordinate Judge is altogether wrong. As already observed, there was no contention on the part of the plaintiff's

vendors as to their having parted with their rights to the plaintiff, and Rookhinee in her examination does not seem to question the plaintiff's purchase, but she says that he is not entitled to any thing more than the receipt of rent from her. The Subordinate Judge is clearly wrong when he says that Nobo Krishto and Rookhinee have jointly built this house, for on referring to the evidence of Rookhinee we find that she distinctly states that the house was built by Nobo. He is also clearly wrong in saying that Rookhinee is the heiress of Nobo. It is very clear that under the Hindoo Law, Nobo Krishto's heir would be his nephew Shiboo. Nobo by becoming a byragee did not divest himself of all title in his family estate, and therefore on his death his heirs would be entitled to inherit that estate and not his kept mistress, although she may have performed his funeral rites on account of his being an out-cast. The lower Court is also wrong in laying any stress on the payment of rent by Rookhinee. The dakhilas show that Nobo Krishto is the ryot mentioned, and Rookhinee's name is merely mentioned marfutwaree, and those payments of rent by her would not confer upon her any title to the property. It is clear that Shiboo is Nobo's heir and that he sold his rights to Gunga Narain, and Gunga Narain having sold to the plaintiff the plaintiff is entitled to the jummaie lands and to eject Rookhinee.

We, therefore, reverse the decision of the Subordinate Judge and restore the decree of the first Court with all costs payable by the defendant, respondent.

The 24th February 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Authorized agent—Section 301 Act VIII of 1859.

Kishoree Mohun Bose, *Petitioner*,

versus

Gour Monee Dossee, *Opposite party*.

Baboo Bama Churn Banerjee for Petitioner.

Baboo Nil Madhub Sein for Opposite party.

A vakeel may be a "duly authorized agent" within the meaning of Section 301 of the Code of Civil Procedure.

Norman, C. J.—I AM of opinion that this rule must be discharged with costs.

It appears to me that the application is vexatious. The facts are simply these:—

Gour Monee Dossee applied to the First Subordinate Judge of the 24-Pergunnahs for leave to sue *in formâ pauperis*.

She is a woman who, according to the usages and customs of the country, ought not to be compelled to appear in public. Her petition is signed and verified by herself, and it was presented to the Court by a pleader of the Court. After the petition was admitted, or I should rather say received, the Subordinate Judge issued a commission to examine the petitioner regarding the merits of her claim and her property in the manner provided for by the 303rd Section. After the making of that order, Kishoree Mohun, who is the person against whom the complaint was made—the person who would be the defendant in the suit—presented a petition, objecting that Gour Monee's petition had not been presented by a *duly authorized agent*, as required by the 301st Section, and prayed that the petition should be taken off the file.

On that petition the parties were heard, and the Subordinate Judge passed an order stating that the 301st Section contained nothing which prohibited a pleader from presenting a petition on behalf of a pauper.

The petitioner then came up to this Court, and without distinctly bringing it to the notice of the Court by his petition that there had been any adjudication by the Subordinate Judge on Gour Monee's petition, and that the petition had been admitted after a determination and adjudication on this point by the Subordinate Judge, obtained a rule from a Division Bench of this Court calling upon the other side to show cause why the order of the Subordinate Judge admitting the petition should not be set aside.

Now, I cannot help thinking that if it had been properly and distinctly brought to the notice of the Court that there had been such

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an adjudication and determination by the Subordinate Judge as above referred to, the rule would not have been granted. I think the Court would have said—"If you are not "satisfied with the order of the Subordi-"nate Judge, if you have an appeal go "to the Judge on appeal with a petition "on a proper stamp. If you have no ap-"peal, we cannot help you."

Baboo Bama Churn Banerjee for the petitioner says that the petition to the Judge and the order on it were read to the Court, but certainly it is not mentioned in the petition to this Court that there was any adjudication by the Subordinate Judge after hearing both parties. However, a rule was issued and an explanation was called for from the Subordinate Judge, and the Subordinate Judge in his explanation says that he does not understand but that a pleader may be an authorized agent under Section 301.

Upon this the other side was called upon to show cause why the order of the Subordinate Judge of the 12th of September 1870, allowing the plaintiff to sue as a pauper, should not be set aside.

The case coming on to-day, we have thought it right to call on Baboo Bama Churn Banerjee to support the rule, and to show that the vakeel by whom the petitioner was represented may not be an *authorized agent* within the meaning of the 301st Section. It is hardly necessary to state that there is nothing in the character of a vakeel which would disable him from acting as the agent of a pauper who has suffered an injury.

Section 301, dealing with paupers, accords to them a privilege which is not allowed to other persons under Section 25. It provides that "if the petitioner be a female, who "according to the custom and manners of "the country ought not to be compelled to "appear in public, the petition may be "presented by a *duly authorized agent* who "may be able to answer all material ques-"tions relating to the application, and who "shall be liable to be examined in the same "manner as the party represented by him "might have been examined had such party "attended in person." A plaint under Section 25 can only be presented by the plaintiff in person, his *recognized agent*, or by a pleader.

Now, what are *recognized agents* appears by reference to Section 17. *Recognized agents* are a very limited class, but the petition of a pauper may be presented by a *duly authorized agent*—not such agents only as are mentioned in Section 25.

If the Subordinate Judge, dealing judicially with the materials before him, had come to a wrong conclusion as to the facts on the question whether the vakeel was the agent duly authorized by the petitioner, I think we should not have authority under Section 15 of the 24 and 25 Vic. 104 to deal with the question of fact as if it were before us on a regular appeal. The Judge considered that the vakeel was a duly authorized agent within the meaning of the 301st Section, and in this we think he was right.

It is said that the lady executed a vakalutnamah which authorized a large number of vakeels to appear for her. (This does not appear in the petition, but it has been mentioned before us by Baboo Bama Churn Banerjee and we accept the statement.) Two of these accepted the vakalutnamah, and one vakeel ultimately presented her petition. Now, it is not stated anywhere in the petition that that vakeel was not in a position to answer all material questions connected with the petition or relating to the application.

Was he an agent duly authorized or not? We can scarcely do otherwise than assume that when he accepted the power to act for the lady, when he consented to present her petition, he must have taken the petition into his hands and read it. If his mind was constituted like that of all other persons with whom our experience has brought us in contact when undertaking the cause of a pauper, he would have taken care to ascertain from the petition that the facts stated in the petition were true and capable of being substantiated. No person with the legal training of a vakeel would take a case from a pauper without satisfying himself on this point. A regard for his own interest as well as for his own character would render it necessary that he should do so; and it cannot, therefore, be presumed in the present case that the vakeel who appeared for the pauper was not capable of answering all material questions connected with her application, and that he had not that amount of knowledge that is required in authorized agents under Section 305.

Speaking for myself, I may say that in my opinion the order of the Subordinate Judge is perfectly correct. I think that the course taken by the petitioner is one that has

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been adopted by him for the purpose of embarrassing the poor woman to whom he is opposed. Although costs are not usually awarded in proceedings *in formâ pauperis*, I think that in this case the rule should be discharged with costs. We assess the pleader's fees at 2 gold mohurs, and the petitioner must also pay the amount of stamp-duty due to Government on account of these proceedings.

Loch, J.—I concur in the order made by the Chief Justice. The question as to whether the party who presented the petition was a duly authorized agent was one for the Subordinate Judge to determine, and on the objection raised by the petitioner the Subordinate Judge did hear and determine that question, and certainly there is nothing in the finding to which the Subordinate Judge has come that is either contrary to law or improbable in itself. There is nothing to prevent a pleader of the Court being a duly authorized agent as described in the law, and as this has been found by the Subordinate Judge there is no ground for asking the interference of the High Court in the manner which has been done in this case.

The 25th February 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Joint Hindoo family—Separation—Re-union.

Case No. 1989 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Hooghly, dated the 31st May 1870, modifying a decision of the Moonsiff of Hurripal, dated the 31st March 1870.

Petambur Dutt (Plaintiff) *Appellant,*

versus

Hurish Chunder Dutt and another (Defendants) *Respondents.*

Baboo Bykuntnath Paul and *Moonshee Mahomed Yusoof* for Appellant.

Baboos Hem Chunder Banerjee and *Omendronath Chatterjee* for Respondents.

Where the partition of a family property is made simply for the purpose of determining what the share of one member is, and after his secession the other members continue to live together and mess together remaining to all intents and purposes as they were before, these others must be presumed to have re-united.

Glover, J.—It will be unnecessary to detail at length the circumstances of this rather complicated case, inasmuch as the special appeal is preferred only in respect of a one anna share of the property. The plaintiff claims this as his portion of the estate of his deceased uncle Modhoo Soodun, on the ground that the family had separated and never re-united so as to give the descendants of the re-united brothers, *viz.*, the defendants, a superior claim.

There is no doubt that the father plaintiff, Gunesh Ram, did separate of the his brothers in 1224, B. S. from

The Moonsiff on this part of the case found that the separation continued, and that Modhoo Soodun was not at the time of his death re-united. He, therefore, gave plaintiff a decree for his share of his uncle's property.

The Subordinate Judge considered that after Gunesh Ram's separation the three remaining brothers remained joint, and that Modhoo Soodun died a member of the re-united family, and that his heirs were consequently the descendants of the re-united brothers.

Against this decision Petambur, one of the sons of Gunesh Ram, appeals specially urging—

(1)—That the Subordinate Judge has come to his finding on re-union upon inadmissible evidence, the *angshonamah* not having been proved and it not having been shown to have come out of proper custody; and that if admissible, it did not prove re-union but rather separtion, and

(2)—That there is no proof as to re-union after the separation in 1224, the evidence given by the defendants being insufficient to prove re-union according to Hindoo Law.

With regard to the first point, we observe that the Subordinate Judge has not decided the question of re-union on the *angshonamah* alone, but upon the whole evidence, oral as well as documentary; and as to the deed in question, he remarks that its appearance is satisfactory; that it comes from proper custody; and that many witnesses

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speak to the fact that after Gunesh Ram's secession, the rest of the brothers continued to live in the same house, in the same mess, and to all appearance in the same way as before the elder brother left them.

As to the *angshonamah* having come from proper custody, it seems clear that the Subordinate Judge was right. The document would have remained in the hands of those members of the family who remained joint, and it has been filed by their repersentatives. This document sets forth in detail the share of Gunesh Ram, the separating brother; and considering that it is said to have been executed more than 50 years ago, direct evidence in support of it was not to be expected. The plaintiff himself does not deny that a separation did take place in 1224, and there is considerable force in the Subordinate Judge's remarks that if it were true that the separation affected all four brothers, the plaintiff could have filed his *angshonamah* and so have supported his allegation. On the whole, we think that the Subordinate Judge had evidence before him on which he could legally come to the conclusion that the separation of 1224 only affected the plaintiff's father. Gunesh Ram, and that the other brothers, Modhoo Soodun; Ramjee, and Gunga Norain, remained joint both in mess and in interest. No doubt the Moonsiff who examined the witnesses came to a different conclusion; but whether the Subordinate Judge's estimate of the evidence were correct or not, there is no error in law in his judgment so far.

But it is contended that admitting that estimate of the evidence to be correct, the Subordinate Judge is still wrong in law; that there must be direct evidence as to the joint nature of the interest; and that general evidence as to a family living in commensality is no sufficient proof that they were a joint family according to Hindoo Law.

The case of Jadub Chunder Ghose *versus* Motee Lall Ghose and others, decided by Mr. Justice Wells on the Original Side of the High Court, and reported in 1 Hyde, 214, is cited to show that a separation by one brother is a virtual separation of the whole family; but granting this to be so the decision quoted lays down this also, "that when the remaining brothers continue "joint they are supposed to have re-united."

Now, in this case it has been found by the Subordinate Judge that after Gunesh Ram's secession, the remaining three brothers continued to live together and mess together, and to all appearance to hold all their interests in common "*ekkutre and ekkhane*," and that in fact the partition of the family property into shares was made simply for the purpose of determining what Gunesh Ram's portion was, and that as regards the remaining brothers the transaction was nominal only, the three remaining to all intents and purposes as they were before Gunesh Ram left them, and must therefore be presumed to have re-united. This seems to dispose of the second objection.

But if it were otherwise, the plaintiff, it appears to us, must fail on his own statement of facts. Supposing, as he alleges, that the separation of 1224, B. S., included all the brothers, and that from that date Modhoo Soodun remained separate till his death without re-uniting with the family, it is clear that the plaintiff's cause of action arose on the death of the widow of Modhoo Soodun, who, if her husband died separated, would have succeeded to a life-interest in his estate; and it is proved by the evidence that this lady died at least 17 years ago, so that the plaintiff's suit would now be barred by the Statute of Limitation.

The Subordinate Judge did not decide this point, although he found as a fact that the plaintiff had failed to prove any possession of the disputed property in the terms of his plaint, as he had already found that Modhoo Soodun was at the time of his death living joint in estate with his brothers Ramjee and Gunga Narain.

We find, therefore, no reason to interfere with the decision of the Court below, and dismiss this special appeal with costs.

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The 27th February 1871.

Present:

The Hon'ble F. B. Kemp and W. Ainslie, *Judges.*

Section 246 Act VIII. 1859—Onus probandi.

Case No. 1673 of 1870.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 26th May 1870, *reversing a decision of the Moonsiff of that District, dated the 20th July* 1868.

Toofanee Doss (Plaintiff) *Appellant,*

versus

Mun Rakhun Roy and others (Defendants) *Respondents.*

Baboos Mohesh Chunder Chowdhry and *Gopal Chunder Mookerjee* for Appellant.

Baboos Kishen Succa Mookerjee and *Gopee Nath Mookerjee* for Respondents.

Where an unsuccessful claimant under Section 246, Code of Civil Procedure, sues for confirmation of alleged possession and adjudication of title, the onus in the first instance is on plaintiff, and an important question in the case is, who was in possession at the time of the attachment.

Kemp, J.—We think that this case must be again remanded. It appears that the plaintiff sues on the allegation that he is a guzashtadar of the property in dispute. The disputed property was sold in execution of a decree and was purchased by the decree-holders, the special respondents, as the guzashta holding of their judgment-debtor. The plaintiff claimed under Section 246 and was unsuccessful. He then brought a suit to establish his right. In the plaint, as is usual in such suits, he alleged that he was still in possession, but that his title had been prejudiced by the proceedings under Section 246, and therefore he sued for confirmation of possession and adjudication of title. In the first instance, the Court below tried this suit as if it were a possessory suit and gave the plaintiff a decree. We remanded the case on the 2nd of December 1869. We told the Judge that under Section 246 the plaintiff had to establish his right, and that the onus in the first instance would be upon him. We drew his attention to a case reported in Volume XI, Weekly Reporter, page 42; and we particularly directed his attention to an important question in the case, namely, who was in possession at the time of the attachment. The Judge, on remand, finds that the plaintiff refers to shushmahee papers, receipts, and farkhuttees, as the proofs on which he had to rely to establish his right. These proofs, the Judge observes, have already been overruled; that the shushmahee papers are not proof admissible in the case, and that the farkhuttees and receipts did not show for what lands they were granted, and therefore are of no value in the present suit; and further that they have not been proved by oral evidence.

In this case the decree-holder, as purchaser of the rights and interests of the judgment-debtor, and the plaintiff who is a claimant under Section 246, both claim a guzashta right in the lands in dispute. Both parties must seek for proof of their title in the zemindaree sheristah. The plaintiff has filed a copy of certain shushmahee papers which he obtained from the Collectorate. These shushmahee papers were delivered by the putwarree of the pergunnah, and in them the plaintiff's name appears as the guzashta tenant. These shushmahee papers, the Judge observes, have been overruled; but we cannot find any order overruling them, and certainly the order of remand does not overrule these documents. The Judge, therefore, ought to have given the plaintiff an opportunity of proving these shushmahee papers, and there is also oral evidence in the record and the local enquiry of the Ameen and Moonsiff. It may be that in this case the plaintiff's title is one of occupancy alone depending upon his long possession, and therefore it was all the more important that the Judge should have carefully enquired into the point to which his attention was called in our order of remand, as to who was in possession at the time of the attachment, namely, the plaintiff or the judgment-debtor. The Judge will understand that long possession when established is evidence of title. We, therefore, remand the case. The Judge will give the plaintiff an opportunity to proving the shushmahee papers; he will take into consideration the whole of the evidence in the case, decide who was in possession at the time the attachment was made, and find whether the plaintiff has proved possession for such a time as would be sufficient to establish his title, independent of any pottah or other title-deed.

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The 28th February 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge.*

Mesne profits—Section 196 Act VIII of 1859—Costs of collection.

Case No. 305 of 1870.

Miscellaneous Appeal from an order passed by the Judge of Jessore, dated the 23rd June 1870, *reversing an order of the Moonsiff of that District, dated the 9th September* 1869

Gooroo Doss Roy (Judgment-debtor) *Appellant,*

versus

Anund Moyee Debia and another (Decree-holders) *Respondents.*

Baboos Mohendro Lall Shome and *Hem Chunder Banerjee* for Appellant.

Baboos Motee Lall Mookerjee and *Bungshee Dhur Sein* for Respondents.

Where a suit is decreed as one for possession with mesne profits, the decree-holder is not barred from asking the Court under Section 197, Civil Procedure Code, to enquire into the amount of mesne profits in execution.

In decreeing mesne profits a Court has no right to disallow the costs of collection on the assumption that a large zemindar can collect rents without costs.

Norman, C. J.—It appears to us that this appeal must clearly be dismissed, except as to a very small portion.

The first point taken is that the original decree contains no award of mesne profits for the period of the plaintiff's dispossession prior to the suit. It seems to us that this is a mistake. The decree is a very short one and contains these expressions—"The suit is for possession with mesne profits," and it subsequently states that "the suit is decreed," that is to say, the suit for possession and mesne profits is decreed. The decree goes on to make an award with respect to the land of which the plaintiff sued to recover possession. It makes no provision as to mesne profits, and for a very good reason, because it appears from the judgment that the amount of mesne profits is to be ascertained in execution. We think, therefore, that there is no ground for saying that the decree does not award mesne profits to the plaintiff in such a sense as to enable him to ask the Court, under Section 197 of Act VIII of 1859, to enquire into the amount of the mesne profits in execution of the decree.

The second objection is that the Judge was wrong in not making any allowance on account of collection charges. We think that the Judge has disallowed the costs of collection for a very insufficient reason. He assumes—and we think quite gratuitously—that because the defendant is a large zemindar, therefore he can collect rents without costs.

It appears to us, therefore, that the decree of the Judge must be modified, by deducting from the amount of wasilat allowed by him the collection charges, at the rate of 10 per cent. as allowed by the first Court,—a rate which seems to us to be reasonable.

The plaintiff presented a cross-appeal on the ground that the Judge did not allow mesne profits from the date of the suit to the date of delivery of possession. The answer to the cross-appeal is simply this, that no provision is made in the decree for the payment of any mesne profits after the date of suit until the date of delivery of possession, as might have been done, if the Court had thought fit, under the 196th Section.

The result is that the decree of the Lower Appellate Court will be varied to the extent we have mentioned above, and except as to that extent the appeal of the defendant and the cross-appeal of the plaintiff will be dismissed. Each party will bear his own costs in the appeal and cross-appeal.

The 28th February 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge.*

Bona fides—Presumption—Execution.

Case No. 307 of 1870.

Miscellaneous Appeal from an order passed by the Officiating Judge of Backergunge, dated the 21st May 1870, *affirming an order of the Moonsiff of Burrisaul, dated the 20th February* 1869.

Meer Lootf Ali and others (Objectors) *Appellants,*

versus

Aboo Bibee (Judgment-debtor) *Respondent.*

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Baboo Kashee Kant Sein for Appellants.

Baboo Bama Churn Banerjee for Respondent.

Honesty and *bonâ fides* must be presumed in all cases in the absence of evidence to the contrary, as well in all applications for execution as in every other instance in which the conduct of a party to a civil suit or criminal prosecution is considered and has to be dealt with by a Court of justice.

Norman, C. J.—It is clear that the judgment of the Judge must be reversed and that process of execution in this case must issue. The question which has been argued before us is, whether the right to issue execution is barred by the 20th Section of Act XIV of 1859.

Now the facts appear to be these. The decree is a decree of the late Sudder Court, dated 1st June 1861. The first application to execute the decree was made on the 16th May 1864, and upon that a notice under Section 216 Act VIII of 1859 issued calling on the defendant to show cause why the decree should not be executed against him. That notice is on the record, and the return of the officer who effected the service is endorsed on the back of the notice. We concur with the learned Judges who remanded this case in considering the return to be *primâ facie* evidence of the truth of the facts stated therein. It appears from this return that the notice was taken by an officer of the Court to the house of the judgment-debtor, and as he was not found a copy was stuck up upon the door of his house. No further proceedings appear to have taken place upon that application for execution. From the date of service of that notice down to the time when the plaintiff applied for execution on the 16th July 1868, there is no pretence for saying that steps had not been taken from time to time to keep the decree in force.

The Judge, however, finds that "the "notice of July 1864 was clearly only "colorable." Baboo Bama Churn Banerjee, who appears to support the Judge's finding, is not able to point out any evidence on which that finding of the Judge is based, beyond the mere fact that the plaintiff did not choose to proceed further with the execution. We think that when a step towards the execution of a decree is taken in a Court of justice, it must be assumed to have been taken honestly and *bonâ fide*. Honesty and *bona fides* must be presumed in all cases, in the absence of any evidence to the contrary, in a case of application for execution, as well as in every other instance in which the conduct of a party to a civil suit or criminal prosecution is considered and has to be dealt with by a Court of Justice. It seems to us that the presumption which would arise in this is exactly the reverse of any inference adverse to the decree-holder. The decree-holder seeking to execute his decree serves a notice under Section 216 but cannot find the judgment-debtor. Is he, in order to preserve his right from being barred by limitation, to bring in a fictitious list of property which probably the judgment-debtor does not possess; or if he does possess, the decree-holder does not know and has no means of knowing where and how that property is to be found? Is he to be driven to issue out process of execution against the person of the judgment-debtor, the effect of which may probably be that he will have to pay the daily expenses of the judgment-debtor whilst in the civil jail and get nothing whatever from him? The inference that *we* should draw from the circumstances which appear in this case is, that the decree-holder felt that it was useless to take any further steps against the man who had probably concealed himself.

We think there is nothing to warrant the inference of the Judge that the notice of July 1864 was "only colorable" and was not *bonâ fide*. That being so, the application for execution of July 1868 is within time and the execution must proceed.

The respondent will pay the appellant his costs in this Court and in the Courts below.

The 28th February 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Section 273 Act VIII of 1859—Stipends—Annuities—Discharge.

Case No. 398 of 1870.

Miscellaneous Special Appeal from an order passed by the Judge of 24-*Pergunnahs, dated the* 22*nd September* 1870, *reversing an order of the First Subordinate Judge of that District, dated the* 16*th September* 1870.

Nowab Asudut Dowla Reza Hossein Khan (Judgment-debtor) *Appellant,*

versus

Haminsud Dowla Abed Khan (Decree-holder) *Respondent.*

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Baboos Ashootosh Dhur and *Kumolakant Sein* for Appellant.

Mr. R. E. Twidale for Respondent.

A judgment-debtor refusing to place at the disposal of the Court whatever property he has (even though it be a stipend or annuity receivable from the Government) with a view to provision being made for the payment of his debt, is not entitled to ask for his discharge under Section 273, Code of Civil Procedure.

Norman, C. J.—This is a special appeal from the decree of the Judge of 24-Pergunnahs. The facts appear to be these. The judgment-debtor is a person enjoying what is called a stipend or annuity of rupees 200 a month; it does not very clearly appear what are the conditions under which he receives that stipend. The first Court finds that the judgment-debtor receives it from Government, and the Judge assumes that the creditor cannot touch it. The judgment-debtor being arrested in execution of a decree for a sum of rupees 1,700, applied under the provisions of Section 273 Act VIII of 1859 for his discharge on the ground that he had no present means of paying the debt either wholly or in part, and that he was willing to place whatever property he possessed at the disposal of the Court.

The Judge of the 24-Pergunnahs has held that the inability of the decree-holder to seize this stipend, is no reason why the debtor should take advantage of that circumstance and insist on retaining that stipend without making any attempt to pay his debt. The Judge has, therefore, directed that the debtor should set apart a fixed portion of his stipend and authorize the decree-holder to draw that amount monthly; and he ordered that if the debtor would not consent to this arrangement, the decree-holder should be at liberty to have his decree executed by imprisonment of the debtor.

We are of opinion that the decision of the Judge is perfectly correct. It is one of the conditions upon which the person arrested under a warrant in execution of a decree is to be entitled to his discharge, that he is to be willing to place whatever property he possesses at the disposal of the Court. If therefore the debtor refused to place this stipend or annuity at the disposal of the Court in order that the Court might make provision for the payment of the debt due to the decree-holder in such a manner as it might seem just and proper with reference to the circumstances of the case, the judgment-debtor was not entitled to ask the Court for his discharge under the 273rd Section.

The result is that in our opinion this special appeal must be dismissed with costs, which we assess at one gold mohur.

The 28th February 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Pauper suit—Stamps—Claim of Government—Costs of suit.

Case No. 438 of 1870.

Miscellaneous Appeal from an order passed by the Judge of Moorshedabad, dated the 23rd September 1870.

Pran Kristo Roy (one of the Judgment-debtors) *Appellant*,

versus

The Collector of Moorshedabad on behalf of Government (Decree-holder) *Respondent.*

Baboo Sreenath Doss for Appellant.

Baboo Unnoda Pershad Banerjee for Respondent.

Where Government, after attaching a pauper plaintiff's decree in order to recover the value of stamps under Section 309 of the Code of Civil Procedure, consents to the sale of the decree in execution of another decree against the pauper, and obtains an order by which it secures the chance of any surplus arising from such sale, it cannot afterwards, when the sale is found to yield no surplus, be heard to say as against the purchaser that the decree was sold subject to its claim for stamps.

The amount of stamps in a pauper case cannot be claimed as a lien or charge upon the decree in favor of Government, but is recoverable in the same manner as costs of suit; Government being, as regards its claim in such a case, in no higher position then an ordinary judgment-creditor.

Norman, C. J.—One Unnopoorna Dossia brought a suit as a pauper, and obtained a decree for moveable and immoveable property in suit No. 11 of 1869. The decree did not give costs to either party, but it contained an order that Government should recover the value of stamps under the 309th Section of Act VIII of 1859 from the pauper plaintiff, Unnopoorna. The decree was dated the 22nd of January 1870.

Gunga Ram Paul, a creditor of Unnopoorna, in execution of a decree against

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her attached the decree which she had obtained in suit No. 11 of 1869. Subsequently to the attachment of Gunga Ram Paul, the Collector of Moorshedabad on behalf of the Government obtained an attachment against Unnopoorna's decree for satisfaction of the amount awarded to them in respect of stamps. On the 24th of June 1870, a petition was put in on behalf of Government, alleging that Unnopoorna's decree in suit No. 11 of 1869 had been attached in execution of the decree of Gunga Ram Paul, praying, amongst other things, that the sale might proceed, and after payment of the amount due under Gunga Ram Paul's decree, the surplus proceeds arising from the sale should be made over to Government.

The decree of Unnopoorna in suit No. 11 of 1869 was sold in execution of Gunga Ram Paul's decree on the 4th July. It did not, however, realize sufficient to pay off the amount due to Gunga Ram Paul. One Pran Kristo Roy became the purchaser. The Government subsequently presented a petition for the attachment of the decree purchased by Pran Kristo for satisfaction of the amount due to them for stamps, contending that notwithstanding the sale, Pran Kristo Roy, as purchaser of Unnopoorna's decree, was liable for the amount payable to Government for stamps.

The case came before the Officiating Judge of Moorshedabad, who held that Pran Kristo Roy, as assignee of the decree, must be held responsible for any sum due from the original decree-holder, Unnopoorna, to Government in respect of stamp-duty.

From that decision an appeal is preferred to this Court.

Two objections are taken by Baboo Sreenath Doss.

The first is, that the Government having consented to the sale of the decree under the execution of Gunga Ram Paul, and having obtained an order by which they secured to themselves the chance of any surplus arising from that sale, cannot be heard to say now, as against the purchaser at that sale, that the property sold was subject to any claim of Government under the decree made in its favor for the value of stamps.

We think that this contention is well-founded. Whatever may have been the right of Government to have prevented the sale by Gunga Ram Paul, or to have insisted on any supposed rights as incumbrances on the decree, by consenting to the sale they became in fact the sellers themselves to put it at the lowest. They permitted, if they actually did not induce, the purchasers present at that sale to believe that they were to buy the decree free from all claims of the Government, who were to be satisfied out of the proceeds. If such a claim as that now made by the Government should be allowed, the greatest injustice would be done to Unnopoorna. If her decree, notwithstanding the consent of Government to the sale and their election to take payment out of the proceeds of the sale, was still, notwithstanding the sale, to be treated as subject to a lien for the stamp-duty, the price which would be realized at the sale would be the value of the decree less the amount of the incumbrance in favor of the Government; and yet, out of the price, after that value was deducted Government would get paid. If the contention of the Government is well-founded, it would prove that if the decree had realized a sum sufficient to pay off the claim of Government, and if Government had been paid in full out of the proceeds, Unnopoorna might be mulcted in double the amount due to the Government.

We think, therefore, it is clear that the Government is bound, as between themselves and other parties to that sale, to treat the sale as passing an absolute interest in the decree free from any claim or charge on the part of Government.

The next point urged by Baboo Sreenath Doss seems equally fatal to the right of the Government. By the 309th Section, the amount of stamps in a pauper case is recoverable by Government from any person ordered to pay the same in the same manner as costs of suit are recoverable. Now, costs of suit are recoverable by attachment and execution. There is nothing in the 309th Section which makes the claim for the amount of stamps ordered by the decree to be paid to Government, a lien or charge in favor of Government upon the decree for the amount of such stamp.

The decree of Unnopoorna having been attached by Gunga Ram Paul before any steps were taken by the Government, and sold by the permission of the Government under that decree, we think it quite plain that the purchaser acquired a perfectly good

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title to the decree, and a right to enforce it in any manner he might think fit without any reference to the claim of Government.

The decree of the lower Court is reversed with costs in both Courts.

Loch, J.—I concur, for it appears to me that Government in this case is in no higher position than an ordinary judgment-creditor; and as the other creditor Gunga Ram attached the property of the debtor before Government, he was under the law entitled to have his decree satisfied in full out of the sale proceeds before any part of them could be paid to the other creditor. It matters very little under such circumstances whether Government consented to the sale by Gunga Ram of the property of the debtor or not.

The 28th February 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Execution proceedings—Section 20 Act XIV of 1859.

Case No. 483 of 1870.

Miscellaneous Appeal from an order passed by the Judge of Dacca, dated the 22nd September 1870, *affirming an order of the Sudder Moonsiff of that District, dated the 11th July* 1870.

Radha Gobind Shaha (Decree-holder) *Appellant,*

versus

Brojendro Coomar Chowdhry (Judgment-debtor) *Respondent.*

Mr. R. T. Allan and *Baboo Dwarkanath Sein* for Appellant.

Baboos Sreenath Doss and *Mohinee Mohun Roy* for Respondent.

Where a decree-holder is referred to a civil suit by the Court to which he applies for execution, and he accordingly carries on proceedings in order to get full relief under his decree, such proceedings must be held to be in furtherance of execution and as keeping the decree alive.

Mookerjee, J.—The appellant in this case is the decree-holder. He obtained a decree for possession of certain land in July 1863. This decree was confirmed on appeal in January 1864 and further confirmed on special appeal in November 1864. The decree-holder applied for execution of his decree on the 9th June 1864, while the appeal in the High Court was pending. The decree-holder in that application stated that the judgment-debtor had after the passing of the decree built a pucca-house on a portion of the disputed land, and he prayed that possession be given him by the demolition of the building. The Moonsiff before whom the execution proceedings were pending referred him to a regular suit.

The decree-holder went to the Civil Court, praying that a complete relief under his decree might be granted to him by ordering the demolition of the building erected by the judgment-debtor. This case was pending for some time in the Zillah Courts, but ultimately an appeal being preferred to the High Court, this Court held on the 11th April 1867 that the decree-holder could have obtained relief in the execution department, and that there was no necessity for him to institute a separate suit. The High Court accordingly dismissed that suit.

The decree-holder then applied to the Moonsiff for the execution of the decree by the removal of the pucca-house. Both the lower Courts have held that the execution is barred, refusing to take into account the proceedings taken in the regular suit as proceedings to keep the decree in force. The Lower Appellate Court says—"The only "question is whether the regular suit, which "at the instance of the Moonsiff the appel-"lant instituted, can in any way be made to "keep the decree in force. Strictly speaking "of course it cannot, but I think also the "appellant can take no benefit from his "regular suit, because it was open to him to "appeal against the Moonsiff's order refer-"ring him to a regular suit."

Although it is correct to say that the decree-holder could have appealed but did not appeal, still the proceedings that he has taken in the Civil Court to give effect to his decree are proceedings to keep the decree in force. We find that the decree-holder applied to the Moonsiff to give him possession of the land by the removal of the building. The Moonsiff not knowing his duty refused to give him possession and referred him to a civil suit. The decree-holder went to the Civil Court, and the only object in going to the Civil Court was to have the complete

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benefit of the decree he obtained against the defendant. The High Court thought that it was unnecessary for him to bring a separate suit. But that does not show that the proceedings were not *bonâ fide*, for there is nothing to show that he did not take those proceedings to keep the decree alive.

I would, therefore, hold that the proceedings taken in that suit were proceedings under Section 20 Act XIV of 1859 to keep the decree in force; and as this application is within three years of the last order passed in those proceedings, the decree is not barred by limitation. I would, therefore, remand the case to the Court below for adjudication on the merits of the application. I think the decree-holder should have his costs, which will be three gold mohurs.

Jackson, J.—I concur. I also think that in a case were the decree-holder was referred to a civil suit by the Court, and he accordingly carried on proceedings in order to get full relief under his decree, such proceedings ought in justice to be held proceedings in furtherance of the execution of the decree.

The 28th February 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

[Res adjudicata—Onus probandi.

Case No. 2182 of 1870.

Special Appeal from a decision passed by the Judicial Commissioner of Chota-Nagpore, dated the 4th July 1870, *affirming a decision of the Officiating Deputy Commissioner of Manbhoon, dated the 27th November* 1869.

Rajah Mokoond Narain Deo (Defendant) *Appellant,*

versus

Jonardun Dey Burnick (Plaintiff) *Respondent.*

Baboo Gopeenath Mookerjee for Appellant.

Baboo Tarucknath Paleet for Respondent.

The cause of action between two parties cannot be said to be a *res adjudicata*, if the first case was disposed of on appeal on a purely technical point, even though the suit was decided on its merits in the Court of first instance.

In a suit for possession where plaintiff claims under a pottah, the execution of which is not denied by defendant, whose contention is that the lessor had no power to grant it, the onus is on the defendant to prove his plea.

Glover, J.—THE plaintiff in this case sues for possession of a mouzah called Ghât, with mesne profits from the year 1270 to 1275 inclusive. He claimed under a mokurruree pottah granted by the defendant's ancestor, Rajah Hurry Narain Deo, on the 25th Bysack 1252 to one Bisho Nath Singh Lalla, who transferred the holding to the plaintiff's elder brother, Sheodursun, in 1253. The plaintiff alleges that he remained jointly with Sheodursun in possession of these lands till the year 1265, when the defendant collected rents direct from the ryots and so dispossessed him.

It appears that in 1864 the plaintiff brought a suit alleging ouster on the part of the defendant with reference to these lands, and although he got a decree in the first Court, his case was dismissed in appeal, without going into the merits, on the ground that so long as the widow of his brother Sheodursun was alive he had no right to bring the suit. The present suit was brought on the 5th of April 1869. The defendant alleged that the matter was *res adjudicata*, having already been decided between the parties in the suit of 1864; that the plaintiff had not been in possession within 12 years and that limitation barred his suit; that his mokurruree title was a fraudulent one, and even if genuine would be invalid inasmuch as the grantor thereof had not the power to give it. Both the lower Courts have decided on all points in favor of the plaintiff.

It is contended in special appeal, first, that this suit comes under the provisions of Section 2 of Act VIII of 1859, the subject-matter being a *res adjudicata* which could not form the subject of a second suit. This objection appears to us altogether untenable.

The original suit brought by the plaintiff against the defendant, no doubt, was decided on the merits in the Court of first instance (that decision being in plaintiff's favor), but the Judge, on appeal, disposed of the case purely on a technical point, so that as between the plaintiff and defendant there has been no cause of action similar to the present one already heard and determined by a Court of competent jurisdiction.

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The second objection is that the Judicial Commissioner has decided the issue of limitation on no evidence at all. This objection, we also think, is worthless, as the Judge has found on the evidence that the rent for these disputed lands was paid to the defendant's tehseeldar, and that the receipts were made over to the plaintiff, and this would be some evidence on which the Judge could presume that the plaintiff had paid these rents and was in possession by doing so. It is said that these receipts have not been attested; but even if it were so, this would not affect the credibility of the oral evidence, which was to the effect that the money was collected from the plaintiff and receipts given to him; and whether the receipts given to him are the receipts now filed or other receipts does not effect the question at issue. The question was whether the plaintiff paid any rent and got any receipts, and if he did so whether that was evidence of possession.

The third and last objection with reference to the validity of the pottah has been fully disposed of by both the Courts below. The Judge has found as a fact that the defendant does not deny the execution of the pottah, but that his objection is that it was given by somebody who had no power to grant it. That being so, the Judge was not wrong in throwing the onus on the defendant to prove his special plea. He failed to do this, and the point was therefore properly decided against him.

All the grounds taken in special appeal therefore fail, and the special appeal is dismissed with costs.

The 1st March 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Section 230, Act VIII of 1859—Procedure.

Case No. 407 of 1870.

Miscellaneous Appeal from an order passed by the Officiating Judicial Commissioner of Assam, dated the 22nd September 1870, *reversing an order of the Deputy Commissioner of Kamroop, dated the 11th August* 1870.

Luleet Narain Gossamee (Claimant) *Appellant,*

versus

Keshub Deb Gossamee (Decree-holder) *Respondent.*

Baboo Luleet Chunder Sein for Appellant.

Baboo Obboy Churn Bose for Respondent.

Where a party complains under Section 230, Civil Procedure Code, of having been dispossessed in execution of a decree to which he was not a party, and there are reasonable grounds for thinking that his claim is *bonâ fide*, it is the duty of the Court to treat the case as a regular suit between the claimant as plaintiff and the decree-holder and judgment-debtor as defendants.

Mitter, J—THE decree-holder in this case, one Keshub Chunder Gossamee, instituted a suit against Sreepoora Debia and Buddun Chunder Surma for possession of certain lands. The special appellant, Luleet Narain Gossamee, intervened, claiming the property in dispute under a will alleged to have been executed in his favour by the predecessor of the decree-holder, Keshub Chunder. The Court, however, without making Luleet Narain a party to the suit, and without determining what his rights in the disputed property were, gave a decree in favor of Keshub Chunder as against the defendants Sreepoora and Buddun Chunder. Keshub Chunder has now applied for execution, and the special appellant, Luleet Narain, appeared before the Deputy Commissioner of Kamroop, evidently under the provisions of Section 230 Act VIII of 1859, complaining that he had been dispossessed by the decree-holder, Keshub Chunder, of the lands in question in execution of a decree to which he was not a party. The Deputy Commissioner instead of trying the case in the mode prescribed by the Section above referred to, *viz.*, instead of ascertaining in the first place whether the claim brought by Luleet Narain was a *bonâ fide* claim brought by a person other than the defendant in the original suit, and then trying the case as a regular suit as he ought to have done, passed an order to the effect that the order passed by him on the 16th June last "will not disturb Luleet Narain if he is in possession."

Against this order the decree-holder, Keshub Chunder, appealed to the Officiating Judicial Commissioner, and that officer without going into the merits of the case as a regular suit between the parties, reversed the order of the Deputy Commissioner upon

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the ground that he, the Deputy Commissioner, had no power to stay the execution of the decree.

We are of opinion that there has been a miscarriage in the investigation of this case in both the lower Courts. The provisions of Section 230 are clear and imperative. If there are reasonable grounds for thinking that the claim preferred by the plaintiff is a *bonâ fide* claim, preferred not on behalf of the party cast in the original litigation, it is the duty of the Court to treat the case as a regular suit between the claimant as plaintiff and the decree-holder and the judgment-debtor as defendants, the application being registered and numbered as a regular suit.

We, therefore, reverse the decision of both the Courts below, and remand the application of Luleet Narain to the Court of first instance to be dealt with under the provisions above referred to.

The costs of this Court and of the lower Courts will abide the ultimate result.

The 1st March 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Section 119, Code of Civil Procedure—Re-hearing.

Case No. 460 of 1870.

Miscellaneous Appeal from an order passed by the Subordinate Judge of East Burdwan, dated the 12th September 1870.

Sookh Moyee Dossee, *Appellant,*

versus

Nurmooda Dossee, *Respondent.*

Baboo Bhyrub Chunder Banerjee for Appellant.

Baboo Nil Madhub Sein for Respondent.

In an application for a re-hearing under Section 119 Act VIII of 1859 made after the time allowed by that Section, where applicant alleged that the property which had been attached in execution was not her property and that she had had no notice of either suit or decree:

HELD that she was entitled to an enquiry into the truth of the allegation as to attachment, and that if her whole plea were made out she would be entitled to a re-hearing of the case.

Glover, J.—THE appellant in this case was one of a number of co-defendants, against whom a suit had been brought on a bond which hypothecated certain landed property as security for the debt. Several of the defendants made their appearance and defended the suit, but the present petitioner was not present at the time the suit was decided, and she now comes in under Section 119 forty-five days after (as the Subordinate Judge says) the attachment of her property in the mofussil, to pray for a re-hearing on the ground that she had no notice of the suit. The Subordinate Judge refused her application on the ground that she was out of time, more than 15 days over the time allowed by Section 119 having elapsed since the process for enforcing the judgment (in this case, the attachment of her property) had been executed in the mofussil.

The appeal is made on the ground that no process for enforcing the judgment had ever been taken against the property of the petitioner and that she had no intimation of a suit having been brought against her. It appears from the record that this petitioner, Mussamut Sookh Moyee, did, when she came before the Subordinate Judge, offer to give evidence in support of her allegation, that the property which had been attached was not her property, and that therefore no process for enforcement of judgment had been executed against her.

It is contended by the pleader on the other side, that the petitioner has no right to the privileges given by Section 119; that she was one of a number of co-defendants against several of whom judgment was passed, and if she did not chose to make her appearance at the time the case was disposed of, the Court had the power to pass such orders with regard to her as appeared just and proper under the circumstances of the case (Section 116). We do not understand why a party, against whom such an order may have been passed under Section 116, cannot afterwards come up and apply for a re-hearing under Section 119. That Section applies without any distinction to all parties against whom a judgment *ex-parte* has been pronounced, on the ground of their not putting in appearance when the case was first heard. Further, it does not appear that any order was passed under the provisions of Section 116.

Then with regard to the objection that the property which was attached in the mo-

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fussil, and the attachment of which is said to have been the first notice which the petitioner had of the judgment passed against her—it is contended that she must necessarily have known of the judgment, and that the attachment was made against her property from the fact that this property had been mortgaged under a bond by herself as the guardian of her minor son. No doubt, if there was any evidence on the record to show that Sookh Moyee admitted that the property attached was that very property which she had mortgaged, there would be an end of the question; but in her application she distinctly says that the property which had been attached in execution of the decree was not her property but the property of some other person, and offered to give evidence in support of that plea.

In the case of Shib Chunder Bhadooree *versus* Luckhee Debia Chowdhrain, reported in the 6th Volume, Weekly Reporter, page 51, which is a case very similar to this, the learned Judges remanded the suit to the lower Court to take evidence on an allegation made under circumstances similar to these. In that case the party who was applying for a re-hearing under Section 119 objected that the property which had been attached in execution was not his; that it might have been attached as his but that in reality he had no interest in it; and therefore that the attachment gave him no intimation that there had been an *ex-parte* decree passed against him, and the learned Judges remanded the case to have an enquiry made on these points and to have it decided whether or not the applicant had, by reason of the property attached being the property of another person, not received intimation by the process of attachment of the decree passed against him. This case appears to be very similar.

That the property which the decree-holder has attached is the property mortgaged by this petitioner is denied by her; and if this denial can be made out, and if it can further be made out that she had no notice either of the institution of the suit or of the *ex-parte* decree passed against her, she would be clearly entitled under the provisions of Section 119 to a re-hearing of the case.

We remand this case to the lower Court for a fresh trial with reference to the above remarks.

The 1st March 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Cause of action—Pleadings—Registered tenants—Section 27 Act X of 1859.

Case No. 1928 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Purneah, dated the 2nd July 1870. *affirming a decision of the Moonsiff of Kishengunge, dated the 3rd February* 1870.

Dhunput Singh Roy Bahadoor (one of the Defendants) *Appellant,*

versus

Vellayet Ali and others (Plaintiffs) *Respondents.*

Mr. R. T. Allan and *Baboos Sreenath Doss* and *Kishen Dyal Roy* for Appellant.

Baboo Grish Chunder Ghose for Respondents.

A plaintiff has no right to change the character of his pleading, and to obtain a decree on a cause of action not originally contemplated.

A zemindar is bound to look only to his registered tenant; the equivalent of registration being presumed where he receives rents from his tenant in recognition of his tenancy.

Bayley, J.—In this case the plaintiff sues to reverse the sale of a *madad maish paiki* jageer, held under Regulation VIII of 1819, on the ground of no notice having been served upon him. I may add that we have carefully considered the whole terms of the plaint, and we find there is nothing whatever in it that the tenure was not of the class contemplated by Regulation VIII of 1819, or that the sale was improperly held under that Regulation, except the bare mention that the plaintiff did not receive due notice.

The first Court gave the plaintiff a decree, which the Lower Appellate Court has affirmed on appeal.

In special appeal the contention by the pleader for the special appellant is, that the Lower Appellate Court has erred in law in holding that the sale made in this case under

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Regulation VIII of 1819 is illegal. It is admitted, or rather it has been found as a fact, that some of the plaintiffs are purchasers of a portion of the lands, and others claimants as co-parceners by inheritance. It is admitted, however, that all the cases will be governed by one decision in special appeal. The whole question is as to the correctness of the decision of the Lower Appellate Court in holding that the sale in this case was illegal under Regulation VIII of 1819. Act X of 1859, Section 27, clearly lays down that a zemindar is bound to look only to his registered tenant, and the equivalent of that registration may be, according to the rulings of our Courts, presumed in case the zemindar receives rents from his tenant in recognition of his tenancy. But the tenure itself in the case now before us, is one of the class contemplated by Section 8, Regulation VIII of 1819; and on the pleadings the plaintiff, whose only case really was that the sale under that Regulation in this case was wrong and illegal, rested on the allegation of no notice having been served upon him. Now, the plaintiff had ample opportunity of requesting to have an issue fixed and determined upon that point, but from the first to the last he has not done or attempted to do anything of the kind, though the plaint itself indicated this as the basis of the illegality of the sale. It is extremely difficult to find out from the judgment of the Lower Appellate Court what its view on the merits of the case is; but this fact is clear that the Lower Appellate Court has erred in law in holding that the property was not liable to sale under the provisions of Regulation VIII of 1819. Plaintiff's case was that the sale was illegal in consequence of no notice having been issued on him. Nevertheless, he took no means to have that point raised in issue and decided. He raised no other point, and has no right to change the character of his pleading now. I, for myself, am always averse to see a plaintiff who comes to Court on one cause of action resiling from that point and getting a decree on a cause of action which he never thought of.

In this view I would reverse the decision of the lower Courts, and dismiss the plaintiff's suit with all costs.

Mitter, J.—I am of the same opinion. I think the Lower Appellate Court is wrong in holding that the tenure in question was not liable to be sold under the provisions of Regulation VIII of 1819. The objection was never raised either in the plaint or in any other proceeding in the Court of first instance; and if it were raised there, the defendant zemindar might have conclusively proved that the tenure fell within the provisions of Section 8 of that Regulation.

On the other point raised in the case, it is sufficient for me to say that the Lower Appellate Court having distinctly found that the plaintiff's name was never registered in the zemindar's books, and that the plaintiff was never recognized as a tenant in any shape whatever, the defendant zemindar was not bound to give any notice to the plaintiff when he instituted proceedings against the registered tenant for arrears of rent admittedly due to him. That being so, the plaintiff's suit for reversal of the sale must necessarily fall to the ground.

The 1st March 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Rights of fishing (public and private) —Prescription—User.

Case No. 2020 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of East Burdwan, dated the 15th July 1870, *affirming a decision of the Moonsiff of Culna, dated the 10th January* 1870.

Chunder Juleah and others (Plaintiffs) *Appellants,*

versus

Ram Churn Mookerjee and others (Defendants) *Respondents.*

Baboos Chunder Madhub Ghose and *Sreenath Banerjee* for Appellants.

Baboos Kalee Mohun Doss and *Khettur Mohun Mookerjee* for Respondents.

The right of fishing in a navigable river does not belong to the public, nor is the Government prohibited by any law from granting to individuals the exclusive right of fishing in such a river.

Prescriptive rights are founded on the presumption of a grant from long continued uninterrupted user and enjoyment as of right.

Glover, J.—THIS was a suit for a declaration of the plaintiffs' right to fish in the

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river Ganges between two given points, viz., the house of Gopee Boishtub and the Satgachea Ferry, without payment of rent, and to recover damages for loss of fish occasioned by the defendant's action in obstructing the river with stakes, nets, and other appliances, whereby the plaintiffs were prevented from catching that quantity of fish which they otherwise would have caught had there been no such obstructions.

The defendants Ram Chunder and Sham Chunder Mookerjee after denying that they had raised any bund or in any way obstructed the river to the loss of the plaintiffs, alleged that the plaintiffs had no right of fishing within the limits specified by them without payment of rent; that the julkur Bhandoduho was included in the Government estate No. 2375 on the Collector's towjee, which was sold by Government and purchased by the defendants who let the right of fishing to tenants. They added that no injury had been done to the plaintiffs or to the public.

The other defendants, Otul Beharee Mundul and Nil Kant Roy, the owners of another portion of the julkur called Nubogunge, stated that this julkur was part of the estate Kaleepore, which was sold for arrears of rent due by the durputneedar and was bought by them (defendants), since which time they have been in possession.

With regard to the julkur Bhandoduho, which formed part of the river in which the plaintiffs sued to have their right to fish declared, the Moonsiff found that it had been a khas mehal of Government, and had been sold to the defendants Ram Chunder and Sham Chunder by Government, and that these defendants had therefore the right to fish the water in any way that seemed best to them.

As to the other julkur Nubogunge, the Moonsiff considered that the defendants Otul Beharee and Neel Kant had not been able to prove that the flowing stream of the Ganges in which the plaintiffs claimed the right of fishing was identical with the julkur Nubogunge, purchased by them at the auction sale for arrears of rent.

And with regard to the plaintiff's title, he held that although they had in common with the public generally the right of fishing without payment in the navigable stream of the Ganges, which was the khas property of Government, they had no title to do so on the ground that they had exercised the right for more than 12 years without payment of rent. The claim for damages was dismissed.

The Subordinate Judge on the appeal of both plaintiffs and defendants modified the Moonsiff's decision, and passed an order dismissing the plaintiffs' claim altogether.

They now appeal specially to this Court, and urge—

(1).—That the Subordinate Judge has misconceived the nature of the suit, which was not to prove a rent-free title to the river, but to establish a right to fish therein based on an uninterrupted enjoyment for more than 12 years.

(2).—That the Subordinate Judge was, therefore, wrong in dismissing the suit, because plaintiffs were unable to file documents of title.

(3).—That he was also wrong in supposing that no private rights of fishing can exist in a navigable stream.

(4).—That 12 years uninterrupted enjoyment of the right of fishing would give the plaintiffs a title to have their right declared, and to have the obstructions in the way of their exercising that right in its entirety removed.

The first objection appears to me well-founded. The Subordinate Judge treated the suit as one of alleged rent-free tenure. The two first issues fixed by him at the hearing of the appeal show this. They were (1) whether the julkur is the *valid rent-free holding* of the plaintiffs, or does the said property form part of the zemindaree as well as of the Government khas mehal? and (2) whether the plaintiffs had held *under a rent-free title* possession of the property in question before the alleged dispossession mentioned in the plaint? and on these issues the Subordinate Judge decided that as the "plaintiffs had not been able to "prove their allegation by any documentary "evidence," and as "they could not show "that they received from the actual owner "of the said river any document of rent-"free title, or any old char with regard to "their holding any rent-free title to catch "fish in an unfordable stream," therefore their claim is not proved and their suit is dismissed, the mere fact of their having fished "without any right in the julkur" not being sufficient to give them a rent-free title.

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Now, it is clear from the words of the plaint which have been read to us, that the plaintiffs did not attempt to set up any rent-free title. What they said was that they had for very many years been in the habit of fishing in the julkurs in question, which were the navigable stream of the Ganges, and that the defendants had no right to obstruct the free exercise of their privilege by erecting bunds or putting up stakes and nets. They did not, as the pleader for the special respondents contends, claim an exclusive right in themselves, but sued on general grounds as forming part of the general public. No doubt, the wording of the plaint is in one place somewhat dubious; but taking the whole together and looking to the way in which the case was conducted in the first Court, there can, I think, be no doubt that the plaintiffs claimed the right of uninterrupted fishery on the ground that the public were entitled to fish in the river and had so fished from time immemorial. And if this view be correct, of course the Subordinate Judge was wrong in insisting on documentary evidence of an exclusive rent-free title, and in dismissing the plaintiffs' case for want of such evidence.

I do not, however, think it necessary to remand the case for further trial.

It has been strongly contended that the right of fishing in a navigable river belongs to the public, and that no grant of such right can be made to any private individual, and that on this account if on no other the plaintiffs are entitled to succeed. I am not aware of any law in force in this country which restricts the power of the State in this way. No doubt there is a decision of the late Sudder Court (S. D. A. Reports, 1859, page 1357) Gureeb Hossein Chowdhry and others *versus* G. Lamb, which has been much relied on by the special appellant, in which there is the following remark:—that "by the "Regulation Law, Regulation XI of 1825, "which is declaratory of the Common Law "of this country, as well as by the Common "Law of England, the bed of a navigable "river is not the property of any individual, "and consequently the right of fishery in "such rivers is not private property, but "that right is a right common to every per-"son. And if any individual claims an "exclusive right in navigable waters, "he must show that it has been acquired "either by grant or by prescription, and that "until that be shown the presumption is "strong against him."

But in the first place, this case is not on all fours with the present. It had reference to the Megna, a large river in which the tide ebbs and flows regularly, and which fact had every thing to do with the decision arrived at; for the learned Judges say in the concluding part of the decision—"Altogether we are "of opinion that neither of the parties before "us has to any extent proved the special "titles set up by them. Had the present "claims advanced on either side been for the "exclusive right of fishing in a river alone "the ebbing and flowing of the tide, in that "case the claims of the parties would have "been limited to the extent of their riparian "ownership."

The julkur now in dispute is in a navigable river certainly, for boats can and do pass at all seasons of the year, although in the hot and cold seasons the water is not very deep, but the river has no tide at the place where the julkurs are situated, only a dormant stream like most other inland rivers.

In the next place, I do not understand that Regulation XI of 1825 enacted that "the "bed of a navigable river could not be the "property of any individual." On the contrary, that Regulation appears to me distinctly to recognize the fact that the bed of such river might become the property of an individual proprietor, as in the case of an island between which and a riparian proprietor the water might be fordable. In this case, the nearest riparian proprietor could, if the channel between his estate and the newly formed island were fordable, step in and secure it for himself. The Regulation did not therefore, as it seems to me, declare that the beds of all navigable rivers were the property of the State; but if it had done so, it would have followed, I suppose, that the right of fishery in the waters over that bed would be the property of Government also. Anyhow I fail to see the inference which has been much pressed upon us, that because the bed of a navigable river does not belong to any individual, but does, except under particular circumstances, belong to the State, the right of fishery in such a river cannot become private property. I should rather have inferred that if the State had rights under ordinary circumstances over the river's bed, they had also over the fisheries and could grant the latter to individuals as well as the former.

I do not indeed consider that the decision above quoted laid down any such general

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proposition, and it is certain that the point decided had no connection with it. I have also consulted Mr. Justice Bayley, one of the Judges who took part in that decision, and he has no doubt that the only point decided was the right to a fishery in what was almost, if not quite, an arm of the sea. In short, the whole gist of the judgment is opposed to the meaning which the special appellant's pleader wishes to put upon it, although there are detached passages which may support his contention.

It must not be forgotten, moreover, that although the Common Law of England now forbids the grant of rights of fishing by the Crown in a public river, meaning by that a navigable river where the tide ebbs and flows, it was not so always; but before the Great Charter the Crown had the power to grant to individuals exclusive rights of fishing therein (*vide* I Stephen's Commentaries, 680), and I do not see that the governing power in this country is prohibited by any law from doing the same thing. As a matter of fact it has done so in very many instances, and very many julkurs composed of portions of large navigable rivers (meaning by navigable, rivers which allow of the passage of boats at all seasons although they are not tidal) have been leased out by Government either separately or as adjuncts to estates. To my certain knowledge, julkurs in the large rivers Soane and Gunduk have been and are leased out to individuals by the Government, and the practice has gone on for the last hundred years.

I do not, therefore, think that it can be said that the public have the right which the special appellant's pleader claims for them, or that the plaintiffs as representing the public could remove the obstruction placed in the way of their more profitable fishing by the proprietors of the julkurs in question. And it has been found as a fact by the Subordinate Judge that the defendants are proprietors holding their rights from the Government.

There remains the question whether 12 years' enjoyment of an unrestricted right of fishing, is sufficient to create in the plaintiffs the right to have the defendant's appliances for fishing removed.

I think not. The plaintiffs cannot at any rate claim a title by prescription, for prescriptive rights are founded on the presumption of a grant from long continued uninterrupted user and enjoyment as of right. Now, as the plaintiffs' case is that Government had no power to interfere with the rights of the public to fish in any navigable river, it could not have conferred a grant of such privileges to any one. The enjoyment claimed cannot, therefore, be accounted for, and is inconsistent with there having even been a grant or conveyance.

And as for uninterrupted enjoyment for 12 years, that cannot, it seems to me, give the plaintiffs any claim under the Statute of Limitations; for they do not allege that they have held their rights adversely to the defendants, but admit that the defendants have themselves the right to fish even as they the plaintiffs.

No one has prevented the plaintiffs from fishing, and no one has, so far as this record shows, demanded rent from them. They ask to have the defendants restrained from exercising what appear to me legitimate—rights of ownership in property sold to them by Government.

I think that this special appeal should be dismissed with costs.

Kemp, J.—I concur in dismissing this special appeal. The Subordinate Judge was no doubt wrong, as shewn by my learned colleague, in considering this to be a case in which the plaintiff based his right on a sunnud or any lukheraj holding; but the Subordinate Judge found on the evidence that the two julkurs in dispute, which are not julkurs of a tidal river, had been settled by or purchased from the Government, and that the defendants were entitled to the exclusive right of fishing in those julkurs. The julkurs in dispute belonged to khas mehals in which the Government have or had a proprietory title. That title has been leased in the one case and sold in the other to the defendants. The plaintiffs did not prove a right to fish either by grant or by user for such a period as to raise the presumption of a grant.

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The 1st March 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Rights—User.

Case No. 2081 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 8th July 1870, *affirming a decision of the Moonsiff of that District, dated the 29th November* 1869.

Shunkur Sahoo and others (Defendants) *Appellants,*

versus

Gurbhoo Sahoo and others (Plaintiffs) *Respondents.*

Mr. C. Gregory and *Baboo Abinash Chunder Banerjee* for Appellants.

Baboo Chunder Madhub Ghose for Respondents.

Deprivation of the right to a rise of water is an injury; and a claim to repair a bund for the purpose of securing such right, is not answered by the tender of another bund quite as good.

Bayley, J.—We think this special appeal must be dismissed with costs.

The plaintiffs sued for the declaration of their right to repair an old bund over a piece of water called Daw Singia.

The defendants' allegation was that the suit was barred by limitation; that there was no exercise of the rights claimed by the plaintiffs within 12 years of suit; and that no injury had accrued to the plaintiffs at all.

The first Court upon the evidence gave plaintiff a decree, and the Lower Appellate Court has affirmed that decree.

In special appeal it is contended by Mr. Gregory that the judgment of the Lower Appellate Court is erroneous on two grounds; *firstly*, because the Lower Appellate Court has not come to any finding whether the plaintiffs had exercised the right of repairing the old bund within 12 years of suit; and *secondly*, because no injury had accrued to the plaintiffs by the defendants' action.

Now, the Subordinate Judge has believed the plaintiffs' evidence as proving their allegation. The suit was for declaration of the plaintiffs' right to repair the old bund. The evidence is to the effect that that right existed for many years until within a very recent period; when the plaintiffs' people went to repair the bund the defendants obstructed them. If the Subordinate Judge believes this evidence, and he says he does, it would prove that the plaintiffs did exercise the right within 12 years of suit. We are, therefore, of opinion that the Lower Appellate Court has substantially found as a fact upon the evidence that the plaintiffs did exercise the right of repairing the bund within 12 years of suit.

As to the *second* objection, it was stated as part of the plaintiffs' case that "there "existed an old bund on account of which "the water used to rise up and pass into "the dandh of the plaintiffs, which is connected with it and irrigates the land of the "plaintiffs; that that bund had been destroyed and the defendant had erected another "bund on a low ground; that in this new "bund the water does not rise so high as to "flow into the dandh of the plaintiffs; and "that hence the suit was instituted for repairing the old bund." This allegation is found as a fact by the Lower Appellate Court to be supported by the evidence adduced by the plaintiffs. It is clear, therefore, that there is deprivation of the plaintiffs' right of some rise of water which they previously enjoyed, and that this is owing to the new bund raised by the defendant on low ground and the obstruction by defendant to plaintiffs' repairing their old bund. Such deprivation of right is certainly an injury.

It is argued that the new bund answered the purpose of the plaintiffs quite as well as the old. The previous remarks and the statements of facts contradict this contention, and even if they do not it is proved that the plaintiffs had a certain right to repair a certain bund, and it is no answer to a claim of a right to say that the party can have another bund quite as good as the old specific one which they repaired by right. Addison on Tort, page 73, has been quoted in support of the contention, but we are of opinion that the passages cited have no application to the present case. Essential injury must be proved in cases where a party deals with what is entirely his own property. Here the defendant obstructs the repair of the old bund, which it was the right of the plaintiffs to repair.

On the whole, we think the Lower Appellate Court has come to a finding of fact which cannot be interfered with in special appeal, and we therefore dismiss this special appeal with costs.

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The 22nd February 1871.

Present :

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Damages—Breach of contract.

Case No. 1800 of 1870.

Special Appeal from a decision passed by the Judge of Dacca, dated the 3rd June 1870. *affirming a decision of the Additional Subordinate Judge of that District, dated the 21st July* 1869.

Radha Gobind Shaha (Defendant) *Appellant,*

versus

Imam Buksh Oostagur (Plaintiff) *Respondent.*

Mr. R. T. Allan and *Baboo Dwarkanath Sein* for Appellant.

Baboos Sreenath Doss and *Gopal Lall Mitter* for Respondent.

In a suit for damages for breach of contract to supply wood which defendant had engaged to supply for the construction of a house, where the intention was found to have been that the plaintiff should from time to time give defendant notice of the different articles of wood-work required:

HELD that defendant was only liable for damages to the extent of the wood which he did not supply according to the order given to him, not for the wood for which requisition had not been made.

Jackson, J.—THIS is an action by the plaintiff for damages arising out of a breach of contract by the defendent to supply wood required by the Public Works Department for the building of the Magistrate's Cutcherry at Dacca. The plaintiff alleged that in consequence of the breach of contract, he had been obliged to procure wood at a higher rate from some other party ; and he accordingly sues to recover the excess costs of the wood. The defendant, on the other hand, alleged that he had been prepared to supply the wood and he had not broken the contract, but the breach of the contract had in fact been on the part of the plaintiff.

Both the lower Courts upon these points have decided against the defendant, and have given the plaintiff a decree for the excess value of the whole of the timber which had been estimated for the building.

Several grounds have been taken before us in special appeal against this decision. But we are satisfied that none of them is tenable with the exception of one. One of the contentions on the part of the defendant was that, even if he had broken the contract, he was not liable for the whole of the wood-work required for the building, but only for such portion of it as he had been required by the plaintiff to supply.

Both the lower Courts have alluded to this question : the Judge in the following terms :—

"Again the appellant urges that he is "not liable for more timber than specified "in the list admitted by plaintiff. It ap- "pears to me that this plea is not sound. "There is indeed a sentence in the contract "saying that plaintiff will give defendant "notice from time to time as the wood is "wanted, but the contract was for the "whole of the timber required for a par- "ticular building, and while defendant has "confessedly never supplied for more than "3 beams out of the quantity specified in "the list, I cannot see that the plaintiff "has been guilty of any neglect in sending "no requisition for more."

But looking into the contract, we find that although there was a general agreement to supply the whole wood required for the house, it was also specially stated that the plaintiff informed defendant what particular sort of wood-work was required to be supplied within a particular time ; and it does appear as if it was the intention that the plaintiff should continue from time to time to give the defendant further notice of the other different articles of wood-work which would be required. There is nothing to show that the defendant obtained any such further notice beyond the special notice which is alluded to in the contract ; and there is nothing to show that the defendant was made acquainted with what was actually required beyond what was specially stated in that notice. The defendant's objection, then, that he could only be made liable for what he was specially required to supply, and which he did not supply, seems therefore to be sound. It may be that because the defendant broke the contract as regards that particular order, therefore the plaintiff did not think it necessary to give him any further order. But it is evident that the defendant could not supply until the plaintiff gave him such order ; and it is not quite

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certain that the defendant might not have carried out the subsequent order even if he did not carry out the first order. The defendant is only liable for the amount of wood which he did not supply according to the order given to him by the plaintiff, and the decree given against him must be reduced to a very great extent. The decree as it stands at present is for 2,433 cubic feet, and we decrease the amount to 719 cubic feet; and we accordingly confirm the decree of the lower Court in so far as it awards to the plaintiff the excess price for 719 cubic feet of wood, and the decree of the lower Courts which allows the excess price of the remainder of the wood must be set aside.

Costs of this Court and of the lower Courts will be calculated in proportion to the amount decreed.

Mookerjee, J.—I entirely concur.

The 2nd March 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Measurement papers—Evidence.

Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 3rd September 1870, *affirming a decision of the Moonsiff of Monghyr, dated the 10th June* 1870.

Jharee Sahoo (Plaintiff) *Appellant,*

versus

Bundhoo Sahoo and others (Defendants) *Respondents.*

Baboo Hem Chunder Banerjee for Appellant.

Mr. C. Gregory for Respondents.

A Lower Appellate Court was held to have been fully justified in rejecting measurement papers as inadmissible in law, where no proof was given to show in what circumstances, under what authority, and for what purpose they had been prepared.

Bayley, J.—We think this special appeal must be dismissed with costs.

The plaintiff, as purchaser of a decree against Sheo Sahoy Sahoo, sues for the declaration of his right to have a house sold in execution as the property of these judgment-debtors. In the execution department his petition for sale was disallowed on the objection of Bundhoo Sahoo, the defendant.

The first Court after a careful review of the whole evidence and referring to the measurement papers, which it held were not drawn up in the presence of the parties or made the subject of a judicial investigation, came to the conclusion that the plaintiff failed to prove his right. The first Court further found that the title and possession of the defendant were borne out by the evidence, and that the plaintiff's suit was barred by limitation.

The Lower Appellate Court has also substantially come to the same finding and has dismissed the plaintiff's suit.

In special appeal the only ground pressed upon us is, that the Lower Appellate Court is wrong in holding that the measurement papers were no evidence in the case.

Now, the words used by the Lower Appellate Court must be read as a whole, and by their context, and not by detached passages or words. The Lower Appellate Court says—"The measurement papers relied upon by "the plaintiff are no evidence in this case, as "they are not said to have been drawn up in "the presence of any of the parties. No "proof is forthcoming that the judgment-"debtors ever tenanted the house; and al-"though Seetul, who lived in it for a long "time, says that he had been paying rent to "the father of the judgment-debtors, yet he "is forced to admit that latterly he paid rent "to the defendant." Reading the whole passage together, it is clear that the words "no evidence" is with reference to the reliance to be put upon it. The Lower Appellate Court's meaning is that it is no *sufficient* evidence; and that is clear from the succeeding sentences with reference to the evidence of Seetul. The Lower Appellate Court proceeds to hold that on his part the defendant proved by sufficient evidence his possession under the kobalah, by receipt of rent for a period of more than 12 years, and that the plaintiff's suit was thus barred by limitation. This is a finding of fact upon the evidence come to by both the lower Courts. No special appeal will lie, and it is therefore dismissed with costs.

Mitter, J.—I concur in dismissing this appeal. I wish merely to add that the decision of the Lower Appellate Court must be affirmed, even if we consider that that Court

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has rejected the measurement papers in question as inadmissible in law. The special appellant gave no proof whatever to show how, under what circumstances, under what authority, and for what purpose those papers were prepared; and in the absence of such proofs the Lower Appellate Court was fully justified in rejecting them as inadmissible.

The 2nd March 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Attachment—Rival decree-holders—Jurisdiction.

Case No. 1347 of 1870.

Special Appeal from a decision passed by the Judge of Dacca, dated the 18th April 1870, reversing a decision of the Subordinate Judge of that District, dated the 4th May 1869.

Radha Gobind Shah (Plaintiff) *Appellant,*

versus

Shaikh Oozeer Jemadar (Defendant) *Respondent.*

Mr. R. T. Allan and *Baboo Dwarkanath Sein* for Appellant.

Mr. R. E. Twidale for Respondent.

Where property has been attached in execution of a decree, it is competent to a rival decree-holder to show that the attachment should not have issued as the decree under which it issued was barred by lapse of time, and the Court, if satisfied that the decree is so barred, is competent to see that the decree-holder who took out execution does not share in the distribution of the sale proceeds.

Mookerjee, J.—THE plaintiff as well as the defendant in this case held certain decrees against the same judgment-debtor. There was another person of the name of Munglanunda, who also held a decree against the said judgment-debtor. It was found that the property had been first attached on the application of the decree-holder Munglanunda. After the sale of the property, the Sudder Ameen in distributing the sale proceeds held that Manglanunda was entitled to the entire satisfaction of his decree, and adjudged to the plaintiff and the defendant rateable shares of the surplus sale proceeds. It was found subsequently, at the instance of the defendant, that the decrees in execution of which the plaintiff had attached the property were barred by limitation; and that according to Section 20 Act XIV of 1859 no process of execution should have been issued in regard to those decrees. The Sudder Ameen, therefore, ordered the plaintiff to refund the money he had received as his share, and held that the defendant was entitled to that sum,—he being the sole remaining attaching creditor. When the plaintiff was required by the Sudder Ameen to refund the money, the plaintiff, who had other decrees in the Subordinate Judge's Court against the same judgment-debtor, applied to the Subordinate Judge to require the Moonsiff to send the amount to his Court. The Subordinate Judge by a proceeding asked the Moonsiff to remit the sum to his Court. But the Moonsiff refused to send the money, because he had already ordered it to be paid to the defendant, who had attached the property after Munglanunda. The plaintiff has now instituted this suit to recover that money.

His suit is based on the ground that the Sudder Ameen ought to have remitted the money as required by the Subordinate Judge, and that the decrees he held against the judgment-debtor in the Subordinate Judge's Court would have been satisfied if the money had been sent. He, therefore, prays that the order of the Sudder Ameen, dated the 3rd February 1868, refusing to send the money should be set aside. There is also a prayer in the plaint that a previous order of the 26th September 1867, by which the Sudder Ameen held that the decrees which the plaintiff held in his Court were barred, should also be set aside. But from the whole tenor of the plaint, it is very clear that the plaintiff rested his right to a share in the surplus sale proceeds on the ground of his being a decree-holder of the Subordinate Judge's Court. There is no allegation in the plaint that the decrees which the Sudder Ameen had held to be barred were not actually barred, but were really subsisting decrees at the time of the plaintiff's attachment. We, therefore, find that in the Courts below there were no issues on the point whether the decrees which the Sudder Ameen had held to be barred were actually barred or not.

The first Court gave the plaintiff a decree, but it is not very clear on what ground the decree was given. There is no adjudication whether the decrees which the plaintiff held were justly found by the Sudder Ameen to

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be barred or not. But the first Court being of opinion that the Sudder Ameen ought to have obeyed the order of the Subordinate Judge by sending the money to his Court, and as the Sudder Ameen has not done so and as the plaintiff had attached the property but the defendant had not, the plaintiff was entitled to get the money. Now, there appears to be a confusion of ideas in the Subordinate Judge's mind. He does not state clearly whether the attachments he speaks of were attachments made in execution of the lapsed decrees or the decrees of his own Court. But he says only that the plaintiff had attached and the defendant had not. On appeal the Judge found that the defendant had attached the property in execution of his decree, whereas the only attachment which the plaintiff had made of the property was in execution of the decrees which had lapsed by efflux of time, and there was no attachment of the property under the decrees of the Subordinate Judge's Court. The Judge, therefore, reversed the decision of the Subordinate Judge, and held that the plaintiff not being an attaching judgment-creditor, who had attached the property prior to the order of the distribution of the sale proceeds, was not entitled to a rateable distribution of the same.

It is now contended before us by Mr. Allan, that the real object of the suit was to have it declared that the order of the 26th September 1867, by which the Sudder Ameen held that the decrees in execution of which the attachment was made were decrees which were no longer subsisting being barred by limitation, was a wrong order; and that although in the plaint it was not stated that the decrees were not barred, still that point ought to have been tried by the Courts below. The simple answer to this argument is that the suit has not been brought on that ground, and that point has not been pressed before any of the Courts below. We cannot in special appeal say that the decisions of both the Court below are wrong on a point which was never pressed before them. However, we allowed Mr. Allan an opportunity to show from the records of the case, which have been sent for by an order of this Bench, that the decrees were not really barred. But he was unable to satisfy us on that point; and even if we were disposed to send the case back, we see there is no use of our doing so when we find that the appellant's pleader is unable to satisfy us that any good would result to any party by our sending the case back, plaintiff being unable to show us that the decrees were in reality not barred at the time of the attachment.

Then, it is contended by Mr. Allan that the Court had no authority at the instance of a rival decree-holder to decide, for the purposes of distributing the surplus sale proceeds, whether the decrees under which the plaintiff had obtained the attachment were really barred or not. I, however, think that it is in the power of a rival decree-holder to show that any other decree under which the property has been attached is no more a subsisting decree, and that the processes issued by the Court in execution of that decree should not have been issued at all. It is a matter of the greatest concern to a decree-holder to see that the assets are distributed amongst persons who are really entitled to them. Under Section 272 of the Procedure Code, it is undoubtedly in the power of one decree-holder to show that the decree obtained by another decree-holder, and under which the property had been attached, was a decree obtained by him by fraud or by other improper means; and if he can show that, the Court distributing the surplus sale proceeds would be competent to award satisfaction to the decree-holder who has shewn that his rival's decree has been obtained by fraud or other improper means. By a parity of reasoning, I think one decree-holder is quite competent to show that the decree of another decree-holder is barred by lapse of time, and that therefore that person is no longer a decree-holder, and consequently not entitled to a share in the sale proceeds; and if the Court is satisfied that that decree is really barred, the Court is also fully competent to see that he should not have any benefit in the distribution. Parties aggrieved by that order may contest the justness of it by a suit, and may show that the order passed by the distributing officer was a wrong order, inasmuch as the decree was not barred. If the case of the plaintiff was that the Sudder Ameen was wrong inasmuch as the decree was not barred, it was quite competent to him to show and prove that fact in the suit he has brought, and to state that fact clearly and to ask the Court to decide whether the decrees held by him in the Sudder Ameen's Court were really barred or not. He has done no such thing. But in the last stage of special appeal he has asked us to do so; and even then when opportunity was given to him, he was unable to show us that his decrees were not barred. I would, therefore, hold that the order of the Judge is a

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proper order and that the plaintiff is not entitled to participate in the distribution of the sale proceeds. I would, therefore, uphold the order of the Judge and dismiss this appeal with costs.

Jackson, J.—I entirely concur.

The 2nd March 1871.

Present:

The Hon'ble L. S. Jackson and W. Ainslie, *Judges.*

Obstruction—Damages—Wasilat.

Case No. 1407 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Gya, dated the 20th May 1870, *affirming a decision of the Sudder Moonsiff of that District, dated the 13th September* 1869.

Churn Singh (one of the Defendants) *Appellant,*

versus

Rungoo Singh and others (Plaintiffs) *Respondents.*

Mr. C. Gregory for Appellant.

Baboos Kishen Succa Mookerjee and *Hem Chunder Banerjee* for Respondents.

Obstruction to possession may be the ground of a claim for damages, but it cannot support a claim for wasilat unless there has been dispossession and the claimant has been prevented from enjoying rents and profits.

Jackson, J.—We have come to the conclusion in this case that there has not been a satisfactory trial on proper issues.

The plaintiff alleged himself to be holding a lease of mouzah Sadipore, and he alleged that the defendant had obstructed his possession and enjoyment of that mouzah; and he, therefore, asked the Court to give him a decree for possession and for wasilat.

The defendant put in a written statement in which he alleged several things. He denied that he had any connection with mouzah Sadipore, but he alleged that he had a lease of a certain other mouzah called Sadipore Lahuree: he further stated that the deed of lease had been stolen from his house, and that the plaintiff becoming aware of that fact had brought the present suit for the purpose of annoying him, and in some way of disturbing him, the defendant, in the enjoyment of his rights as ticcadar of Sadipore Lahuree; and he, therefore, prayed that the suit might be dismissed, and be allowed his costs.

The Moonsiff who tried the suit originally framed, what he calls, two issues of fact, which are vague and obscure and involved to the last degree. The points that he really did try were, whether the defendant had got a lease of mouzah Sadipore, and upon this point going into the evidence he decides in the negative. He then goes on to observe that in this state of things, the plaintiff is undoubtedly entitled to possession, "for the lease of 20 years pleaded by the "defendant has not been proved to the "satisfaction of the Court. The plaintiff, "therefore, can no longer be deprived of "possession," and thereupon he orders "that the suit be decreed, that the plaintiff "be put in possession of the disputed mou-"zah, and the principal defendant, Jugger "Nath Singh, do pay to plaintiff Court-costs "with interest from date of decision to "date of realization, at the rate of 12 per "cent. per annum, and mesne profits to "whatever amount the same may be ascer-"tained in execution of decree, from the day "of the institution of the suit to the day "of possession."

Then the defendant appealed, and he appears to have chiefly laid stress upon the fact that he set up no claim of a nature adverse to the plaintiff's claim as ticcadar of Sadipore; and that consequently there was no cause of action against him, and that the suit ought to have been dismissed with costs.

The Subordinate Judge then taking up his written statement, and considering that one part of that written statement contained a denial of the plaintiff's title, holds that he was endeavouring in appeal to make a different defence from that which he set up in the Court of first instance, and holding him to be thus impugning the plaintiff's title, decides that judgment has been properly given against him.

Now, the decision of the Moonsiff, which was in this way upheld by the Judge, really concludes almost nothing except this—that the defendant had no lease of mouzah Sadipore. It gives the plaintiff a vague

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relief in the shape of wasilat against the defendant without having found that the plaintiff had really been ousted from his mouzah by the defendant, and it leaves the amount of the wasilat to be determined afterwards in excution. I do not think it would be satisfactory or safe if we should allow the case to remain in that condition.

The defendant did not seriously deny the plaintiff's right as lease-holder of Sadipore, nor did he, it seems to me, deny that Sadipore and Sadipore Lahuree are distinct mouzahs. It may be that the defendant's allegation in respect of mouzah Sadipore Lahuree was put forward with the intention of, if possible, avoiding any liability for mesne profits, by disclaiming in distinct terms any title adverse to that of the plaintiff. It seems to me, therefore, in that state of things, that the Moonsiff ought to have determined whether the defendant had, under color of his ticca of mouzah Sadipore Lahuree, dispossessed the plaintiff from his own lands of Sadipore or from any part of it.

The only evidence which has been shown bearing upon that point is the decision of the Magistrate in a certain criminal case in which the plaintiff alleges himself to have been obstructed by the defendant, and the defendant, it appears, was fined by the Magistrate on that account.

Now such obstruction by the defendant might be the ground of a claim for damages, but unless the plaintiff had been dispossessed by the defendant, and the defendant had collected the rents or prevented the plaintiff from enjoying the rents and profits of his mehal, it would not support a claim for wasilat.

We think, therefore, that the case must go back in order that the Moonsiff may try it *de novo* on fresh issues, namely, whether the plaintiff had been dispossessed from mouzah Sadipore or any part of it by the defendant, under color of his lease of mouzah Sadipore Lahuree; and, if so, what the period of dispossession had been, and whether the plaintiff was in fact out of possession by the act of the defendant at the time of bringing the suit; and whether, consequently, he is entitled to wasilat for mouzah Sadipore, as prayed in the plaint, from the time of bringing the suit until the period of final possession.

Ainslie, J.—I concur.

The 2nd March 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Conveyance of attached property—Execution—Attachment.

Case No. 1695 of 1870.

Special Appeal from a decision passed by the Officiating Judge of East Burdwan, dated the 12th May 1870, *affirming a decision of the Subordinate Judge of that District, dated the 15th February* 1870.

Maharajah Dheeraj Mahatab Chund Bahadoor (one of the Defendants) *Appellant.*

versus

Surno Moyee Dossee (Plaintiff) and others (Defendants) *Respondents.*

Baboos Chunder Madhub Ghose and *Ashootosh Mookerjee* for Appellant.

Baboos Romanath Bose and *Taruck Nath Sein* for Respondents.

A deed of sale conveying property, if executed while the property is under attachment, cannot afterwards be made valid by the release of the property.

The striking off of the execution case does not do away with an attachment once made, unless the attachment is expressly abandoned by the party at whose suit it was issued.

Glover, J.—THE plaintiff in this suit obtained a decree on the 5th of May 1863 against Sham Chand Baboo and his wife Joy Coomaree Bibee. The circumstances under which Joy Coomaree came into the suit are not very intelligible; but there is no necessity to enter into them because there is no doubt that the decree was given both against husband and wife. In execution of this decree the plaintiff attached one of the properties which had originally belonged to Joy Coomaree, and on the 6th November 1865 obtained 1,500 Rs. on account of his decree, and allowed the execution case to be struck off the file. In the interim, however, the defendants (special appellants before us) got a conditional deed of sale from Sham Chand Baboo and his wife Joy Coomaree, which was eventually foreclosed and a decree for possession obtained. After the Rajah had so obtained possession, the original

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decree-holder took out execution again and applied for attachment of the judgment-debtor's property. The Rajah objected to the attachment and his objection was allowed; hence the present suit by the plaintiff for a declaration that the property of which the Rajah is in possession is liable for the unsatisfied portion of the plaintiff's decree of the 5th of May 1863. The defence of the Rajah is that as his kut-kobalah was registered, the decree obtained on it was entitled to take precedence of the decree of the plaintiff; and that although when the kut-kobalah was executed, the property conveyed was under attachment, that attachment was very soon after allowed to drop and was ineffectual.

Both lower Courts decided in plaintiff's favour, and we think that they decided rightly. There can be no doubt that when the defendant's conditional deed of sale was executed, the property conveyed by that deed was under attachment and no alienation could legally have been made by the judgment-debtor. The contention that the kut-kobalah became afterwards effectual as against the judgment-debtor, by reason of the decree-holder's having allowed the attachment to lapse, is altogether untenable. No subsequent laches, supposing there to have been laches on the part of the decree-holder, could make valid what was in its inception invalid. If the kut-kobalah was a document which could not have been legally given by the judgment-debtor at the time it was given because that judgment-debtor had then no power to alienate, it was not afterwards made valid by the fact of the property being released from attachment. But we are by no means satisfied that the attachment ever did cease to exist. The lower Court has found as a fact that it continued, and the joint petition of the judgment-debtor and decree-holder shows that when the execution case was struck off, it was agreed upon by both parties that the attachment should be considered as subsisting. It is contended that inasmuch as the decree-holder subsequently made two several applications for attachment in 1868 and 1869, that of itself shows that the first attachment was abandoned. But it would not follow of necessity that because subsequent applications for attachment were made, the original attachment was abandoned. The question was discussed at some length in the case of Jhoboo Sahoo and others *versus* Ram Churn Roy and others, reported in Volume XI of the Weekly Reporter, page 516. In that case the learned Judges gave detailed reasons for holding that the striking off of an execution case does not of necessity do away with an attachment once made, unless there is something to show that the attachment was expressly abandoned by the party at whose suit it was issued. If it could be shown in this case that the subsequent petitions by the judgment-creditor were to the effect that he had of his own accord abandoned the first attachment and applied to have the property attached *de novo*, that would be a different thing; but there is nothing on the record to show the circumstances under which the subsequent applications were made, nor can the pleader for the special appellant show us that the facts are as stated by him.

We see, therefore, no reason to interfere with the judgment of the Court below, and dismiss the special appeal with costs.

The 2nd March 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Pre-emption.

Case No. 1747 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Sylhet, dated the 27th May 1870, *affirming a decision of the Moonsiff of Lushkerpore, dated the 3rd March* 1870.

Akhoy Ram Shahajee (Plaintiff) *Appellant,*

versus

Ram Kant Roy and others (Defendants) *Respondents.*

Mr. C. Piffard and *Baboos Ashootosh Dhur* and *Debendro Narain Bose* for Appellant.

Baboos Unnoda Pershad Banerjee and *Nuleet Chunder Sein* for Respondents.

A right of pre-emption attaches to the sale of the share of a zemindaree in the case of a co-sharer, though it may not attach on the ground of vicinage.

The right of pre-emption is not one which attaches to property, and the obligation it implies may be limited to the residents of a district or to a family or to any particular class of persons, it being for the claimant in each case to show that it attaches to the defendant.

Jackson, J.—THE plaintiff in this case claimed a right of pre-emption on the ground

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that he was a co-sharer. The defendant Rookinee Kant had purchased a 4 anna share of the estate, of which plaintiff was a co-sharer from the defendant. The defendant Rookinee Kant stated that he had effected the purchase from one Koroona Moyee whose general agent he was, though the purchase had been made in his own name; and Koroona Moyee intervening as defendant urged that neither she nor the vendor were bound by any right of pre-emption, and that she, Koroona Moyee, was herself a co-sharer in the estate. There was also an allegation that the preliminaries had not been properly performed.

The Appellate Court from whose decision this appeal is preferred, agreed on each and every point with the decision of the Moonsiff who originally tried the suit. The Subordinate Judge held that no right of pre-emption existed as to a share in a zemindaree; that the vendor and purchaser being residents of the Mymensingh and Tipperah Zillahs were not bound by any right of pre-emption, as the exercise of that right was not customary in those districts among Hindoos; that the purchaser was herself a co-sharer in the estate, and finally agreed with the Moonsiff that the preliminary rites had not been properly performed.

On each and all of these points this special appeal has been argued. On the first point, that no such right attaches to a share in a zemindaree, the Subordinate Judge is in error. It was ruled by the decision of the Full Bench of this Court in the decision quoted in the margin,* that such a right did attach to a sale of a share of a zemindaree in the case of a co-sharer, though it might not attach on the ground of vicinage.

* 14 Weekly Reporter, page 1, Full Bench.

On the second point, I am of opinion that the Subordinate Judge has laid down the law correctly. It is admitted that among the residents of the district of Sylhet, there is a custom sanctioning a right of pre-emption even among Hindoos. But the defendants are not residents of that district, and there is no evidence to prove that in the case of transactions between them any such right can be exercised. It would not be exercised in the case of a European buying or selling landed property in the district of Sylhet, unless it would be proved that such was a general custom among Europeans in that district. It has been found that there is no such custom among Hindoos in Zillahs Mymensigh or Tipperah. Consequently the defendants are not bound to acknowledge that right any more than a European would be so bound. It is not a right which attaches to the property. This was ruled in the Full Bench decision of this Court quoted in the margin. There may be such a custom in the district of Sylhet. The obligation may be limited to the residents of a district, or of a family, or to any particular class of persons, as stated by Mr. Justice Phear in his judgment in Weekly Reporter, Volume VIII, page 446. But it is for the plaintiff in each case to show that it attaches to the defendant. The lower Court is satisfied in this case that it does attach to the defendant, and, in my opinion, upon very good grounds.

13 Weekly Reporter, page 21, Full Bench.

But it is said that as the actual purchaser was a resident of Sylhet, the plaintiff is entitled to exercise the right. This might be the case if the defendant Rokhinee Kant was the actual purchaser. But this fact is found against the plaintiff. I cannot see that the mere fact of the purchase being made in Rookhinee Kant's name makes any difference. The plaintiff states that he may have been thereby deceived. This is not probable. It may give him some right of action if he has been injured thereby, but it does not bring into force the right of pre-emption if it did not otherwise exist.

It is unnecessary to notice any further points in this appeal. If the above view of the law is correct, and it is the view of the Full Bench of this Court, the plaintiff cannot succeed, and his special appeal must therefore be dismissed with costs.

Mookerjee, J.—I concur in dismissing this appeal.

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The 2nd March 1871.

Present:

The Hon'ble G. Loch and W. Ainslie, *Judges.*

Pre-emption — Khuleet — Shureek — Thorough-fares —Butwarrah—Ambiguous plaint.

Case No. 1875 of 1870.

Special Appeal from a decision passed by the Judge of Sarun, dated the 14th July 1870, reversing a decision of the Subordinate Judge of that District, dated the 31st December 1869.

Lalla Puriag Dutt and another (two of the Defendants) *Appellants,*

versus

Shaikh Bundeh Hossein (Plaintiff) *Respondent.*

Mr. R. T. Allan for Appellants.

Mr. R. E. Twidale and *Baboo Romesh Chunder Mitter* for Respondent.

The term *khuleet* applies to a pre-emptor in the first degree, *i. e.*, a partner in the *substance* of a thing (called *shureek* in Baillie's Digest of Mahomedan Law) as well as to a pre-emptor in the second degree, *i. e.*, a partner in *its rights.*

Public thoroughfares give no right of pre-emption.

The right to pre-emption of a partner in the substance applies where he is a partner in the whole property, not where there has been a partition of the original estate under the Butwarah Law, even though, notwithstanding the intention to make a complete partition, incompleteness has resulted from accident or oversight.

An ambiguous plaint is bad in form, a plaintiff claiming under two several rights being bound to state the fact distinctly.

Ainslie, J.—THIS is a suit founded on right of pre-emption. The plaintiff claims as "shuffee khuleet," and has obtained a decree in the Lower Appellate Court.

The first ground of appeal taken by defendants, special appellants, is that whereas plaintiff claims as "khuleet" or pre-emptor in the second degree, it was not open to the Judge to find that he was "shureek" or pre-emptor in the first degree.

This objection is founded on the opening words of Chapter 2 on Pre-emption in Baillie's Digest of Mahomedan Law, page 476. "A 'shureek' (or partner in the substance of a thing) "is preferred to a 'khuleet' (or partner in its rights as of water or way)." But it has been brought to our notice by the respondent's pleaders, that in the original Arabic version of the Hedaya, the word "khuleet" is used in both places, and "shureek" does not appear at all; and from my personal experience I incline to think that in the Behar districts "khuleet" is habitually used to represent a pre-emptor of the first degree. It certainly was so in Tirhoot in the case reported in 11 Weekly Reporter, page 169, and in a Sarun case (this appeal also comes from this district) to be found in 12 Weekly Reporter, page 484.

And as it appears that the term "khuleet" is used in the Hedaya to designate the person whom Baillie calls a "shureek", it cannot be said that it is improperly used in a plaint as a designation of a partner in the substance. No doubt it requires some addition to make clear what the foundation of the plaintiff's alleged title is; but this may be either shown by express words or it may be inferred from the written statement. In this suit it seems clear that the plaintiff was claiming as partner in the substance. It is, therefore, quite unnecessary to follow the appellant's pleader into a discussion of whether a pre-emptor by partnership in the appendages (one of the second degree) can enforce his claim in respect of any thing but small parcels of land.

The respondent has attempted to set up an alternative case for the plaintiff, that he is "khuleet" either in respect of the substance or of the appendages.

In the first place, I think a plaint that is ambiguous is bad in form. I do not mean to say that the plaintiff might not have claimed under two several rights, but if he intended to do so, he should have stated the fact distinctly that the adversary might have due notice and the Court be enabled to raise the proper issues;—and in the second, I think that in this case the ambiguity really is non-existent and is only an ingenious suggestion of the respondent's pleader. From the judgment of the first Court, it is quite clear that what the Court and the parties understood to be in issue, was simply the right by partnership in the substance and that no claim by partnership in the appendages was advanced under cover of the ambiguous expression "khuleet."

If it were possible at this stage to admit a claim as pre-emptor by right of way, it

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would be very simply disposed of by pointing out that public thoroughfares give no right of pre-emption, and that village roads are in the nature of thoroughfares.

It remains to enquire whether the Judge was right in holding plaintiff to be a partner in the substance. The village was regularly partitioned by the Revenue Authorities. Plaintiff's interest is in one of the separated lots and defendant's in another: but it is urged that some 11 beegahs were left undivided. The greater portion consisted of the aforesaid roads and of land of mâfeedars and others over which the owners of the village exercised no rights of proprietorship; but the Judge finds that certain small portions recorded in Nos. 248, 251 and 314 of the butwarah khusrah were left the joint property of the owners of the village, and on the existence of these lands he founds a title for the plaintiff by right of partnership in the substance. The Judge states that these lands are described in the partition proceedings as worthless, and therefore not susceptible of being divided, but that one small plot of 6 cottahs, which was described as a hole, is now a fishery yielding rent, and that on another, which was then a road, a ryot has since erected a house.

It is on this joint ownership that the respondent relies. The decision reported in 10 Weekly Reporter, page 314, is brought forward in support. In that case the reservation of the Julkur and Nimukshayer as common property after the division of the land was held to be sufficient foundation for the claim of the pre-emptor. I wish to offer no opinion on this point;—this case is clearly distinguishable.

In that case the parties, by consent and deliberately, reserved a joint interest (if the subject-matter was capable of partition). In this case, it is stated by the Judge of the first Court that they divided Julkur, Nimukshayer, Kayaree, &c., in short every thing which was worth dividing, and only remained jointly interested in what was either utterly worthless or (more probably) was treated as public property in the same way as the roads.

In short, the partition was as if two persons dividing a house and its curtilage carefully marked off each room and foot of ground, but forgot or neglected to sub-divide a worn and useless brick that had fallen from one of the walls and was lying in a rubbish heap in some corner. Out of this brick can we build a joint ownership of a portion of the thing sold, when one of the two sells his separated share to a stranger? Yet this is just what the plaintiff seeks to do in this case. It is said that the undivided property is now of some value. But it is manifest that the intention was to make a complete separation, and that the incompleteness, if such it can be called, was at the utmost the result of mere accident—(as I have said above, I think it extremely probable that this land was treated as subject to rights of the public at large and not the private property of the landlords)—and I cannot conceive that the respondent can maintain that the oversight is to override the express intention of the parties.

Mr. Twidale for the respondent has quoted the instances mentioned in page 478 of Baillie's Mahomedan Law; but in my opinion those cases in no way support his contention but rather go against it. In the first instance, when two persons holding land in common divide it but leave an existing wall and the land on which it stands undivided as their common boundary, they deliberately and intentionally maintain a community of interest for their mutual advantage. The wall is an integral part of the property of each at the time of partition, and consequently the right of pre-emption by partnership is held to attach. In the second case no community of interest is maintained. A new common interest is created, but does not extend further than the intention of the parties at the time of creating it, *i. e.*, beyond the wall. The previous intention to divide completely is not affected, though the new wall becomes a source of common profit. So in this case, the common profit which may have arisen since the separation, which was intended to be complete at the time it was made, cannot operate to defeat the original intention.

I would, therefore, reverse the decision of the Lower Appellate Court and dismiss the suit with costs in all Courts.

Loch, J.—I concur in making an order reversing the judgment of the Lower Appellate Court as proposed by my colleague. The cases which rule that a partner in the substance is entitled to exercise the right of pre-emption, presume that the party so claiming is a partner in the whole property; and those rulings are not applicable to a case like the present, where the original estate has been partitioned under the

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Butwarah Law and these separate estates formed out of the one original estate. The utmost that can be conceded to the plaintiff is a right of pre-emption to so much of the land as remains in the joint possession of him and the vendor, but nothing beyond it. The appeal is decreed with costs in this and the Lower Appellate Court, and the decree of the first Court dismissing the suit with costs is restored.

The 2nd March 1871.

Present:

The Hon'ble L. S. Jackson and W. Ainslie, *Judges.*

Appeal—Section 348, Code of Civil Procedure.

Case No. 2028 of 1870.

Special Appeal from a decision passed by the First Subordinate Judge of Shahabad, dated the 2nd June 1870, *reversing a decision of the Moonsiff of Saseeram, dated the 1st October* 1869.

Mussamut Ritooraj and others (Plaintiffs) *Appellants,*

versus

Oojagur Singh and others (Defendants) *Respondents.*

Baboo Taruck Nath Dutt for Appellants.

Baboo Rughoobuns Sahoy for Respondents.

In a suit to establish title to 3 annas and a fraction of an estate, plaintiff having obtained a decree for only 2 annas appealed; but the Lower Appellate Court reduced the share allotted to the plaintiff.

HELD that as no question of the share to be awarded was raised before the Lower Appellate Court by the defendant under Section 348, Code of Civil Procedure, that Court should not have interfered with the decision in the way it did.

Ainslie, J.—IN this suit the plaintiff sought to establish his title to 1 anna 7 pie and 5 krants of mouzah Surenda, and 3 annas 11 pies and 5 krants of mouzah Nowa, with a view to obtain partition of the estate. The suit in respect of mouzah Surenda was dismissed entirely, and in respect of mouzah Nowa a decree was given by the first Court for 2 annas. The plaintiff then filed an appeal which was tried by the Subordinate Judge of Shahabad, who confirmed the decision of the first Court in respect of Surenda, and modified it in respect of mouzah Nowa by reducing the share allotted to the plaintiff to 1 anna and 9 pies. In this Court plaintiff only claims 1 anna 2 pies in mouzah Surenda, and the 2 annas of mouzah Nowa awarded by the Moonsiff. No question as to the share to be awarded in mouzah Nowa appears to have been raised by the respondent before the Lower Appellate Court under Section 348 of the Civil Procedure Code. The Subordinate Judge, therefore, should not have interfered with the judgment of the first Court in respect of that mouzah; no attempt has been made in this Court to support his judgment in respect of it and it must be set aside.

As regards mouzah Surenda, it appears that there were three brothers, Kashee, Gunga, and Gopal, each holding a share of 1 anna and 2 pies. The shares of Kashee and Gopal were sold in execution of decree and purchased by Hur Suhae and others; but the share of Gunga has remained intact up to the present time. Subsequently to the execution sale, a suit was brought by the plaintiffs against the representatives of the auction-purchasers to establish their (plaintiffs') right to continue in possession, on the ground that the auction-purchasers had lost their rights by neglecting to enter on the lands sold. This suit was dismissed. In it the plaintiffs claimed to establish their title to 1 anna and 9 pies out of the shares of Kashee and Gopal which had been sold. They then set out, as they have done in this case, that each of the three brothers Kashee, Gunga, and Gopal held a 1 anna and 2 pies share, and this does not seem to have been contradicted either in that case or the present one. No question was raised in that suit as to the rights which the plaintiff derived from Gunga. The only question was as to the shares of the other two brothers. The fact that that suit was dismissed in no way affects the claim now set up; and the Moonsiff appears to have been in error when he supposed that the plaintiffs in that suit were stating their entire interest in the estate as 1 anna and 9 pies, whereas from a perusal of the plaint it appears that in addition to the 1 anna and 9 pies, the subject of that suit, there was another share of 1 anna and 2 pies concerning which there was then no dispute or suit.

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The Subordinate Judge has followed in the same error. No one appears in this Court to oppose the claim of the plaintiff in respect of the 1 anna and 2 pies share of mouzah Surenda. We, therefore, think that the appeal must be decreed and that the plaintiff must obtain a declaration of his title in respect of 1 anna and 2 pies of mouzah Surenda and 2 annas of mouzah Nowa. The appellant is entitled to his costs of this Court and of the Court below.

Jackson, J.—I concur.

The 2nd March 1871.

Present :

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Secondary evidence—Copy of a copy — Lower Court's decision — Legal presumption — Hindoo Law — Shebait—Alienation—Putnees.

Case No. 2191 of 1870.

Special Appeal from a decision passed by the Officiating Judge of Rungpore, dated the 15th July 1870, *reversing a decision of the Officiating Subordinate Judge of that District, dated the 14th April* 1869.

Tahboonissa Bibee and others (Defendants) *Appellants,*

versus

Koomar Sham Kishore Roy (Plaintiff) *Respondent.*

Baboos Sreenath Dass and *Luleet Chunder Sein* for Appellants.

Baboo Debendro Narain Bose for Respondent.

Where the Lower Appellate Court regarded the evidence as proving that there was an *urpunnamah*, and that it could not be found on search, that Court was held to have done right in accepting as secondary evidence the authenticated copy of an authenticated copy of that document.

It must be presumed in law that the judgment of the lower Court is right, until the contrary is shewn. If there is any doubt in the case, the benefit of the doubt ought to be given to the respondent and not to the appellant.

Under the Hindoo Law the Shebait or trustee manager of an endowment is competent to alienate a reasonable portion of the property, if such alienation is absolutely required by the necessities of the management, *e. g.*, restoration of an image or tenantable repair of a temple.

The grant of a putnee tenure by a Shebait may be valid.

Mitter, J.—THE plaintiff in this case is the purchaser of an estate paying revenue to Government at a sale held under the provisions of Act XI of 1859, and he brought this suit for the purpose of setting aside a putnee tenure created by one Chunder Nath Surmah in favor of the defendant, and specially registered in the Collector's books prior to the purchase of the plaintiff under the provisions of Section 39 of that Act. The plaint alleges that the property in question belonged in fact to the idol Doya Moyee Dabee; that Chunder Nath was simply the manager of the endowed property; and that no permanent alienation like the creation of the putnee which was alleged to have been made by Chunder Nath, was legally binding against the idol, who was in fact the real defaulter; and that the plaintiff was therefore entitled to recover khâs possession of the property, treating the putnee in question as a nullity upon the ground that it was created by a person without any right or title whatever.

The case set up by the defendant was that the property was not debuttur; that Chunder Nath was the real owner of that property; and that even if Chunder Nath were the manager of the idol Doya Moyee Dabee, the putnee was created for such purposes as would justify such alienations under the Hindoo law, which is the law according to which disputes relating to the debuttur property are to be determined.

The Court of first instance came to the conclusion that the putnee was a valid putnee; that the debuttur was a *nominal* one (using the English word "*nominal*" in the middle of its decision which was written in Bengalee); and that the person who really had the beneficial enjoyment of it was not the idol Doya Moyee Dabee, but Chunder Nath, the lessor of the defendant.

On appeal the Judge after accepting the copy of a copy of an alleged *urpunnamah*, by which the debuttur was said to have been created, came to the conclusion that the evidence on both sides was nearly balanced; that under that circumstance the burden of proof ought to be shifted on the defendant; that if the burden of proof were thus shifted, no sufficient case is made out

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by him to rebut the *primâ facie* evidence given by the plaintiff; and the Judge therefore found that the property was a *bonâ fide* debuttur property of which Chunder Nath, the lessor of the defendant, was simply the manager. The Judge has further found that according to a decision of the Privy Council reported in page 18, Volume XIII, Weekly Reporter, he had every reason to hold that the creation of a putnee by a *Shebait* was altogether null and void, even though it might have been made under circumstances of necessity. The Judge then goes on to say that even if such an alienation would be justified by a special case of necessity, the case of necessity set up by the defendant was not sufficient.

Under the above state of facts, the simple questions which we have to determine in this special appeal are, 1*st*, whether the finding on the question of debuttur has been arrived at by the Judge on legal evidence and in a legal manner.

2*ndly*.—Whether assuming the property to be a *bonâ fide* debuttur property, a putnee created by a Shebait would be absolutely null and void in law, even though made under circumstances of special necessity, and

3*rdly*.—Whether the case of necessity set up, and, as the Judge afterwards says made out by the defendant in this case, is sufficient under the Hindoo Law to justify the alienation.

We think the learned Judge in the Court below has committed errors in law on all these points.

With reference to the *first* point, the Judge admits that the evidence was equally balanced, and it is clear from his judgment that he would not have thought that the evidence adduced by the plaintiff was sufficient to shift the burden of proof on the defendant, if he had not accepted the copy of the copy of the *urpunnamah* above referred to. We do not mean to say that the Judge was wrong in admitting that document in evidence in the first instance. It was offered in the Court below, and there is evidence on the record, *viz*., that of Chunder Nath, which has been held by the Judge to prove that there was an *urpunnamah*, and that that *urpunnamah* could not be found out or discovered by him on search. Under such circumstances, the Judge was right in accepting secondary evidence, and as secondary evidence the authenticated copy of an authenticated copy is admissible under the rulings of the Judicial Committee of Her Majesty's Privy Council. But we are clearly of opinion that the Judge ought not to have acted upon that deed when it is admitted that *no* evidence whatever was given to prove that a deed of that description, containing the terms and provisions embodied in it, had been actually executed in favor of Chunder Nath by the former owner of the property. It being clear, therefore, that the Judge was wrong in acting upon this document, we think he should not have reversed the judgment of the first Court in the absence of the *urpunnamah* for the duty of the Appellate Court, as laid down by the Privy Council, is not to interfere with the judgment of the first Court until it is perfectly satisfied in its own mind that the conclusion arrived at by the first Court is erroneous. If there is any doubt in the case, the benefit of that doubt ought to be given to the respondent and not to the appellant, for it must be presumed in law that the judgment of the lower Court is right until the contrary is shewn. No doubt the Appellate Court may make further enquiries; but such enquiries ought to be made with discretion, and only in those cases in which the Appellate Court finds itself unable to do justice to the parties on the evidence and material as they stand upon the record.

Assuming, however, that the finding on the question of debuttur is correct, we cannot agree with the Judge in holding that it has been finally decided by the Privy Council that a permanent alienation such as the creation of a putnee made by the *Shebait* of an endowed property, is absolutely null and void even though it be made under special circumstances of necessity. It is true that the idol must be treated in law as the owner of the property, and it is also true that the *Shebait* must be looked upon in no other light than the *Shebait* or trustee manager of that endowed property; but under the Hindoo Law a *Shebait* is competent to alienate a reasonable portion of the property, if such alienation is absolutely required by the necessities of the management. This point has been so ruled by this Court, and it is therefore unnecessary for us to dwell upon it any further. The case referred to by the Judge is not at all in point. In that case their Lordships in the Privy Council had simply to deal with the question whether a certain alienation had been actually made by a person who held

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the property in dispute simply in the capacity of a *Shebait*; and in dealing with that question their Lordships observed in the course of the discussion that such an alienation would raise a presumption of breach of trust on the part of the manager, and their Lordships would not therefore presume that the manager in that particular case actually executed the deed in question.

But this decision actually shows that there may be cases in which the grant of a putnee tenure by a *Shebait* would be valid; for if such grants were absolutely null and void, it would not have been necessary for their Lordships in the Judicial Committee to consider whether the grant in that particular case had been actually made or not.

On the 3rd and last point, we observe that the case of necessity set up by the defendant has not been rejected by the Judge as untrue. The Judge believes the testimony of Chunder Nath, and he expressly uses the words "made out" with reference to the defendant's case as we have already observed. Now, accepting the evidence of Chunder Nath as true, it appears that the putnee in question was granted for the purpose of raising funds to repair the temple of the idol, and to restore its image which had been destroyed by some accident after the performance of the not inexpensive ceremonies prescribed by the Hindoo Law in such cases. According to these circumstances, it is quite clear that the very existence of the idol was at stake; and if the destroyed image of the idol had not been retored, and its temple which was unfit for habitation repaired, Chunder Nath could not have been in a position to fulfil the trust. The power then of Chunder Nath to resort to an alienation of a portion of the endowed property in order to raise funds for such purposes would necessarily follow under the Hindoo Law which is applicable to such trust property, for Chunder Nath was not bound to provide for such expenses from his personal funds. It has been contended that Judge did not accept the case of necessity set up by the defendant; but this objection has been sufficiently disposed of above.

On the whole, then, we think, concurrently with the opinion expressed on this point by the Court of first instance, that the plaintiff is not entitled to have the putnee set aside as invalid. We accordingly reverse the decision of the Judge and dismiss the plaintiff's suit with costs of all Courts.

The 2nd March 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Zemindar—Ijaradar (farmer).

Case No. 2196 of 1870.

Special Appeal from a decision passed by the Officiating Judge of Rajshahye, dated the 9th August 1870, *reversing a decision of the Deputy Collector of that District, dated the 30th March* 1870.

Kristo Soondur Sandyal and another (Defendants) *Appellants,*

versus

Koomar Chunder Nath Roy (Plaintiff) *Respondent.*

Baboo Bhyrub Chunder Banerjee for Appellants.

Baboo Sreenath Doss for Respondent.

The right of a landlord to receive rent from a farmer depends upon his securing to the latter quiet possession and giving him proper and lawful means of realizing rents from the tenants.

Bayley, J.—In this case, the plaintiff sued the defendants, ijaradars, for arrears of rent.

The defendants' case was that the peadahs on the part of the plaintiff came and dispossessed the defendants, turning them out of their cutcherry and forbidding the ryots to pay rents to the defendants and otherwise interfering with the proper collection of their rents.

The first Court gave the plaintiff a decree for rupees 217-3-9, which was accepted by the agent of the defendants as correct. It found that no means had been afforded to plaintiff by the defendants to ascertain the amount of rent due to the defendants from the ryots with reference to the portion of period for which the plaintiff had dispossessed the defendants.

The Lower Appellate Court in remarking upon the evidence taken by the Ameen states—"That evidence confirms the view I "have already stated as my impression from "the evidence taken in Court, *i. e.*, that "there was no formal dispossession by the

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"Rajah, plaintiff, but that the ryots were "encouraged to pay their rents directly to "the Rajah. Most of the witnesses admit- "ted that the ijaradars were in possession; "others did not know which party was "in possession; many stated that rents "were not now being paid, and nearly all "declared that the Rajah had sent for "their dakhillas, and that the dakhillas were "still with him." Then the Lower Appellate Court goes on—"It is quite clear "that while there had been no formal eject- "ment, the Rajah, plaintiff, had unjustifiably "interfered in the collection of rents, had "encouraged the ryots to deposit their "rents with him as superior landlord, and "had for the same reason collected their "dakhillas, probably with the view of de- "termining how far the arrears of the far- "mers were due to the non-payment of "rent by the ryots." The Lower Appellate Court, however, held that the farmers, defendants, were in possession, and were liable for the kists of rents which had accrued since the alleged dispossession. Further on in the judgment, the Lower Appellate Court observes that the defendants had their remedy at law by suing the defaulting ryots for arrears, and that they could not plead as set off the amount they had paid to the superior landlord.

Now, the real right of the zemindar to receive rents from the farmers depends upon his securing to the latter quiet possession, and giving him proper and lawful means of realizing rents from the ryots. In the present case, it is clear from the findings of the Lower Appellate Court, as quoted above, that that quiet possession and proper and legal means of collecting rents have been directly interfered with.

It is said that the Rajah, plaintiff, received rents only as depositary, but he refused to produce his books or to show that credit was given in any way to the farmers for the sums received. It is quite clear that the receipt of rents by the zemindar from the ryots was a direct interference with the farmers' right. It is no answer to say that the farmers must pay to the zemindar afterwards. The contract with the farmers was that they should be guaranteed in quiet and undisturbed possession and means of collecting rents direct as was defendant's right. Moreover, it seems that the finding of the Lower Appellate Court is against the evidence which the Court itself records.

We, therefore, reverse the decision of the Lower Appellate Court and affirm the decision of the first Court with costs of this appeal and of the Lower Appellate Court.

The 2nd March 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Right of occupancy—Ejectment.

Case No. 2204 of 1870.

Special Appeal from a decision passed by the Judge of Rungpore, dated the 13th August 1870, reversing a decision of the Subordinate Judge of that District, dated the 15th May 1869.

Hyder Buksh and another (Defendants) *Appellants,*

versus

Bhoopendro Deb Coomar (Plaintiff) Respondent.

Baboo Debendro Narain Bose for Appellants.

Baboo Unnoda Pershad Banerjee for Respondent.

A zemindar cannot eject tenants who have been holding or cultivating for a period of more than 12 years, even though they were originally tenants-at-will.

Mitter, J.—We think this case ought to be sent back to the Lower Appellate Court for the purpose of determining whether the defendants, special appellants, have acquired a right of occupancy in the property in dispute under the provisions of Section 6 Act X of 1859. The defendants might have been originally tenants-at-will, but if they and their ancestors have been holding or cultivating the lands in dispute for a period of more than 12 years, the zemindar who is the lessor of the plaintiffs in this case could not have ejected them under the law, and the plaintiffs who derive their title from the zemindar would also stand in the same position. From the tenor of the Judge's decision, it appears that one-half of the jote at least has been in the possession of the defendants and their ancestors for a very long

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time. With reference to the other half, no express opinion has been given by the Judge as to the length of time for which the defendants and their predecessors have been in possession. The case is, therefore, remanded to the Judge for the purpose of trying whether the defendants and their predecessors have been in possession of the disputed lands as ryots for a period of more than 12 years or not. If this question is determined in the affirmative, the present suit must be dismissed because the defendants would be entitled to hold the lands subject to the payment of a fair and equitable rent, if their tenure is not otherwise protected from enhancement.

Remand accordingly.

The 3rd March 1871.

Present:

The Hon'ble L. S. Jackson and W. Ainslie, *Judges.*

Intermediate-holders — Lessor and Lessee—Limitation.

Case No. 1817 of 1870.

Special Appeal from a decision passed by the Officiating Additional Judge of Tirhoot, dated the 8th June 1870, *affirming a decision of the Subordinate Judge of that District, dated the 15th December* 1869.

Shaikh Najmoddeen Hossein (Plaintiff) *Appellant,*

versus

Mr. Lloyd (Defendant) *Respondent.*

Mr. C. Piffard for Appellant.

Mr. R. T. Allan for Respondent.

Intermediate-holders setting up as mokurureedars are not debarred from pleading limitation against their landlord.

Ainslie, J.—The plaintiff, who is special appellant in this Court, instituted this suit to eject the defendant from 33 beegahs of land on the allegation that this land was held by Justin Finch on a lease for life, and that the tenancy determined on his death in 1861. No copy or counterpart of the lease has been produced, and it is now admitted that there is no such lease. Defendants have put forward a lease granted in 1794 to one Louis Kech or Kirke, assigned by him to Joseph Finch in 1808. On the production of this document the plaintiff denied its genuineness, and now contends further that even if it be genuine it creates no permanent tenure.

The case of the plaintiff, as stated in this Court by Mr. Piffard, is as follows:—That plaintiff having acquired the estate called upon Geoffrey Finch, the owner at that time of the Shahpore Oondee factory, to show his title to hold certain lands: he was then informed that a mokururee lease in favor of Justin Finch was in his possession, but that it was then in Calcutta; and Finch promised to produce it. In reliance on this assertion and promise, plaintiff received rents and granted receipts as for a permanent tenure. This went on from 1241 (1833-34) to 1861, when a portion of the estate in which the Finches had acquired a share took place, and it became necessary to examine the various deeds affecting the property. Plaintiff then learnt that there was no mokururee deed in favor of Justin Finch but was informed that he had a lease for life, and he now seeks to eject the defendants who have held the factory since Justin Finch's death. It is contended by Mr. Piffard that no question of limitation arises when the defendant admits that plaintiff is his landlord; and secondly, that even if limitation could be pleaded the plaintiff would be in time, as he was kept from asserting his rights by a fraud, and that the discovery of that fraud only took place in 1861.

The right to re-enter on the expiry of a terminable lease granted to Justin Finch is abandoned, and the case as now put is in the form of a claim to a discovery of the title of the defendants and a trial of the title that may be set up.

It appears that the factory was built before 1798, when the plaintiff's father acquired the village at a revenue sale. The greater part of the land in suit is covered by the buildings connected with the factory, and as Mr. Piffard for the special appellant abandons the claim to eject, the only question to be tried is whether the case put in by defendants is genuine and valid.

Of its genuineness there seems to be no doubt whatever. It can only be in respect of this deed that the Judge observes—"It is "clearly proved who the original mokururee-"dars were, and that they were succeeded

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"in due course by Joseph Finch, then by "Geoffrey Finch, after whom Frederick and "Justin held undisturbed possession of the "lands."

As regards the validity of the deed, the Judge observes that it is needless to discuss it, the suit being barred by limitation.

It is admitted that the plaintiff's father acquired the estate in which the lands in dispute lie at a revenue sale in 1798, and that the factory was then built. It has not been shown how the property was dealt with for the next 35 years, but from 1833 it was treated as a mokururee, and this continued unchanged down to 1861 for nearly 27 years.

Here, if ever, limitation must operate to prevent the landlord from denying the nature of the tenure.

The rule that a tenant cannot plead limitation against his landlord, as laid down in VII Weekly Reporter, page 395, in which previous decisions are cited, appears to be too general in its terms. That this view was not taken by their Lordships of the Privy Council in the case of* Rajah Saheb Perladh Sein *versus* Doorga Pershad Tewaree, and in the same *versus* Run Bahadoor Singh, XII Moore, pp. 323 and 334, is clearly deducible from the judgments in those cases, though not expressly stated in so many words.

The lower Courts having found on the issue of limitation in favor of the respondents, who claimed as mokururreedars, their Lordships observe in the first case that there is no evidence to show that the appellant had any knowledge of the claims so made at any time more than 12 years before institution of suit, and therefore his suit was within time; and in the second, that the knowledge of the mokururee lease had been wrongly inferred from a circumstance which did not warrant the inference.

Now, if there was any general rule of law by which a person claiming as mokururreedar is debarred from pleading limitation against his landlord, surely their Lordships would have disposed of these cases on that ground, and would not have gone into the question of notice of claim. The fact that their Lordships considered it necessary to enquire into the date on which the landlord received notice that the intermediate-holders were setting up as mokururreedars with a view to determine the issue of limitation, shows clearly that the issue is one which can be raised between parties so related. Having this authority to support the view now taken, it is not necessary to discuss the question at length; but I must confess that I do not see on what grounds it can be said that a mokururreedar's title, by which the landlord's power to deal with his estate at his own pleasure and to the best advantage is limited, is not *pro tanto* an adverse title. It has been contended that a title to be adverse must be such as is inconsistent with any title whatever in the opposite party, and the cases cited appear at first sight to go to that length. If on a close examination these cases appeared to support the contention, and there was no decision of the superior Court on the point, I should be inclined to submit the question to a Full Bench; but as matters stand, it appears to me that it is clearly settled by the decision of the Judicial Committee and that we have only to follow that decision. I therefore hold that this suit is barred by limitation, unless the plaintiff can remove the bar by his plea of fraud which remains to be considered.

Mr. Piffard contends that there is evidence that the consent of the landlord to the holding of Justin Finch as a mokururreedar was obtained by a false statement in respect of the existence of a mokururee lease said to be in Calcutta, and that this evidence stands uncontradicted. On this point the Judge has recorded no opinion, but it is unnecessary to remand the case; for on looking at the evidence, it is clear that the plea cannot be maintained. The point, though not now taken for the first time, was evidently not much relied on below; and the bare statement of Waezooddeen is so inconsistent with the course of dealing between the parties, and it is so utterly improbable that the landlords who have held the estate from 1798 and have for so long been treating the tenure as a mokururee, and have not even attempted to show that at any time since 1798 the land in suit has been held on a lease for a term, should have really been led to believe that any lease to Justin Finch existed, of which they had no personal knowledge; that the statement of this witness cannot possibly support a finding that a fraud was practised on the plaintiff, by which he was prevented from ascertaining the true state of

* 12 W. R., P. C., p. 6.

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the case, and that such fraud was only discovered in 1861.

In my opinion the appeal must be dismissed with costs.

Jackson, J.—I concur in holding that the plaintiff in this case is barred by lapse of time.

By his own showing he had notice so long ago as 1833 that the defendant claimed to hold the land upon the very title which the defendant now asserts, namely, a mokururee lease; and he permitted the defendant to continue holding, as he had previously held for five and thirty years, down to the bringing of the present suit—a period of about 10 years.

I think, therefore, that the only possible conclusion was the dismissal of the suit.

The appeal will consequently be dismissed with costs.

The 3rd March 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Sale under Act VIII (B. C.) of 1865—Ejectment.

Case Nos. 2045 to 2050 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Hooghly, dated the 23rd August 1870, *affirming a decision of the Moonsiff of Ghattal, dated the 27th June* 1870.

Raj Kishen Mookerjee (Plaintiff) *Appellant,*

versus

Dusruth Sootrodhur and others (Defendants) *Respondents.*

Baboo Umbika Churn Banerjee for Appellant.

Baboo Dwarkanath Sein for Respondents.

Where the rights and interests of a judgment-debtor are sold in execution under Act VIII (B. C.) of 1865, the tenure itself does not pass, much less does it pass free from all incumbrances; and the purchaser is not entitled to eject tenants who have been occupying and cultivating the land for more than 12 years.

Kemp, J.—THIS suit was brought by the plaintiff, who, after resuming certain lakheraj lands, brought rent-suits, obtained a decree, and in execution purchased, as he says, the land free of all incumbrances under Act VIII of 1865. He now sues several ryots who are represented in the several cases, Nos. 2045 to 2050, to eject them from their tenures.

Both Courts have held that these ryots are khoodkasht ryots; that they have been in occupancy of the land for more than 12 years; that they have built houses upon it at some expense; that the plaintiff is not entitled to eject them summarily; and that he is only entitled to receive rent from them.

Turning to the sale-certificate, we find that the rights and interests of the judgment-debtor only passed to the plaintiff, and there is nothing, which, according to the wording of the certificate, shows that the tenure was sold, and much less that it was sold free of all incumbrances. On the merits of the case, we have no doubt that the decision of the Judge is a just and proper decision. We have been shown two pottahs in two out of the six cases before us. One pottah is for 5 cottahs of land, and the other for 1 beegah 11 cottahs. In the pottah for 1 beegah 11 cottahs, there is a distinct mention made that the land was taken, not only for dwelling but also for agricultural purposes; and in the pottah for 5 cottahs, although it is mentioned that the land is taken for "boodbash," it is also recited that the land is bastoo and oodbastoo; and it cannot therefore have been taken for purely dwelling purposes. Moreover, there are other terms in the pottah quite inconsistent with any such supposition; for instance the pottah contains a clause that the ryot will not have the right to any claim for abatement on account of fallow lands, droughts, inundations, and the like. If the land was taken for a dwelling-house, and for that purpose alone, such a clause would be quite inconsistent. In the other pottah, it is very clear that it could not have been taken only for dwelling purposes. A decision has been quoted to show that under Section 6 of Act X of 1859, no occupancy right can be acquired in lands taken for purely building purposes. That decision does not apply to the present case, and moreover this case is governed not by Act X of 1859 but by Act VIII of 1865; and we find that the plaintiff has not bought the tenure free of incumbrances, and is not entitled to eject the tenants who have been

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occupying and cultivating the lands for more than 12 years. He may be entitled, as the lower Courts have held him to be entitled, to receive rent from them; but he is certainly not entitled to eject them summarily.

The special appeals, namely, Nos. 2045, 2046, 2047, 2048, 2049 and 2050 of 1870 are therefore dismissed with costs.

The 3rd March 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Section 354 Act VIII of 1859—Procedure.

Case No. 2052 of 1870.

Special Appeal from a decision passed by the Officiating Judge of East Burdwan, dated the 14th June 1870, *reversing a decision of the Moonsiff of Aosgaon, dated the 3rd August* 1869.

Woomesh Chunder Roy and others (Defendants) *Appellants,*

versus

Jonardun Hajrah and others (Plaintiffs) *Respondents.*

Baboos Doorga Mohun Dass and *Judoonath Mookerjee* for Appellants.

Baboo Grish Chunder Chatterjee for Respondents.

Where a party fails to file a memorandum of objections under Section 354 Act VIII of 1859, the Appellate Court is not at liberty to decide the case *ex-parte* without considering the evidence.

Kemp, J.—THIS was a case in which the plaintiffs sued to have their right of irrigation in the tank of the defendant declared. When the case was first before the Moonsiff, the very issue that was raised in the remand order was raised in the first instance, for the Moonsiff says that the plaintiffs have to prove three things to have their right of irrigation from the disputed tank declared—1st, that they have irrigated their lands with the waters of the disputed tank for 12 years or upwards prior to the institution of the suit; 2nd, that they so irrigated their lands during the said period, that is to say, for 12 years without interruption; and 3rd, they should further show that they had the undisputed use of the waters for that time.

In the first instance, the Moonsiff found that the evidence of the plaintiff's witnesses was very confused as to the period during which they, the plaintiffs, had irrigated their lands with the waters of the disputed tank, and that they had not proved their right of user; further that the evidence of the witnesses examined by the plaintiffs so far from supporting their case in some respects damaged the case of the plaintiffs, and he dismissed the suit. Then the case came on appeal before the Judge, and the Judge remanded it and said the following issue must be tried, namely, whether the plaintiffs have a prescriptive right to irrigate their lands from the water of the defendant's tank, and whether they have exercised this right without interruption for a period of 12 years previous to the date of their cause of action. Now, that is the very point that had been already raised and tried by the Moonsiff, and the remand does not appear to us to have been in any way necessary. The present Judge, however, agreed with his predecessor that the issue he had drawn up was the proper one to be tried, and therefore he referred the case to the Moonsiff for re-trial under Section 354, and, strange to say, the Moonsiff, the same Baboo who first tried the case, comes to quite an opposite conclusion upon the same issue and on the same evidence from that he had formerly come to. After the remand, the Moonsiff held that the plaintiffs had made out their case and says—"Indeed the witnesses of the plaintiffs did not in their former depositions make the above statement," namely, that the plaintiffs had uninterruptedly irrigated their land from the tank in dispute for 12 years; "but as the point was not distinctly mooted in the issues formerly framed, and the witnesses were not especially examined on it, they had disposed in the above manner; and I therefore think my former judgment was wrong." Now, it is very clear, as already

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shown, that the same question was distinctly mooted ; and it is therefore difficult to understand. how the Moonsiff could have changed his opinion so completely, unless he considered that because the case was remanded he was bound to find for the plaintiffs.

In special appeal the first point taken is that no time was fixed by the Appellate Court within which the parties to the suit might file their memorandum of objections to the finding of the first Court.

Now, this ground was not taken in the grounds of special appeal ; but even if it had been taken, we think there is no force in it whatever. It is clear that the 2nd of June was fixed for the hearing of the case, and the case was not decided until the 14th of June ; and therefore there can be no doubt that the special appellants had plenty of time within which to file their memorandum of objections. Moreover, we find that the Judge says that the case was returned by the Moonsiff on the 14th of May, and the 2nd of June fixed for the hearing, and no memorandum of objections had been filed up to that date ; and therefore it is clear from what the Judge says, that the 2nd of June was fixed as the time within which such objections might be filed.

The second objection taken in special appeal appears to us to have considerable force, namely, that the Judge is wrong in law in holding that, as no objections had been put in by the petitioners to the finding of the Moonsiff, it was not necessary for him to look into the case ; that he should have looked into the evidence and considered whether or not the finding arrived at by the Moonsiff was correct. On the other side, a decision has been quoted to be found in Volume IX, Weekly Reporter, p. 438. In that case, the time fixed for filing the memorandum of objections appears to have been one month from the time the finding of the Moonsiff was submitted. Mr. Doyne in that case applied to be heard to object to the finding of the Moonsiff without any memorandum of objections having been filed by his client. Mr. Peterson opposed the application, and the Court said that they declined to hear Mr. Doyne. But the circumstances of that case are not before us : no reasons are given why the Court declined to hear Mr. Doyne, neither is the argument of the Counsel on both sides quoted ; and Mr. Justice Loch, one of the Judges who sat on that occasion, has been consulted, and from what has fallen from the learned Judge we may say that it was not the intention of the Court to take the extreme view contended for by the other side, namely, that because a party has not filed a memorandum of objections under Section 354, the Appellate Court is at liberty to decide the appeal without looking at the evidence. The Section itself says that either party "may," within a time to be fixed by the Appellate Court, file a memorandum of any objections to the finding, and after the expiration of the period so fixed the Appellate Court shall proceed to determine the appeal. Therefore, under the Section it is optional to the parties to file or not to file such memorandum of objections, and there is nothing in the Section which says that the Court, in the absence of any memorandum of objections, shall proceed to decide the case *ex-parte*. On the contrary, the Section says that the Appellate Court shall proceed to determine the appeal.

Then it is said by the other side that, even admitting this view of the law, the appellant has no ground for special appeal, inasmuch as the Judge has come to a finding upon the evidence and that he has determined the appeal. We think that he has not done so in this case. As already shewn, the same Moonsiff who tried the suit before the remand completely changed his opinion after remand, and certainly his reasons for so changing his opinions are, to say the least of it, most unsatisfactory and quite inconsistent with his former judgment,—a judgment arrived at on the very same issue as that fixed by the Judge on remand. Then the Judge says—"No objection has been filed by either party to the finding of the Moonsiff, and I therefore *determine* the appeal." In using this word "determine," it seems probable that the Judge had Section 354 before him at the time of writing his decision ; and he says—"I determine the appeal by holding that the Moonsiff's last decision is correct, and that the plaintiff is entitled to irrigate his land from the tank in question" ; but no reasons whatever are given why he considers the Moonsiff's decision to be correct and his former decision wrong, and why the plaintiff is entitled to irrigate his lands from the defendant's tank. We, therefore, remand the case for the Judge to give his reasons in full for holding the last decision of the Moonsiff to be correct, and to re try the case after considering the whole case.

Costs to follow the result.

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The 25th February 1871.

Present :

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble L. S. Jackson and E. Jackson, *Judges*.

Stamp—Exhibit — Document filed by witness—Court Fees' Act.

Reference to the High Court by the Officiating Judge of Kishnaghur, dated the 14th February 1871.

Anonymous.

Stamp-duty is not chargeable on an application by a witness for the return of a document filed by him in obedience to a summons.

Reference.—I HAVE the honor to apply for instruction as to whether an application by a witness for the return of a document produced by him in obedience to a summons and filed with the records of a case, is chargeable with stamp-duty or not.

It seems to me that the question is whether such an application comes properly under Section 19, Clause 14, or under Schedule 2, No. I, of the Court Fees' Act. I think the words "or in respect of the production or filing of any exhibit" in the former place hardly apply to the present case ; still it seems a hardship that a witness should be obliged to apply on a stamp. I have, therefore, the honor to request the instruction of the Court on the point.

Opinion of the High Court :—

Norman, C. J.—I think that stamp-duty is not chargeable on a request by a witness for the return of a document which has been produced by him.

L. S. Jackson, J.—Primâ facie it would appear that a document produced by a witness summoned for the purpose under Sections 149-153, Code of Civil Procedure, does not stand in the same category as an exhibit produced and filed by a *party* under Section 128, or earlier Section ; and he would apparently be entitled to have it handed back to him at the conclusion of the trial.

Section 135, however, undoubtedly provides for the retention of documents, whether produced by parties to the suit or by *other persons*, till after appeal when they are to be given back on application, subject to the discretion conferred as to exhibits by Section 136.

But I see nothing in the Court Fees' Act which makes such application by a person, who is not a party to the suit, chargeable with stamp-duty.

It is not, I think, in any sense an application in the suit, and it would be extremely hard if a man had to pay stamp-duty for getting back his own document, when he had no interest in the suit. It is bad enough to have one's documents detained for other people's convenience.

E. Jackson, J.—I quite concur.

The 27th February 1871.

Present :

The Hon'ble F. B. Kemp and W. Ainslie, *Judges*.

Sale for arrears of rent—Incumbrances.

Case No. 1729 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Hooghly, dated the 7th May 1870, *affirming a decision of the Moonsiff of that District, dated the 16th March* 1870.

Mohesh Chunder Banerjee (one of the Defendants) *Appellant*,

versus

Chunder Monee Debee and others (Plaintiffs) and others (Defendants) *Respondents*.

Baboos Sham Lall Mitter and *Mohendro Lall Seal* for Appellant.

Baboo Nil Madhub Sein for Respondents.

Case.—A landlord who purchased a tenure which had been sold in satisfaction of his own decree for rent, having objected to the attempted possession of a mortgagee who was executing a decree for foreclosure, a suit was framed under Section 239, Code of Civil Procedure, which having come up in appeal to the High Court was remanded for the purpose of determining whether the lease on which the lands had been held contained any stipulation reserving a right of sale for arrears of rent.

It having been found that there was no such reservation, the tenure was held to have been sold subject to incumbrances, and the purchaser to have been bound by the decree of foreclosure passed against the former holder.

Ainslie, J.—THIS suit was remanded on the 1st of December 1869 by Justices L. S.

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Jackson and Glover,* with a direction to the Lower Appellate Court to try the question whether the lease on which the lands had been held contained any stipulation reserving a right of sale for arrears of rent; and a further issue was also laid down regarding which nothing has been said in the present appeal.

The Lower Appellate Court has now found that there was nothing in the lease which reserved a right of sale to the zemindar, and consequently holds that the tenure was sold subject to incumbrances. Against this decision the special appellant has urged two grounds of appeal, 1st, that the onus of proof has been put on the wrong party; that he was called upon to produce the kubooleut, whereas the opposite party should have been called upon to produce the pottah. As in this case the auction-purchaser, special appellant, is the zemindar, he must have proofs in his own hands equal to any that can be found in the hands of the opposite party, and there was no occasion to call upon the opposite party to prove his (special appellant's) case.

The other ground is, that with reference to a decision to be found in the 6th Weekly Reporter, page 197, the appellant was not bound by the decree of foreclosure passed against the former holder. It appears to us that the facts in this case are not similar to the facts of that case. Here there was a decree of foreclosure which entirely extinguished the rights of the debtor. In that case, there was a simple decree against the debtor making him personally responsible for a portion of the allowance due to the widow of one of the members of a joint Hindoo family in consequence of his purchase of the share of another member of the family; but it is distinctly stated in the judgment quoted that the decree did not directly affect or bind the land, but merely bound the judgment-debtor personally and prevented him from denying his liability. We, therefore, think that the cases are not analogous and that this issue will not affect the present case. The special appellant has also sought to argue a further objection, as to the collusiveness of the decree obtained by the opposite party; but as that point is not taken in the grounds of appeal, we decline to hear him on this ground.

We dismiss the special appeal with costs.

* 12, W. R., p. 460.

The 3rd March 1871.

Present:

The Hon'ble F. B. Kemp and W. Ainslie, *Judges.*

Joint Hindoo family—Separation—Onus probandi.

Case No. 2055 of 1870.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 17th June 1870, reversing a decision of the Moonsiff of Ookrah, dated the 22nd November 1869.

Prem Chund Dan and others (Plaintiffs) *Appellants,*

versus

Darimba Debia (one of the Defendants) *Respondent.*

Baboo Romesh Chunder Bose for Appellants.

Baboo Mohendro Lall Seal for Respondent.

In a suit involving the question whether certain property which was sold in execution was the judgment-debtor's own separate property or the joint property of plaintiffs and judgment-debtor, no presumption in favour of the property being joint was held to arise from the fact of plaintiffs and the judgment-debtor being members of a Hindoo family; and as plaintiffs had once alleged separation, the onus was held to have been rightly placed on them of proving that the property was held jointly.

Ainslie, J.—THE question in this suit is whether certain property, which was sold in execution of a decree as the property of the judgment-debtor, Heera Lall Dhur, was his own separate property or the joint property of the plaintiffs and the judgment-debtor.

The Lower Appellate Court has found that the plaintiffs have failed to prove that this property was held jointly by the whole family. The substantial ground of appeal is that the onus has been thrown upon the wrong party: there is also an objection taken that the finding of the lower Court is wrong, inasmuch as the Judge seems to hold that documentary evidence is absolutely necessary to prove the title of the plaintiffs. On the second point, it is only necessary to say that we do not read the judgment of the Court below as laying down a rule that documentary evidence is absolutely necessary. It merely amounts to this—that the oral evidence before the Judge, unsupported as it was by any documentary evidence, was insufficient to satisfy his mind that the plaintiffs had made out their case.

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As to the onus in this case, no presumption arises from the fact of the plaintiffs and the judgement-debtor being members of a Hindoo family that the property was joint property; for it is admitted that 25 years ago there was a partial separation of the family, when one brother, Puteet Dhur, went out; and it appears from the evidence of Fukeer Dhur, the son of Puteet, that there has been another separation between the plaintiffs some four years ago and that this separation took place before the sale of Heera Lall Dhur's property. It is also perfectly clear from a petition put in in the course of the execution of a decree obtained by Darimba Debia that the plaintiffs then alleged separation. Under these circumstances, it was for them to prove how the separation was effected; and if any lands remained in the joint occupation of all the members of the family after the separation, plaintiffs would have to show distinctly what lands these were. The onus therefore was rightly placed upon the plaintiffs. Whether they have succeeded in proving what they had to prove is a question of fact and no point of law arises, and we cannot in special appeal interfere with the judgment of the Court below on the facts.

The appeal is dismissed with costs.

The 4th March 1870.

Present:

The Hon'ble W. Markby and Dwarkanath Mitter, *Judges.*

Contract of sale—Conveyance—Registration.

Case No. 2447 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of Hooghly, dated the 23rd July 1869, reversing a decision of the Moonsiff of that District, dated the 17th February 1869.

Shama Churn Neogy (Plaintiff) *Appellant,*

versus

Nobin Chunder Dhobah and another (Defendants) *Respondents.*

Baboo Ashootosh Dhur for Appellant.

Baboos Kishen Succa Mookerjee and *Poorno Chunder Shome* for Respondents.

In a suit upon a contract in which defendant, after receiving an advance of purchase-money, had promised to convey certain land to plaintiff on payment of the balance, the alternative being that if he did not execute the conveyance the contract would itself operate as a conveyance:

Held that the document between the parties, though in form a contract for sale, was in fact a conveyance under which plaintiff could hold against subsequent purchasers.

HELD that against one who has such a contract unregistered, a purchaser who has a registered conveyance must prevail.

Markby, J.—THE plaintiff in this case sued either for completion of an agreement to purchase 5 beegahs and 18 cottahs of land made with the defendant Hurrish Chunder Byragee, or, in alternative, to recover possession of that land.

It appears that the contract was made on the 31st Assin 1275, and on a deposit of 60 rupees the defendant Hurish Chunder Byragee promised to convey the land to the plaintiff on payment of the balance of the purchase-money on the 31st of Bhadro ensuing, with the alternative—somewhat peculiar—that if he did not complete the agreement of executing the conveyance, that document would itself operate as a conveyance, the balance of the purchase-money being forfeited.

The form of the document sufficiently explains itself. On some day in Srabun, Hurish Chunder Byragee sold some portion of the same property to Nobin Chunder Dhobah, and actually executed a conveyance to him which was registered.

Nobin Chunder Dhobah came forward in the present suit and claimed to be made a defendant. We agree with the Judges in the case reported at page 196, X Weekly Reporter, that it was not necessary to entertain the application.

The suit of the plaintiff has been dismissed on the ground that he only got at the time when the sale was made to Nobin Chunder Dhobah a mere contract to sell the proper-

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ty, and Nobin Chunder Dhobah being a *bonâ fide* purchaser for valuable consideration, the plaintiff cannot recover possession of the land and compel Hurish Chunder Byragee to execute a conveyance. All that he can do is to get damages against Hurish Chunder Byragee for breach of contract, and the question now before us is whether that proposition is correct in law.

We think that it is certainly correct to this extent that the plaintiff has got no title of which he can avail himself as against Nobin Chunder Dhoba. The difference between a contract for sale of the property and an actual conveyance of the property is perfectly clear ; and as we understand it, the reason why in some cases the person who has only got a contract of sale is considered to have a title against the person who has the actual conveyance is this,—that the transaction, though in form a contract, is in fact a conveyance ; that that which gives the right to acquire is actually a mode of acquiring ; and in the present case the document between the plaintiff and the defendant is, though in form a contract, of such a nature that he could hold under it as against subsequent purchaser.

But now as soon as we hold that, the plaintiff falls into another difficulty, because Clause 1 Section 18 of the Registration Act would apply ; and under Section 50 of that Act "every instrument of the kinds "mentioned in Clauses 1, 2 and 3 of Section "18 shall, if duly registered, take effect, as "regards the property comprised therein, "against every unregistered instrument re- "lating to the same property, whether such "other instrument be of the same nature of "the registered instrument or not."

It is not necessary for us to say how the present contract would have stood had the first purchaser registered his conveyance. But between a purchaser who has a registered conveyance, and one who has only a contract of sale, the former must prevail.

The appeal is dismissed with costs in favor of Nobin Chunder Dhobah.

With regard to the other point mentioned, namely, that the interest of Nobin does not extend to the whole of the 5 beegahs which the defendant promised to sell, it is not necessary for us to interfere, because that matter has been corrected by the Court below, and its decision will stand good and is in no way affected by our order.

The 6th March 1871.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Enhancement of rent — Evidence — Prima facie case.

Case No. 2104 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Officiating Judge of Midnapore, dated the 2nd June 1870, *modifying a decision of the Deputy Collector of that District, dated the 1st November* 1869.

Suroop Manna (Defendant) *Appellant,*

versus

Bonomalee Churn Mytee and another (Plaintiffs) *Respondents.*

Baboo Bama Churn Banerjee for Appellant.

Baboo Hem Chunder Banerjee for Respondent.

In a suit after notice for a kubooleut at enhanced rates, said to be those prevailing in the adjacent villages for similar lands held by the same class of ryots as defendant, the evidence of seven occupant ryots of the neighbourhood, though not a majority, was held to be legally sufficient to make a case which defendant was bound to rebut.

Glover, J.—This was a suit for a kubooleut at enhanced rates of rent after notice. The plaintiff, the purchaser of a Government khas mehal, alleged that the defendant held 14 beegahs 3 cottahs 3 pie of land for which he paid rent at less rates than those paid by ryots of a similar class in the neighbourhood having similar advantages, and demanded rupees 43-13 instead of rupees 18 heretofore paid.

The ryot objected to every part of the plaintiff's case, denied that he held the quantity of land stated by the zemindar, denied the rates and alleged that the value of produce had not increased. He also took objection to the plaintiff's power to enhance, but this part of the case it is unnecessary to notice here.

The Assistant Collector disposed of the case first in 1868, and again took it up in 1869 on remand by the Appellate Court. The Judge held on that occasion that the plaintiff had established his right to enhance, and was entitled to a decree if he could

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prove that the rates claimed were the rates prevailing in the neighbourhood.

The Deputy Collector on this called for evidence from both plaintiff and defendant and fixed the date for hearing. The plaintiff examined his witnesses, but the defendant although granted extension of time did not produce his, and the Deputy Collector decided on the evidence that was before him that the plaintiff had proved the rates demanded by him to be the rates paid by ryots of a similar class to the defendant holding lands of a like kind with like advantages in places adjacent. He therefore gave plaintiff a decree, and so far as mouzah Dooah was concerned the Judge on appeal confirmed the Deputy Collector's order.

The defendant now appeals specially to this Court and contends—

(1)—That as the plaintiff failed to prove the full rates claimed by him, his suit for a kuboolcut should have been dismissed, and

(2)—That there was no sufficient evidence to prove what was required by the law, namely, that the rate paid by the defendant was below the prevailing rate payable by the same class of ryots possessing similar advantages in the neighbourhood.

There was another objection taken to the validity of the notice, but this was not pressed by the special appellant's pleader.

The first objection is untenable, and the Full Bench decision, Gholam Mahomed *versus* Asmut Ali Khan, X Weekly Reporter, Full Bench, 14, does not apply. There has been no failure of proof in this case on the part of the plaintiff as regards the rate of rent prevalent in the mouzah of Dooah, for which mouzah alone the zemindar has obtained a decree.

And with regard to the second objection, we find that after the remand the Deputy Collector did take evidence on the various points required by the law. On the first occasion the witnesses did no doubt speak generally, and their evidence fell short of what was required; but on the second, seven witnesses deposed that the rates demanded by the plaintiff were those prevailing in the adjacent villages for similar lands held by the class of ryots to which the defendant belonged. Four witnesses from adjacent villages, occupant ryots, swore to the rates on lands of the same kind and possessing the same advantages as those held in mouzah Dooah by the defendant, and three occupant ryots of mouzah Dooah deposed to payment of the same rates for their lands.

No doubt it might be said that these witnessess did not form the bulk of the cultivating ryots; but their evidence was legally sufficient to make a case which the defendant was bound to rebut; and although he was allowed more than one opportunity, he neglected to bring any witnessess to prove that the rates asked by the plaintiff were not the prevailing rates for ryots of the defendant's class. In the case of Sadhoo Singh and others *versus* Ramanoogra Lall, IX Weekly Reporter, 83, there was evidence on both sides, and it was held that the proof of the rate paid by the majority was insufficient. Here the defendant gave no evidence whatever. He declined even to pay his share of the expenses for the deputation of an Ameen, and he cannot now object that the witnesses examined by the plaintiff were not a majority of the occupant ryots of the neighbourhood.

We think that the plaintiff did all that under the circumstances was required of him, and that he is entitled to retain his decree.

The special appeal is dismissed with costs.

The 6th March 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Rent-suits—Jurisdiction—Act VIII (B. C.) of 1869.

Case No. 2239 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Beerbhoom, dated the 9th July 1870, *reversing a decision of the Moonsiff of Doobrajpore, dated the 27th April* 1870.

Kullyanessuree Dossee (Plaintiff) *Appellant,*

versus

Narain Kyburto (Defendant) *Respondent.*

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Baboo Obhoy Churn Bose for Appellant.

Baboo Mohendro Lall Mitter for Respondent.

A suit for arrears of rent which had been instituted in the Moonsiff's Court before Act VIII (B. C.) of 1869 came into operation, was decided by that Court after the jurisdiction of the Revenue Courts had ceased to exist.

HELD that the Moonsiff had no jurisdiction in the case.

Kemp, J.—THIS is a suit for the rent of a bowlee tenure, the rent being demanded for the years 1275 and 1276. The suit was admittedly instituted on the 24th of February 1870 or before Act VIII of 1869 came into operation—that Act having come into operation on the 11th of April 1870. The Moonsiff, although the question of jurisdiction was raised in his Court, seems to have been of opinion that it would put the parties to unnecessary trouble if this suit had to be re-instituted in his Court; the jurisdiction of the Revenue Courts in such cases now, or at the time when he passed his decision, no longer existing.

On appeal on the question of jurisdiction, the Subordinate Judge of Beerbhoom held that the Moonsiff had no jurisdiction to try the case. He, therefore, reversed the decision of the Moonsiff and dismissed the original suit.

In special appeal it is said in the grounds of appeal that the Moonsiff had jurisdiction, for the reasons stated by him, to try this suit, and that the Subordinate Judge was wrong in throwing it out on the ground that the Moonsiff had no jurisdiction.

We can have no doubt that the Moonsiff had no jurisdiction in this case. The suit being one for rent, and being instituted before Act VIII of 1869 came into operation, ought to have been brought in the Collector's Court; and if it had been so brought under Section 108 of Act VIII of 1869, the Collector would have had jurisdiction to hear and determine it, and the execution of any decree or order therein passed would have been regulated by the practice and procedure which obtained before that Act was passed.

The pleader for the appellant has called our attention to a decision to be found in Volume XIV of the Weekly Reporter, page 246. The decision in that case turned upon the question whether that was a suit for arrears of rent due on account of land, or whether it was a suit for arrears of rent due on account of buildings and houses. In that suit the rent was demanded for a bazaar close to the palace of the Maharajah of Burdwan. The Judges found that the land was leased as a bazaar, and that the rent being demanded not solely for the land but also for the buildings, it appeared to the Court that the suit would not lie in the Revenue Courts. There is also an obiter to the effect that it would not have been necessary to try the point as to whether the jurisdiction was in one Court or the other, the jurisdiction being now in the Civil Court; but as the question had been pressed on the Judges in connection with the matter of costs, it became necessary to decide whether at the time the plaint was put in it was entertainable in the Civil Court or not; and the Judges found that it was entertainable in the Civil Court; but the decision itself did not turn on that point alone, and therefore it is not a decision in any way binding upon this Court.

We agree with the Subordinate Judge and dismiss the special appeal with costs.

The 8th March 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Butwarrah—Jurisdiction.

Case No. 1761 of 1870.

Special Appeal from a decision passed by the Officiating Additional Judge of Chittagong, dated the 31st May 1870, affirming a decision of the Subordinate Judge of that District, dated the 31st May 1869.

Doorga Kripa Roy (Plaintiff) *Appellant,*

versus

Mohesh Chunder Roy (Defendant) *Respondent.*

The Advocate General and *Mr. R. E. Twidale* for Appellant.

Mr. Moutriou and *Baboo Sreenath Dass* for Respondent.

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Where the real object is to obtain a division of the lands of an estate paying revenue to Government, the suit is not maintainable in a Civil Court.

Mitter, J.—We do not think it necessary to express any opinion upon the various grounds taken in this petition of special appeal. It is admitted that the real object of this suit is to obtain a division of the lands of an estate paying revenue to Government. But the power of making such a division is vested exclusively in the Revenue authorities, and we must therefore dismiss this suit as one not maintainable in the Civil Court.

The application is rejected with costs.

The 8th March 1871.

Present :

The Hon'ble L. S. Jackson and W. Ainslie, *Judges.*

Appeal—False statement—Procedure.

Case No. 1884 of 1870 under X of 1859.

Special Appeal from a decision passed by the Officiating Additional Judge of Tirhoot, dated the 27th May 1870, *affirming a decision of the Assistant Collector of that District, dated the 16th October* 1869.

Jeanund Chowdhry (Defendant) *Appellant,*

versus

Syud Abdool Luteef (Plaintiff) *Respondent.*

Baboo Anund Gopal Paleet for Appellant.

Mr. C. Gregory for Respondent.

A Judge is bound to go into all the matters raised before him in an appeal, even if the appellant appears to have made a false statement, or if he sought to palm off a spurious document upon the Appellate Court.

Jackson, J.—There must be a new trial of this appeal.

The defendant appealed against an order enhancing his rent, and that appeal, as stated by the Judge, partly proceeded upon the allegation, which the Judge considers to have been false, that the Assistant Collector had improperly refused to receive certain papers. The Judge having ascertained both from the statement of the Assistant Collector himself and also from other circumstances that this allegation was untrue, he thereupon declines to go into the other matters raised in the appeal, thinking that the allegations on those points would necessarily be valueless, and therefore dismisses the appeal.

This cannot be supported. The Judge is bound to go into all the matters raised in the appeal, and to decide whether the enhancement ordered was based upon legal ground or not. It is not because the appellant appeared to have made a false statement, or even because he sought to palm off a spurious document upon the Appellate Court, that his suit is to be dismissed. If he has brought himself within any of the provisions of the Penal Code, or any other law which applies to his case and subjects him to criminal proceedings, he may be so dealt with, but the case must be decided on the merits. The case will have to be remanded for trial by the Court below, but under the circumstances we think the special appellant ought not to get the costs of this appeal.

The 8th March 1871.

Present :

The Hon'ble L. S. Jackson and W. Ainslie, *Judges.*

Rent — Co-sharer's right of suit — Section 10 Act VI (B. C.) of 1862 —Collector's powers.

Case No. 1894 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Officiating Judge of Tirhoot, dated the 7th June 1870, *affirming a decision of the Assistant Collector of Tajpore, dated the 26th March* 1870.

Sree Misser and others (Defendants) *Appellants,*

versus

Mr. W. S. Crowdy (Plaintiff) *Respondent.*

Baboo Bhowanee Churn Dutt for Appellants.

The Advocate General for Respondent.

A suit for rent is not maintainable at the instance of one or more of several co-sharers, unless the latter have been accustomed to collect their rents separately.

A Collector proceeding under Section 10 Act VI (B. C.) of 1862 to measure land in respect of which rent has not hitherto been paid, is not entitled to assess or ascertain the rents which ought to be paid or which are fair and reasonable.

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Jackson, J.—This is a suit for arrears of rent on the part of a ticcadar who holds in ticca a certain fractional share of an estate, the defendant being one of the other co-sharers and also occupying the land in respect of which rent is claimed.

The defendant's allegation was that the land in question was his *ziraat*, which he was entitled to hold without payment of rent by the custom of the mehal, as other portions of land were in like manner held by the other co-sharers. He also denied the right of the plaintiff to maintain the suit without the consent of the other co-sharers, and he denied the correctness of the rent claimed and also the plaintiff's share.

The appeal was heard in the first place before Mr. Pearson, Judge of Tirhoot, who overruled certain objections which had been allowed by the Assistant Collector, and remitted the case to that officer for trial upon the merits. Thereupon the Assistant Collector tried the case and came to a decision which was again appealed to the Court of the Zillah Judge, which office was then held by Mr. S. C. Bayley. That gentleman considered himself precluded from going into the points determined by his predecessor, and upheld the decision of the Assistant Collector on the merits.

The case now comes before us in special appeal. The points which arise appear to be four. In the first place, is the suit maintainable by the plaintiff? No doubt, generally speaking, the rule which has been laid down in this Court is, that a suit for rent is not maintainable at the instance of one or more of several co-sharers, unless the course of dealings between the parties has been such that the several co-sharers have been accustomed to collect their rents separately. In this case, therefore, it will be necessary that this point should be determined, namely, whether according to the custom of that estate the several co-sharers have been accustomed to collect their rents separately. If this point be found in the affirmative, the plaintiff will be entitled to maintain the present suit; if not, the plaintiff will be out of Court.

Although the facts are not very clear, yet it may possibly turn out that the plaintiffs and defendants are the only existing co-sharers or persons entitled to divide the rent between them. If that be so, I think it manifest from the necessity of the case that the plaintiff must be entitled to maintain the suit; because otherwise if the plaintiff could not hope to obtain the consent of his co-sharer, he would be debarred from obtaining any relief. Therefore if it should so appear, the plaintiff's suit would necessarily be maintainable.

The second point is whether the defendant, who by his own admission holds land within the estate of which the plaintiff is entitled to a part of the rents, is entitled to hold such land without the payment of rent. On this point it will be necessary for defendant to show that the land is *ziraat*, and as such exempt from the payment of rent to the co-sharers.

The third point is what is the amount of rent payable. On this part of the case there seems to have been some misconception. The Collector appears to have proceeded under Section 10 Act VI of 1862 of the Bengal Council Acts, and to have measured the land and to have further proceeded to ascertain the rent payable in respect of it. It seems to be admitted that in this case the defendant has not hitherto paid rent in respect of the land which is the subject of dispute. Now Section 10 of the Act cited enables the Collector to proceed to ascertain and determine and record the rates of rent payable in respect of such lands; and by a decision of a Division Bench of this Court to be found in XII Weekly Reporter, page 371, these words have been construed to mean the rents which are accustomed to be paid or for the payment of which there has been an agreement or contract; and that under these words the Collector is not entitled to assess or ascertain the rents which ought to be paid, or which are fair and reasonable rates of rent. Therefore if, as it seems, no rent has been previously paid in respect of these lands, the finding of the Collector by which he assessed rent upon it would be of no effect and would not be conclusive against the defendant; but the plaintiff would have to show by evidence in this case what the proper rent payable was, supposing that rent was payable at all.

The fourth point is what is the share of the rent, supposing the rent to be ascertained, to which the plaintiff would be entitled. In the determination of this issue, the plaintiff would have to give evidence of the share which he held in ticca and satisfy the Court upon that point; and it would be open to the defendant on the other hand to

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rebut that evidence and to show what his own share was; and then upon evidence adduced on either side, it would be for the Court to decide.

We think, therefore, that the case must go back to the Lower Appellate Court in order that these points respectively may be tried and determined.

The 8th March 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Section 17 Act VIII 1859—Appeal—Technical objection.

Case No. 2306 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Beerbhoom, dated the 17th August 1870, affirming a decision of the Moonsiff of Rampore Haut, dated the 21st January 1870.

Munoo Dossee (Plaintiff) *Appellant,*

versus

Ishan Chunder Banerjee (Defendant) *Respondent.*

Baboo Obeenash Chunder Banerjee for Appellant.

Baboos Nil Madhub Sein and *Motee Lall Mookerjee* for Respondent.

Where a Lower Appellate Court threw out a case on the ground that the plaint had not been filed by a recognised agent within the meaning of Section 17 Act VIII of 1859, though that point had been disposed of by the Court of first instance:

HELD that the case should not have been thrown out on such a technical objection not affecting the merits of the case.

Glover, J.—THE Subordinate Judge on the cross-appeal of the defendant threw out the plaintiff's claim on the ground that the plaint had not been filed by any recognised agent on the terms of Section 17 of the Code of Civil Procedure. The plaintiff appeals to this Court specially on this point, and a cross-appeal has been filed by the defendant on the ground that, under any circumstances, the decision arrived at by the Court of first instance must have been upheld by the Court on appeal, inasmuch as the suit was dismissed because the plaintiff had neglected to put in any evidence in support of her claim.

With regard to the first objection, we think that the Judge was right in saying that the plaint had not been properly filed under Section 17. The plaintiff resides within the jurisdiction of the Court, and the party who put in the plaint on her behalf was not a person holding a general power of attorney from her. Under the Section above-quoted, therefore, it appears that this person had no authority to file the plaint on behalf of the plaintiff, and so far the Subordinate Judge was right; but this being purely a technical objection not affecting in any way the merits of the case or the jurisdiction of the Court, we think that the Subordinate Judge ought not to have thrown out the plaintiff's case on such objection. The point had been considered and disposed of by the Moonsiff, and the Court of appeal should have confined itself to deciding the merits of the case as between the parties, and not have disposed of the case simply on a ground purely technical.

But it is urged that supposing the Subordinate Judge to be wrong on this point, there is no evidence in the case on which he could have come to a decision in favor of the plaintiff. No doubt the Moonsiff dismissed the plaintiff's case because she had failed to produce her witnesses on the day fixed, but we find on turning to the petition of appeal to the Judge that she gave various reasons for not producing witnesses. She alleged that the onus was not on her, but on the defendant; that in any case there was an admission by the defendant of a considerable part of the claim made by her, for which she was entitled to a decree; and also that the non-production of the witnesses was not her fault; that she had produced them but that they were allowed to go away on the understanding that a compromise was about to be effected between the parties. Whether these reasons were good or bad, it is impossible for us to say at this stage of the case; but still it is possible that she might have persuaded the Judge, if the appeal had been argued, to have remanded the case either for examination of her witnesses or at all events for a decision on that part of the case with regard to which the defendant had made an admission in her favour.

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We think, therefore, the special appellant has, under these circumstances, a right to have the case remanded in order that the Judge may decide it on the merits between the parties.

We remand it accordingly. Costs to follow the result.

The 8th March 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Lien on attached property—Jurisdiction—Section 15, Charter Act.

In the matter of

Munohur Paul, *Petitioner,*

versus

J. P. Wise, *Opposite Party.*

Mr. J. W. B. Money and *Baboos Romesh Chunder Mitter, Luleet Chunder Sein* and *Okhil Chunder Sein* for Petitioner.

The Advocate General, Mr. C. Gregory, and *Baboo Kalee Mohun Doss* for Opposite Party.

The fact of A obtaining a declaration of his lien upon certain property for an amount of debt, is no bar to B's attaching and selling that property, but the purchaser will be bound by that lien.

Where a Moonsiff refuses to attach property in execution which he is bound to attach, he may be compelled to do so by the High Court in the exercise of its powers of supervision.

Jackson, J.—We both agree that we ought to set aside the order of the Moonsiff of Lechragunge, dated the 2nd August 1870, as having been passed without jurisdiction. The rule in this case was granted by Mr. Justice Kemp and Mr. Justice Ainslie; and it appears, therefore, that they also were of opinion that there was a sufficient case made out for an interference by this Court.

The case is this. One Munohur Paul is at present a decree-holder against one Gureeb Hossein Chowdhry. In execution of his decree, he sought in the Moonsiff's Court to attach certain property, which he states belongs to and is in the possession of Gureeb Hossein Chowdhry. Objections to the attachment have been raised by Mr. Wise, who holds a decree against the estate of Mahomed Jokee Chowdhry, the father of Gureeb Hossein Chowdhry, in which it has been declared that the property which Munohur Paul is suing to attach is liable to be sold for certain debts due to Mr. Wise. On this petition of objection being filed, the Moonsiff has ruled that as Mr. Wise has obtained a decree from the High Court to sell this property for the realization of his debts, and as his claim is against the deceased father, he has a superior claim to that of Munohur Paul, which is against the son. He, therefore, declines to carry out the attachment.

The objection to this Court is that the Moonsiff has altogether refused to exercise the jurisdiction which is vested in him by law, and which he is bound to exercise in order to enable the present decree-holder to obtain the benefit of his decree; and if that jurisdiction is not exercised, the decree-holder will be put to the unnecessary trouble and expense of bringing another civil suit.

It is contended, on the other hand, that the Moonsiff was right in rejecting Munohur Paul's application to attach on the grounds stated by him, and whether he was right or he was wrong this Court has no power to interfere. It is said that the Moonsiff in rejecting the application has possibly acted under some feeling of deference to the orders of the Court. All that can be said on this is that if he puts such a mistaken meaning upon the orders of this Court, it is right that this Court should tell him that those orders have no such legal effect as he attempts to put upon them. There is as yet nothing to show that Mr. Wise will enforce his decree against these properties. If Mr. Wise has obtained his decree, he can carry on his decree, and nothing that Munohur Paul can do can in any way injure Mr. Wise's rights under his decree. It does not follow that because Mr. Wise has obtained a declaration of his lien upon these properties for a certain amount of debt, nobody else has power to attach or sell those properties. The purchaser under such circumstances will be bound by the lien, and he will also be at liberty to pay off Mr. Wise's lien. There is nothing, however, to show that Mr. Wise has got any lien upon the property. The Moonsiff has not found that Mr. Wise holds any lien upon it. It would seem as if Mr. Wise has not got so strong a case even as we have put.

Then it is said that there was also an objection taken that the decree which Munohur

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Paul held was a decree obtained by fraud and collusion, and the Moonsiff intended to decide that point. It is very certain that the Moonsiff has not decided that point.

Then lastly comes the question whether this Court has any authority to interfere in this case. In support of this view of the law several decisions of this Court have been quoted to us, and among them the decision to be found in VII Weekly Reporter, page 520, seems to me exactly in point. In that case the Deputy Collector refused to exercise the jurisdiction which he had under the law, and referred the parties to another civil suit. This Court set aside that order, and ordered the Deputy Collector to exercise his jurisdiction. In this case also it is clear that the Moonsiff had jurisdiction to attach and was bound under the law to attach the property; and unless some clear, sufficient, and legal objection is taken to the sale of the property, he is even bound to proceed to the sale of it. He has in fact refused to carry out the decree; he has refused to attach on a ground which is utterly unwarranted by any principle of law. He has in *fact* refused to exercise jurisdiction which he is bound under the law to exercise. We think, therefore, we ought to set aside the order of the Moonsiff, dated the 2nd August 1870, and direct him to carry out the law.

The petitioner will have his costs of this petition, which is estimated at thirty-two rupees.

Mookerjee, J.—I concur.

The 9th March 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Pre-emption—Waiver of right.

Case No. 1452 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Sylhet, dated the 26th April 1870, *affirming a decision of the Moonsiff of Lushkerpore, dated the 31st January* 1870.

Brojo Kishore Surmah (Plaintiff) *Appellant,*

versus

Kirtee Chunder Surmah and another (Defendants). *Respondents.*

Baboo Bama Churn Banerjee for Appellant.

No one for Respondents.

A party is not entitled under the Mahomedan Law to exercise the right of pre-emption after relinquishing that right at the time of sale and purchase.

Mookerjee, J.—THE plaintiff in this case is the appellant. His suit was to enforce a right of pre-emption in regard to the disputed land, by setting aside a deed of sale executed by the vendor defendant in favor of the purchaser.

The vendor defendant denied that the plaintiff had ever performed any of the preliminaries required to be observed by a shufee under the Mahomedan Law; that at the time of sale he, the vendor, gave the plaintiff the refusal of the purchase; but the plaintiff not only refused the offer, but gave him permission to sell the property to whomsoever he liked; that he then sold the land to the purchaser defendant.

The purchaser defendant states that it was only when the plaintiff refused to purchase, that he purchased the same relying on the assurance that plaintiff will not assert any claim to pre-emption; that he purchased in good faith; and that the pre-emptor after having refused the offer cannot now turn round and say that I would purchase. It is contended also that he is estopped from asserting his claims having waived the same.

The Court of first intance was of opinion that the tullub-i-mowasibat has not been performed by the plaintiff, though there is some evidence to the other tullub, namely, that of ishtehasbad.

The Court further held that from the evidence adduced by the defendants, as well as from the testimony of one of plaintiff's own witnesses, it is clear that the vendor defendant had asked the plaintiff to purchase the land, but that he refused to do so; and that consequently the vendor was quite competent to sell, and the purchaser defendant to purchase the same.

The first Court, therefore, dismissed the claim with costs.

This decision has been upheld on appeal by the Subordinate Judge, who says that "I "do not agree with the Moonsiff, but I hold "that the plaintiff has in a manner establish-"ed the fact of his having performed the "preliminaries of ishtehasbad and tullub-i-"mowasibat." He then proceeds to give

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his opinion as to the effect in law of the refusal of the plaintiff to purchase the land when offered to him for sale. He agrees with the Court of first instance in holding that the plaintiff is under this circumstance precluded from asserting his claim, which is a very weak one even under the law of Mahomed. The Subordinate Judge then says that in this view of the case, it is unnecessary for him to decide whether the Court below was right or not in not examing Raj Kishen, a witness in the cause; and lastly, that officer concludes his judgment by holding that "it was only on account of the fault of the plaintiff that he (the witness) was not examined." He, therefore, dismissed the appeal of the plaintiff with costs.

The plaintiff then preferred this special appeal to us, complaining that the Courts below were in error in holding that a claim founded on a right of pre-emption is any way affected by a waiver of the right to purchase previous to the sale of the land. He contends that as the right of shuffa only accrues after the sale, the surrender of that right before a sale has taken place is not valid under Mahomedan Law. In support of this contention, Baboo Bama Churn cites Hedayah, Volume III, page 568, Baillie's Mahomedan Law, page 500, Macnaghten's Mahomedan Law, page 196, and a precedent from the Select Reports, Volume V, page 300.

On referring to the authorities, however, we find that the Hedaya in page 568, Volume III, merely lays down that "the "privilege of shuffa is established after the "sale, for it cannot take place until it be "manifest that the proprietor is no longer "inclined to keep his house, and this is "manifested by the sale of it." This merely shows when the cause of action arises in a claim for pre-emption and when the right to claim shuffa accrues, but does not support the contention raised before us that a pre-emptor is free to assert his claim of shuffa after he has in distinct terms waived his right to do so either immediately before the sale or at the time of it.

In Baillie's Digest of Mahomedan Law, page 500, occurs this passage—"The sur-"render of a right of pre-emption before "a sale has taken place is not valid." This, however, is supported by no authority from the Mahomedan Law books; and I would, therefore, hesitate to act upon this dictum. In the same paragraph, however, is found the following passages:—"When the pre-emptor "has said—'I have surrendered the right "of pre-emption in this mansion,' the surrender is valid"; and also "if he should "say to the seller, 'I have surrendered the "right of pre-emption in this mansion to "thee,' the mansion being still in the sel-"ler's possession, the surrender would be "valid." These passages show that a right of shuffa can be surrendered by the pre-emptor, and if the surrender is made it prevents the pre-emptor afterwards from asserting his claim to shuffa. The finding arrived at by the Courts below in this case is to the effect that the seller at the time of sale offered the land to the plaintiff for purchase, that the plaintiff thereupon not only refused the offer but told the seller to sell his share to whomsoever he liked, and the purchaser relying on this surrender of the plaintiff's right of purchase under the law of pre-emption made the purchase from the seller. Under these circumstances, it appears to me to be monstrous to contend that after such a complete surrender of the plaintiff's right, he should be allowed by any Court of justice to assert his claim. He stood by when the defendant was selling the property to the purchaser, and in clear and unequivocal terms permitted him, the vendor, to sell and the purchaser to buy. No Court of justice in the world would allow or should permit the plaintiff to say, that though I had no intention to purchase when you, the defendant, purchased the land and therefore refused the offer of the vendor and gave him permission to sell to you, yet that I have subsequently changed my mind and will now have the satisfaction to see that your purchase is invalidated, and all the costs incurred by you for the purchase of stamp, &c., are so much loss to you. The plaintiff would be estopped in law from asserting a claim of this nature after having stood by and seen the vendee make the purchase without giving him any warning that he, the plaintiff, has the preferential claim to purchase, or that he intends to purchase, and that the defendant would purchase at his own risk. Now, instead of warning the purchaser or asserting his intention to purchase, he gives the vendor to understand that he has no objection whatever to the sale. This is a complete renunciation and surrender of plaintiff's right of pre-emption, and I would hold that after this renunciation he should not be permitted to claim the right to purchase. It would require very clear and distinct

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authority in the Mahomedan Law to support such a view of it as is contended for by the appellant's vakeel, which, I have no hesitation in holding, is against all principles of justice, against equity, and against good conscience.

The case in Macnaghten is not in point. The question put to the Law Officer was simply "when the shuffee or person who "has a right to pre-emption declines to "purchase the land at the price demanded "by the proprietor, and states that he will "not pay for it more than a certain sum"—is the shuffee at liberty to bring forward a claim for pre-emption when the proprietor has sold the land to a third person on receiving his own price?

In the reply given to that question, the Law Officer states that the refusal by the shuffee to pay the amount which had been paid by the purchaser amounts to a renunciation of the right of pre-emption. The reply, however, went on to say, and I think improperly, because unasked, that the claim of the shuffee to a right of pre-emption cannot be adduced until after the land had been actually sold, and that a refusal to purchase before the sale cannot operate to defeat his (the shuffee's) claim of pre-emption subsequently preferred. There is also in this reply no authority cited to support such a view of the law. The case also is not in point with the present, because in this case the pre-emptor at the time of sale repudiated all intention to become the purchaser and induced the purchaser to buy. There is no question that the same price for which the land was sold to the vendee, was not the amount for which the land was offered for sale to him.

The case at page 300 of the 5th Volume of the Select Reports does not decide the question. There is only an expression of opinion by the Law Officer, but the Sudder Court decided the case on a quite different point. This is, I apprehend, no authority at all. In the opinion given by the Mufti, I find also that he is unable to quote from any Mahomedan Law book any passage or text to support his opinion.

A decision of a Division Bench to be found in what is called the Gap Number of the Weekly Reporter for 1864, page 311 strengthens me in the view I have taken of the law. The opinion of the Judges who decided that case was approved of by another Division Bench, and that decision is in page 480, Volume XI, of the Weekly Reporter.

In this case, it is clear that the plaintiff not only refused to purchase the property when offered to him for sale, but actually accorded his permission to the vendor to sell the same to a third party, the purchaser, and that the purchaser relying on that renunciation by the plaintiff went to the expense of purchasing stamp, &c., for the purchase of the property. I hold, therefore, that the suit of the plaintiff was rightly dismissed by the Courts below. Our Courts are to be guided by the principles of justice, equity, and good conscience. The Mahomedan Law is only the law of this country so far as the Legislature has adopted it as the law of British India, and so far as we see clear authorities in it on a particular point. In all cases, therefore, where there is no clear and positive authority in the Mahomedan Law, I think it is our duty to follow the dictates of justice and good conscience. Now, it cannot be contended for a moment that it is equitable or just that a plaintiff who refused to purchase a property when offered to him for sale, who has likewise induced the purchaser to buy on reliance of his clear renunciation of his right to purchase, should be allowed to get rid of his renunciation and to set aside the sale merely for the pleasure and satisfaction of seeing the whole thing rendered null and void and the purchaser endamaged in costs.

If this be allowed, the consequence would be that no co-parcener of a property would be able to sell his share at a just and reasonable price, but must be compelled to sell to his co-sharer at his price however low and unreasonable. He will be completely at his mercy, and though undoubtedly entitled to sell his share will never practically be able to sell it at its proper value. If we allow the principle contended for by the appellant, we will assuredly act against equity and justice, which is the law we are bound to administer, and assist the plaintiff in the perpetration of a gross fraud. I cannot imagine what greater precaution could possibly be taken by a co-parcener desirous of selling his property than what was taken by the vendor defendant in this case. He goes to the person who has a preferential right to purchase, namely, the plaintiff, and offers his share for sale. This offer is refused not on the score of the price offered being excessive, but plaintiff's unwillingness to avail him-

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self of the right given to him by the Mahomedan Law; the vendor is further permitted to sell to any party he liked. He goes to the vendee, and the vendee finding that the shuffee has declined the purchase accepts the offer, and goes to considerable expense in perfecting his purchase. We are now asked to set aside this sale, to compel the purchaser to forego his purchase and to suffer the loss of his money incurred in getting the bill of sale prepared and executed. I consider the Courts below were right in declining to give such an unjust and inequitable decree to the plaintiff. I would, therefore, uphold the order passed by the Courts below, and dismiss this appeal without costs, no one appearing for respondent.

Jackson, J.—I am of opinion that even under the Mahomedan Law, the plaintiff is not entitled to exercise the rights of pre-emption as he has already relinquished those rights at the time of purchase and sale. I concur, therefore, with my learned colleague in dismissing this appeal without costs.

The 9th March 1871.

Present:

The Hon'ble L. S. Jackson and W. Ainslie, *Judges.*

Embankments—Damages — Cause of action.

Case No. 1956 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Gya, dated the 30th July 1870, *affirming a decision of the Moonsiff of Nowabad, dated the 24th December* 1869.

Seeta Ram (Defendant) *Appellant,*

versus

Shaikh Kummeer Ali and others (Plaintiffs) *Respondents.*

Mr. R. T. Allan for Appellant.

Baboos Hem Chunder Banerjee and *Kalee Kishen Sein* for Respondents.

In a suit for damages for the demolition of a *singha* or embankment intended to keep in surface water, if the embankment was situated on the defendant's land, such demolition could only be a cause of action where it not only infringed a definite right but caused actual damage.

Jackson, J.—THE plaintiffs in this suit are the owners of mouzah Madhorampore, and they sued the defendants, who are the owners of mouzah Dadpore, alleging that the defendants wrongfully destroyed a *singha* or embankment intended to keep in surface water, standing partly on plaintiffs' land and partly in the lands of mouzah Suleempore. They further alleged that the defendants had gone on to erect a new *ayle* wholly upon the plaintiff's land, whereby the flow of water had been further affected, and the plaintiffs, consequently, further endamaged; and they prayed the Court to cause the restoration of the *singha* and the demolition of the *ayle.*

The plaintiff's allegation referring to mouzah Suleempore appears to have had the effect of provoking the proprietors of that village to intervene in the suit, and, on their own application, they appear to have been made defendants.

The Moonsiff's enquiry, however, upon the spot in the presence of both parties, established in his opinion the fact that the whole of the *singha* was situated on the plaintiff's land of mouzah Madhorampore, while the *ayle*, on the other hand, was situated on the defendants' lands of mouzah Dadpore. He, therefore, considered that the defendants had doubly infringed the plaintiff's right, and he gave a decree against them; and the decree was also given against the defendants who are the owners of mouzah Suleempore and who had become parties to the suit at their own request.

On appeal the Subordinate Judge held that it was immaterial whether the *singha* was situated on the plaintiff's land or elsewhere, so long as it appeared that the *singha* was of ancient date; and he seemed to think that the mere circumstance of antiquity gave the plaintiff a claim to maintain the suit, if the *singha* were destroyed by the defendants. On this part of the case, therefore, he affirmed the decree of the Moonsiff without enquiring what the plaintiff's precise right in respect of that *singha* was; and as to the *ayle* also, affirming the Moonsiff's finding on that part of the case, he declared that the plaintiff would be entitled to have an opening made through the *ahur* when necessary.

Against this decision all the defendants have appealed,—the Suleempore defendants as well as the others.

On this part of the case it seems sufficient, I think, to say that the making the Suleem-

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pore proprietors parties to the suit was altogether unnecessary and injudicious, and I may add improper. They were not persons "having an interest in the subject-matter "and liable to be affected by the result of "the suit." Their application, therefore, to be made parties ought to have been refused; and the proper order to be made in respect of them is that they should be expunged from the record as defendants, they being left to pay their own costs of the proceedings.

In regard to the original defendants, it seems to me that the decision of the Subordinate Judge cannot stand. The plaintiff's claim to have the *singha* established or to damages would depend very materially upon the question as to whether it was situated upon the plaintiff's land or no. If the *singha* was situated upon the plaintiff's land, the act done by the defendant would be simple trespass and would be unjustifiable; but if it was situated upon the defendants' own land, that which the defendants have done would amount to a cause of action only if the plaintiff had a definite right to the maintenance of the *singha;* and it would have to be shewn that the destruction of it was not only an infringement of that *right*, but had also caused actual damage to the plaintiff. It is clear, therefore, that the case would have to go back to the Subordinate Judge in order that he should determine the question of situation in the first instance.

Lastly, as to the *ayle*, the specific order which the Subordinate Judge has made is clearly erroneous, because it is not in accordance with the plaintiff's own case. The plaintiff's case was, that the defendants had come upon their land and erected this *ayle*, and had thereby damaged them; whereas it seems that the *ayle* was not erected on the plaintiff's land at all, but upon that of the defendant. That part of the plaintiff's case, therefore, taken separately, must fail; but if it should appear that the defendants have improperly destroyed the *singha* which the plaintiff had an interest in keeping up, then, of course, the question of the further erection of the *ayle* as bearing upon the damage to the plaintiff must be taken into consideration.

The case, therefore, must go back to the Lower Appellate Court in order that it should determine, 1st, what the plaintiffs' right in respect of the *singha* is, *namely*, whether it stands upon the plaintiffs' land, and is therefore their property, or whether it stands upon the defendants' property, but the plaintiffs have an interest and right which entitled them to have it maintained; 2nd, if necessary, whether the erection of an *ayle* by defendants on their own land has contributed with the destruction of the *singha* to the damage of the plaintiffs.

The 9th March 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Claim under a Will—Inheritance.

Case No. 1957 of 1870.

Special Appeal from a decision passed by the Officiating Additional Judge of Chittagong, dated the 22nd July 1870, *reversing a decision of the Sudder Moonsiff of that District, dated the 11th December* 1869.

Moulvie Ahmedoollah (Defendant) *Appellant,*

versus

Gour Huree Biswas (Plaintiff) *Respondent.*

Baboo Okhil Chunder Sein for Appellant.

Baboo Bhowanee Churn Dutt for Respondent.

An heir does not lose his rights as such, because of his inability to prove a Will under which he claimed a larger share in a former litigation in which no question of inheritance was raised.

Jackson, J.—We think that the appeal should be dismissed. The only ground taken is that as the defendant on a former occasion set up the rights of his vendor Badul Bibee under a Will, therefore he is now debarred from setting up her rights under inheritance. It is said that he was bound on that occasion to set up all his claims, and he having failed to do so cannot now set up a right as heir.

It seems, as far as we can see from the former litigation, that there was no question as to Badul Bibee's right by inheritance, and even now there is no dispute upon this point. The only question was whether she was entitled to a larger share in the deceased's property under the Will. It would be monstrous to hold because a person can-

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not prove a Will which gives him a larger share of the property than he would be entitled to as an heir; that he therefore lost all his rights as an heir to the smaller share in the property. The Privy Council decision reported in X Weekly Reporter, page 1, is alluded to. But in that case the claimant first put forward a claim to a smaller share as an heir, and then in a subsequent litigation tried to put forward a will. He was at once met with the fact that if he had a Will he should have set it up at once, and he was not allowed to set up a Will, he having said nothing about it on the former occasion. The decision of the lower Court seems to us to be quite correct, and we dismiss the appeal with costs.

Mookerjee, J.—I concur. The Privy Council case has no application whatever to this.

The 9th March 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Set off—Res judicata—Estoppel—Section 2 Act VIII of 1859.

Case No. 1977 of 1870.

Special Appeal from a decision passed by the Judge of Chittagong, dated the 29th June 1870, *affirming a decision of he Subordinate Judge of that District, dated the 2nd August* 1869.

Abdoollah Khan (Defendant) *Appellant,*

versus

Sreekunto Pershad Hajrah (Plaintiff) *Respondent.*

Mr. C. Gregory and *Baboo Debendro Narain Bose* for Appellant.

Baboos Chunder Madhub Ghose and *Okhil Chunder Sein* for Respondent.

The plea of set off is one form of bringing a suit, the defendant becoming in regard thereto a plaintiff; and he cannot therefore be allowed to set up a claim for which a suit had been previously brought by him and dismissed.

Jackson, J.—We are satisfied that the decision of the Judge is correct. The defendant in answer to the suit for the price of an elephant which the plaintiff preferred against him attempted to establish a plea of set-off. The claim which he made in this plea of set-off appears to be one upon which he had already preferred a suit, which suit had been tried up to the Appellate Court, and even up to this Court in special appeal, and had been dismissed. The Judge finding this held that that dismissal was a conclusive judgment against the defendant, and that he was not entitled to a set-off and disallowed the plea.

Before this Court it is urged that that decision might have been taken as evidence, but it did not debar the defendant from going into further evidence to prove that he was entitled to the set-off he claimed. We think that the former decision on the claim as it was preferred is conclusive against the defendant. The plea of set off is in fact one form of bringing a suit, and the defendant as regards that plea becomes in fact the plaintiff, and the real plaintiff is allowed an opportunity to answer to the plea set up in defence. To allow the same person as defendant to set up again exactly the same claim for which he had already brought a suit, and which suit had been dismissed, would be in fact acting in contravention of Section 2 Act VIII of 1859. The Judge was quite right in disallowing the defendant's attempt to re-open the former claim, and we dismiss the appeal with costs.

Mookerjee, J.—I concur. The decision in the case brought by the appellant is conclusive evidence on the point. The same fact cannot be pleaded as a set off. The contention is quite unfounded.

The 9th March 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Sureties—Liability.

Case No. 2143 of 1870.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 27th June 1870, *reversing a decision of the Second Subordinate Judge of that District, dated the 31st January* 1870.

Puree Soonduree Dabee (Plaintiff) *Appellant,*

versus

Chunder Shekhur Ghossal and others (Defendants) *Respondents.*

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Baboos Anund Chunder Ghossal and *Goopeenath Mookerjee* for Appellant.

Baboos Romesh Chunder Mitter and *Taruck Nath Sein* for Respondents.

Where a bond was taken by a creditor from a principal debtor without the knowledge or consent of the sureties, fixing certain periods for the payment of the sums named in the bond:

HELD that the sureties were entitled to be discharged from all liability.

Kemp, J.—THE only point taken in this case is, that the Judge was wrong in holding that the securities were discharged from all liabilities to the plaintiff. The Judge in support of the decision has quoted a decision to be found in Volume I, Weekly Reporter, page 81. The Judge found that the sureties had no knowledge of the bond or ikrar, for the ikrar is in the nature of a bond taken by the plaintiff from the principals, that is to say, the gomastahs; that this bond or ikrar was taken without the knowledge or consent of the sureties, and fixing certain periods for the payment of the sums named in the bond without the knowledge of the said sureties. We think that the Judge was quite right in applying the decision to be found in Volume I to this case. The liabilities of the parties were changed by this ikrar, and the sureties in our opinion were rightly discharged. There can be no doubt that by the ikrar, which was executed on an adjustment of accounts and which states that a certain sum after deductions was found to be due by the principals, the gomastahs, they accepted that liability, stating that they could not pay that sum at present, and they took time up to the month of Falgoon of the year in which the ikrar was executed; and this having been done without the consent or knowledge of the sureties, and their liability being thereby changed, they are entitled to be discharged from all liability, and the mere recital in this ikrar that the sureties were still bound cannot in any way affect or bind them.

The second ground taken in appeal is that the Judge has dismissed the whole case of the plaintiff, even as against the principals, who have been found liable by the first Court and who have not appealed. Nobody appears for them in this Court, and as they have not appealed to the Judge against the decree of the first Court, that decree as against them must stand, and the decision of the Lower Appellate Court will be modified to that extent. Costs in proportion.

The 9th March 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Default by defendant—Procedure—Section 170 Act VIII of 1859.

Case No. 2275 of 1870.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 5th July 1870, *affirming a decision of the Moonsiff of Burjorah, dated the 23rd April* 1870.

Thakoor Lall Misser (Defendant) *Appellant,*

versus

Brohmo Moyee Dabee (Plaintiff) *Respondent.*

Baboo Rash Beharee Ghose for Appellant.

No one for Respondent.

A plaintiff who gives no evidence in support of his claim, is not entitled to a decree merely on the default of the defendant to give evidence.

Where a defendant contumaciously refuses to appear in answer to a summons, the Court ought to apply the provisions of Section 170, Civil Procedure Court.

Kemp, J.—THIS is a suit instituted for the purpose of declaring that a certain mortgage bond and kubooleut were forgeries. It appears that the defendant No. 1 set up a mortgage from the husband of the plaintiff. Under that mortgage he sued the defendant No. 2 for arrears of rent. In that suit

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the plaintiff intervened, and urged that the mortgage and the kuboolent of the defendant No. 2 were forgeries. The suit, however, of the defendant No. 1 for rent was decreed after incidentally going into the question of the genuineness or otherwise of the bond. In the present suit both Courts have decreed the plaintiff's case, in as far as she seeks to set aside the bond as a forgery; and her suit to have the kuboolent declared spurious was dismissed, inasmuch as a competent Court had already pronounced judgment on that part of the case.

In appeal there is one ground taken which we think has some force, that is, the second ground, that the onus being primarily on the plaintiff, she could not obtain a decree simply upon the failure of the defendant to appear without producing any evidence in support of her claim. Now, in this case, it appears clear that the defendant, although cited by the plaintiff and summoned by the Court, refused to attend. The first Court distinctly states that the defendant was in contempt; that his refusal to attend was contumacious; and therefore the first Court ought, we think, and certainly might have applied the provisions of Section 170 of the Code of Civil Procedure to the case. It appears, however, that the first Court did not do so. The Moonsiff in his judgment says that inasmuch as the defendant although summoned by the plaintiff as a witness to disprove the bond has failed to attend in disregard of the Court's order, therefore the decision on the said bond must be against him. A case has been referred to in the course of the argument to be found in Volume XII of the Weekly Reporter,* in which it is held that where a plaintiff has not given any evidence whatever in support of his case, he is not entitled to a decree merely on the default of the defendant to give evidence. That case seems to us to apply to the present case. The plaintiff gave no evidence whatever, although, as suggested in the course of the argument, it was in her power to prove her possession, or to prove that the signature on the mortgage-bond was not the signature of her husband, or in some other way to prove her allegation. We therefore remand the case. The first Court will give the plaintiff an opportunity of proving her case, and after doing so pass a fresh decision. Costs to follow the result.

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The 9th March 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover,

Judges.

Decree in rent-suit—Cause of action.

Case No. 2280 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Midnapore, dated the 21st July 1870, affirming a decision of the 1st Moonsiff of that District, dated the 21st May 1869.

Bissumbhur Panjah (Defendant) *Appellant,*

versus

Modhoo Soodun Dey and others (Plaintiffs) *Respondents.*

Baboo Luckhee Churn Bose for Appellant.

Baboo Bama Churn Banerjee for Respondents.

In a suit to establish proprietory title, the fact of defendant's having obtained a decree under Act X of 1859 on the ground that he was proprietor and plaintiff only a ryot, was held to give the latter a distinct cause of action to show that he was the real proprietor.

Glover, J.—THERE are no grounds for this special appeal. Both the Courts below have found as a fact that the plaintiff proved the title on which he came into Court, and that the defendant has not proved the mowrussee right which he says he got from the parties from whom the plaintiff purchased the proprietory right. One contention put forward in special appeal is that the plaintiff has no cause of action. It seems to us that as the defendant got a decree in a suit under Act X of 1859, on the ground that he was the proprietor of these lands and the plaintiff only a ryot, this gave the plaintiff a most distinct cause of action, and in fact forced him into Court to show where the real proprietorship in the estate was.

The special appeal is dismissed with costs.

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The 9th March 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Joint-tenancy — Partition — Section 27 Act X of 1859.

Case No. 2285 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 15th July 1870, affirming a decision of the Deputy Collector of Jehanabad, dated the 27th April 1870.

Nubo Kishen Mookerjee (Plaintiff) *Appellant,*

versus

Sreeram Roy and others (Defendants) *Respondents.*

Baboo Romanath Bose for Appellant.

Baboo Motee Lall Mookerjee for Respondents.

Where a zemindar himself put up a tenure for sale in separate lots, and took rents from two of the purchasers separately, it was held that no *written* consent was necessary in order to his being bound to recognize the partition.

Glover, J.—THIS was a suit for arrears of rent jointly against a number of the plaintiff's tenants. The plaintiff brought a suit to resume the tenure of Huree Ram Mundul and others, and got a decree and afterwards took kubooleuts from the tenants. For the costs of this suit he attached and brought to sale the tenure of these parties, and by his directions it was advertised and sold in separate lots, he himself becoming the purchaser of some of them. He now sues for the rent of the entire tenure from the parties who purchased the separate lots at auction. The defendants urge that they are according to the terms of the law purchasers of separate lots, and not liable to pay more than their separate shares of rent, and the Courts below found in their favour.

In special appeal it is contended that under the terms of Section 27 Act X of 1859, the zemindar was not bound to recognise any partition of the tenure which had been registered in his office, and that in any case there was no consent on his part in writing to any separation. No doubt there is no consent in *writing* on the part of the zemindar, but the inference that he did consent to the partition is of the strongest kind. It was by his own deliberate act that the tenure was put up for sale in separate lots, and it is not denied that he has since the sale taken rent from two of the purchasers of these lots separately. The object of the Regulation was the protection of the zemindar from the division of any part of his property without his knowledge, but in this case it is clear that he knew of the division all along, and was in fact himself the cause of the property having been so divided.

We see no grounds to interfere, and dismiss the special appeal with costs.

The 10th March 1871.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Appeals to Privy Council—Rule nisi —Limitation.

In the matter of

Rajah Raj Kishen Singh and others (Respondents to England) *Petitioners,*

versus

Huro Soonduree Dossee (Appellant to England) *Opposite Party.*

Mr. J. W. B. Money for Petitioners.

Baboo Mohinee Mohun Roy for Opposite Party.

In a case where the period within which applications for leave to appeal to England expired during the Dusserah vacation, and the application was presented on the first day of the Court sitting after the vacation, when, though notice was served under the rules,—no cause being shewn to the contrary,—the appeal was admitted and the applicant allowed to incur large costs for translation and transcription and the record was nearly ready for transmission:

HELD that the plea of limitation could not at this stage be heard in bar to the admission of the appeal, and that the High Court was bound to allow it to go on subject to the orders of the Privy Council.

THIS is an application on the part of the respondent to England to have a case of appeal to Her Majesty in Council taken off the file.

The judgment from which the appeal to England has been presented is dated the 1st of April last. The six months within

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which, by the order in Council, applications for leave to appeal to England are to be presented expired, therefore, on the 1st October. By the arrangements for business made by this Court under the powers vested in it by the Act of Parliament, the Court was closed for all business, except applications of an emergent nature, between the 19th September and 13th November 1870. It re-opened for general business on the 14th November. By order of Court notice was publicly posted by which, amongst other things, it was directed that pleaders were not required to file applications of appeal and such like matters between the two dates I have mentioned.

The application for leave to appeal in this case was presented on the first day of the Court sitting after the vacation, namely, on the 14th November. Upon the filing of that application notice was served, in accordance with the rules relating to appeals to Her Majesty in Council, upon the pleaders who had appeared for the respondent at the hearing of the appeal. Service, it seems, was effected on the 24th November; and no cause being shown pursuant to that notice, the appeal was admitted by my order on the 2nd December.

The appellant thereupon appears to have proceeded with proper diligence to have incurred large costs for translating and transcribing the record, and in consequence the appeal is nearly ready for transmission to England.

On the 24th of February last, Mr. Money obtained a rule calling upon the pleaders of the appellant to show cause why the appeal should not be taken off the file in consequence of its having been presented after the lapse of six months from the date of the judgment, for which reason, it was contended, that it was not in the power of the Court to admit the appeal.

I by no means wish to say that any unfair or imperfect representation of the facts was made on the occasion of obtaining the rule by Mr. Money, but certainly at the time of my granting this rule it was not fully present to my mind that notice had been duly served, and that the appeal had been admitted without objection; and that consequently the appellant had been allowed to incur considerable expense, and that the appeal was in fact nearly ready for transmission.

Before going into the other points, therefore, which Mr. Money proposed to argue, I desired him to show why under these circumstances he should be heard at all.

On this part of the matter Mr. Money referred to two cases, one reported in III Bengal Law Reports,* page 126, Original Jurisdiction, which is the case of Goberdhone Bermono *versus* Sreemul Munnee Bibee and another. It appears to me that that case has no bearing upon the present question. In that case it was only decided that, in the case of a petition of appeal to England being filed, due diligence must be shown in transmitting the appeal to the Privy Council otherwise the High Court has power to interfere. That is a case altogether different from the present; but it may be observed in passing that the matter decided in that case has been since provided for in another way, by the† rules made by this Court which came into effect in August last; but this is not a case of an application to take the appeal off the file on the ground of want of diligence.

Then my attention was called to the case reported in I Bengal Law Reports, page 39, Original Civil Jurisdiction, Tamvaco *versus* Skinner. Mr. Money appears to rely upon this case as justifying his present application. It seems to me that there is a wide difference between that case and the present. In that case the petition for leave to appeal to England was similarly presented on the 18th November 1867, that is, on the 1st day after the Court re-opened; and Mr. Justice Markby on an *ex-parte* application allowed the appeal, subject to any application which the defendants might make to take the appeal off the file on the ground that it had been presented after the prescribed time. That being so reserved, we find that the respondent immediately appeared, and on the 7th December, that is to say, within about three weeks after the presentation of the appeal, the Court is called upon to decide whether it should be allowed to remain upon the file or no. The matter having been expressly reserved, and the appellant not having been allowed to incur any expense, the Court determined that it had not power, not having before decided the point, to receive the appeal; and it was accordingly disallowed.

In this case, on the contrary, the party was allowed full time to show cause against

* 14 W. R., *Orig. Side.*, 341.

† 14 W. R., *Rules*, 1.

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the admission of the appeal. He omitted to appear or to show any cause whatever, and consequently the appellant has been allowed to go on and expend a large sum of money for the costs of the appeal; and it is after that has been done that the respondent now appears and makes this application. I cannot doubt that if this application were successful, the appellant would immediately make application to the Judicial Committee of the Privy Council; and I can hardly doubt but that in the circumstances he would there obtain leave to appeal; and I think it rather my duty to allow the appeal to go on subject to the orders of the Privy Council, than to put the appellant to the great and, I conceive, unnecessary expense of going to England, engaging counsel there, and getting an order for the admission of the appeal.

I express no opinion whether the decision in Tamvaco *versus* Skinner was correct, or whether, if correct, it applies equally to appeals presented in this side of the Court.

The 10th March 1871.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Insolvent's property—Official Assignee—Attachment.

Case No. 193 of 1869.

Regular Appeal from a decision passed by the Second Subordinate Judge of 24-Pergunnahs, dated the 25th May 1869.

Anund Chunder Paul (one of the Defendants) *Appellant,*

versus

Punchee Lall Soor (Plaintiff) and another (Defendant) *Respondents.*

The Advocate General for Appellants.

Mr. C. Piffard for Respondents.

The vesting of an insolvent's property in the Official Assignee is liable to be divested by a sale in pursuance of an attachment subsisting at the time of the vesting order.

Jackson, J.—THE ground chiefly relied upon in this case as enabling the plaintiff to recover possession of this property, was the precedence of the sale by the Official Assignee over that of the Court of 24-Pergunnahs in execution. That point has been determined by the Full Bench*; but since that there has been further argument before us upon the other ground on which the Subordinate Judge considered the plaintiff's purchase to be superior to that of the defendant. He observes—"It appears that the debtors "kept this property as security for debt "contracted from Boodh Sing and Bishen "Chand, who afterwards established their "mortgage before the Principal Sudder "Ameen of Moorshedabad and obtained a "decree;" that appears to have been on the 30th April 1869, "making liable the said "property in satisfaction of their debt. It "also appears that the Official Assignee sold "the right, title, and interest of the debtors "in the said property to satisfy the said mort-"gage debt. Under such circumstances, "the purchaser must be held to have acquired "the rights of the debtors as they stood at "the time of the mortgage, namely, the 30th "September 1866."

Mr. Piffard in support of the decree has contended that Boodh Singh and Bishen Chand having obtained from the Court of Moorshedabad a decree for the sale of this property in satisfaction of their mortgage debt, were entitled to carry out that sale in any mode which they thought proper; at any rate, with the consent of the judgment-debtor; and that, consequently, the sale by the Official Assignee on the application of the mortgagees and joined in by them, was a valid sale in furtherance of the decree which they had obtained; and further that the mortgagees had conveyed all their rights to the plaintiff. Consequently, he maintains, in full conformity with the opinion expressed by the Full Bench on the late reference, that his client, the plaintiff, is still entitled to the property,

Now, if it be admitted that the mortgagees did join in this sale, of which, however, the proof, as shewn by the Advocate General, is very defective; still, if they had joined, it seems to me that this would not amount to a sale which could defeat a prior sale by order of the Court of 24-Pergunnahs. The mortgagees could not themselves sell the

* 14 W. R., F. B., p. 33.

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property. That which they had got was a decree in the Moorshedabad Court for the sale of the property in question. The appropriate, and, so far as I know, the only mode of carrying out that decree was to apply to the Court of Moorshedabad for the execution of it, and in execution to have that property attached and sold. It is not denied by the learned Advocate General, and I think we may safely say that the purchase by Anund Chunder Paul in the 24-Pergunnah's Court was subject to all the possible consequences of execution of the decree of the Moorshedabad Court; but it seems clear that the Court of 24-Pergunnahs sold all the right, title, and interest of the judgment-debtor as it stood at the time of the vesting of the insolvent's property in the Official Assignee, and that such vesting was liable to be divested by a sale in pursuance of an attachment subsisting at the time of the vesting order: and, consequently, when the Official Assignee sold, so far as he sold the right, title, and interest of the judgment-debtor, he sold something which no longer existed—something which had already passed to Anund Chunder Paul.

I do not think it necessary for us to say whether the purchaser acquired the rights of the mortgagees or not. If he did, it seems clear that all he could obtain would be to stand in their shoes and apply for the execution of the mortgage decree; but I do not at all wish to decide whether he has that right or not.

I think, therefore, upon this ground as well as upon the other, that the plaintiff's case fails, and that the defendant ought not to be deprived by the plaintiff of the property which he purchased. The decree of the lower Court will be reversed, and the plaintiff's suit dismissed with costs.

Glover, J.—I concur.

The 10th March 1871.

Present:

The Hon"ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Wasilat—Julkur—Approximate value.

Case No. 320 of 1870.

Miscellaneous Appeal from an order passed by the Officiating Judge of Purneah, dated the 30th May 1870, affirming an order of the Subordinate Judge of that District, dated the 22nd November 1869.

Shaik Enaet Ali (Decree-holder) *Appellant,*

versus

Baboo Sobhnath Misser (Judgment-debtor) *Respondent.*

Mr. C. Gregory for Appellant.

Baboos Khettur Mohun Mookerjee and *Kishen Dyal Roy* for Respondent.

In a suit for wasilat where it was decreed that the value of the produce of a julkur should be ascertained in execution, the Lower Appellate Court was held to have come to a right conclusion without any error of law in taking the nearest approximate value of the produce indicated by the evidence and the plaintiff's statement.

Bayley, J.—We think this special appeal must be dismissed, but without costs.

The case arises out of the execution of a decree in regard to the value of the produce of a julkur. The plaintiff sued for possession and wasilat according to the market-value of produce in the month of Assin.

As to the wasilat, the decree was that it should be ascertained in execution.

The Subordinate Judge went into the evidence as to wasilat, and found that the amount stated in the plaint (125 rupees) was the amount due according to the evidence.

The Lower Appellate Court has affirmed that decision.

In special appeal the contention is that there ought to have been a detailed investigation into the actual amount of wassilat as directed in the decretal order; and that it was only for the purposes of the suit that the valuation was estimated at rupees 125. On reading the plaint it appears that this is not so. The valuation of rupees 125 in the plaint

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was really laid as the equivalent of the loss, the replacement of which the plaintiff sought in that suit, and the Subordinate Judge has found as a fact upon the evidence that the plaintiff is not entitled to more than the sum of rupees 125 which he claimed in his plaint. It is true that the Lower Appellate Court did not give in full details of the evidence, but the Lower Appellate Court thought that on the whole the more just result was to be derived from the nearest approximate value of the produce of the julkur indicated by the evidence and the plaintiff's statement. The Lower Appellate Court added that the lease made by the judgment-debtor when in wrongful possession was not a good criterion. The Lower Appellate Court then proceeds to affirm the decision of the Court below as correct, and in fact has substantially found on the evidence that rupees 125 was the proper sum.

There is a cross-objection by the defendant, urging that the amount of wasilat ought to have been ascertained not upon the total produce, but according to the principle laid down in page 445, Volume IX, Weekly Reporter. We think that the principle adopted there cannot apply here, for that was a special case of indigo more or less dependant upon the outlay and other contingencies of that peculiar business. We think that on the whole the lower Courts have come to a right conclusion without any error in law.

As the special appellant, plaintiff, has failed in his special appeal, and as the defendant, special respondent, raised a cross-appeal on the lease wrongly given by him and has failed in it, we decree that each party bear his own costs of this appeal.

The 10th March 1871.

Present:

The Hon'ble G. Loch and W. Ainslie, *Judges.*

Act XXXV. 1858 — Lunatic—Guardian.

Case No 409 of 1870.

Miscellaneous Appeal from an order passed by the Judge of Nuddea, dated the 3rd September 1870.

Bholanath Mookerjee (Petitioner) *Appellant,*

versus

Grish Mohinee Debia (Opposite party) *Respondent.*

Baboo Khettur Mohun Mookerjee for Appellant.

Baboo Doorga Dass Dutt for Respondent.

A Court cannot under Act XXXV of 1858 make over charge of the property and person of an alleged lunatic to a guardian, until it has adjudged him to be of unsound mind and incapable of managing his affairs.

Loch, J.— In cases under Act XXXV of 1858, the Civil Court making the enquiry, as provided by that Act, is required to determine whether the alleged lunatic is or is not of unsound mind; and it is not until the Court has adjudged such person to be of unsound mind and incapable of managing his affairs, that it can make over charge of his property and his person to a guardian.

The Judge in this case has not come to any finding that Bholanath is of unsound mind and incapable of managing his affars; and from the evidence on the record we are unable to come to any such finding.

We, therefore, set aside the order passed by the Judge directing a certificate to be given to Grish Mohinee, leaving it to the parties to renew their application if so advised; but such application must, as ruled by this Court in the case reported in Volume V, Weekly Reporter, page 54, Miscellaneous Rulings, be duly verified.

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The 10th March 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Evidence—Pleadings—Decree for accounts—Execution.

Case No. 2274 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 20th June 1870, *modifying a decision of the Assistant Collector of Howrah, dated the 8th April* 1870.

Woomanath Roy Chowdhry and others (Plaintiffs) *Appellants,*

versus

Sreenath Singh and another (Defendants) *Respondents.*

Mr. R. T. Allan and *Baboo Obhoy Churn Bose* for Appellants.

Baboo Umbika Churn Bose for Respondents.

Where a suit under Act X of 1859 was decreed by the Collector on the ground of an *ex-parte* enquiry and report, the admission of which as evidence was opposed by the defendant, and the Judge in appeal reversed the decision: HELD that plaintiff might have withdrawn his suit with permission to sue again under Section 97, Code of Civil Procedure; but that having chosen to rely on the Collector's opinion, he had no right, after the Judge had decided against him, to supplement his case by other evidence.

Where a decree requires the judgment-debtor to render accounts, he can only discharge himself by accounting for all the monies that have come into his hands, and it is always open to the decree-holder to show that this has not been done.

Glover, J.—THIS was a suit against an agent for money collected as rent and for accounts under Act X of 1859. The defendant is said to have been appointed in Assin 1275 and discharged in Pous of the same year, during which time he collected rupees 3,771 from the ryots and remitted to the proprietor only rupees 2,293.

The defendant said that he had made no collections at all and had no accounts to give.

The Collector gave plaintiff a decree for the balance of collections, *viz.*, rupees 1375, and for the account papers. But the Judge on appeal reversed that part of the decision which decreed the money and made the defendant liable only for an account.

We see no reason to interfere in this case. The amount of collections deposed to by the gomashta is considerably less than what the plaintiff himself admits to have received, and to prove the balance there is only the *ex-parte* enquiry made by the plaintiff's Mohurrir. It is obvious that this account could be no evidence against the defendant, and the Judge was right in rejecting it. But it is argued by Mr. Allan for the special appellant that, inasmuch as this enquiry by the plaintiff's Mohurrir was admitted as evidence in the first Court and was not objected to on the part of the defendant, the plaintiff was led to suppose that it formed legally sufficient evidence in support of his case; whereas if he had known its inadmissibility, he would have brought forward the ryots themselves to give testimony and to prove how much they had paid to the defendant's gomashtas.

Now, we find that although the Officiating Collector did admit the report as evidence, he did so in the face of strong opposition on the part of the defendant. This is clear from the judgment, where it is noted that the revenue agent employed for the defendant "took objection to the reception of the "tomâr" papers on the ground that they were not books kept in the ordinary course of business, and that the enquiry was conducted *ex-parte* and could not bind defendant. The special appellant, therefore, could not have been taken by surprise when the Judge in his turn considered the question. The special appellant might have mended his case in the lower Court, and have withdrawn his suit with permission to sue again under Section 97 of the Civil Procedure Code. As it was, he chose to rest his case on the opinion of the Collector that the Mohurrir's report was evidence, and has no right to ask to supplement his case now that the Judge has decided the point against him.

It was said in the course of the argument that the decree for accounts is absolutely useless to the plaintiff; as the order does not compel the defendant to render satisfactory accounts, but only accounts which may be totally false and useless to the plaintiff. To this it may be replied that under the decree the defendant as agent can only discharge himself by showing that he has paid

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or accounted for all the monies that have come into his hands and for which he is accountable, and it will always be open to the plaintiff to show that the defendant has not complied with the terms of the decree.

The special appeal is dismissed with costs.

The 10th March 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Invalid transfer—Khas possession.

Case No. 2290 of 1870.

Special Appeal from a decision passed by the Judge of Cuttack, dated the 20th June 1870, *modifying a decision of the Moonsiff of that District, dated the 18th February* 1870.

Suddye Purira and others (Plaintiffs) *Appellants,*

versus

Boistub Purira and others (Defendants) *Respondents.*

Baboo Umbika Churn Banerjee for Appellants.

Baboo Mohendro Lall Mitter for Respondents.

Where a ryot makes a transfer of a tenure which is not transferable, the landlord is entitled to look to him as the party liable for the rent, but is not entitled to khas possession.

Kemp, J.—We think there is no ground for this special appeal. The plaintiff has got a decree in both Courts to the effect that the transfer of the tenure by the defendant, who was his ryot, to a third party was invalid, inasmuch as it was not a transferable tenure and was made without the consent of the plaintiff, the superior holder. The plaintiff is, therefore, entitled to look to the former tenant for the rent, and as the parties revert to their former status, he is not entitled to khas possession. He is simply entitled to look to the former tenant as the party liable for the rent, and not the transferee.

The appeal is dismissed with costs.

The 10th March 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Solehnamah—Evidence.

Case No. 2330 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Midnapore dated the 17th August 1870, *reversing a decision of the Moonsiff of that District, dated the 17th February* 1869.

Sreemutty Dossee (one of the Defendants) *Appellant,*

versus

Pelaram Dossee (Plaintiff) *Respondent.*

Mr. R. T. Allan for Appellant.

Baboo Romanath Bose for Respondent.

In a suit for possession where plaintiff put in a copy of a solehnamah to which defendant was not a party: Held that although no question of right or title could be decided adversely to the defendant on the basis of that agreement, yet it would be evidence that by an order of Court passed on that solehnamah the plaintiff was put into possession.

Glover, J.—This was a suit to recover possession of a tank called Boyshtub Pushkurnee, measuring 2 beeghas, and to have it declared that the plaintiff held this tank under an ancestral lakheraj title. The defendant is the talookdar of the mouzah. The plaintiff alleged that he had been dispossessed of the tank in dispute by the talookdar on the 11th of Kartick 1273. The Moonsiff found that the plaintiff had not been able to prove any lakheraj title; and also that he had not been in possession at any time within 12 years. The Subordinate Judge, on the contrary, considered that the plaintiff had shewn that he was in possession in the year 1273 and was therefore not barred, and that from the copy of a solehnamah entered into between the plaintiff and

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certain other parties, as well as by two taedads copies of which had been brought from the Collector's Office of West Burdwan, as also from the oral evidence adduced by him, the plaintiff had proved his lakheraj title and was entitled to recover.

In special appeal it is contended that there was no legal evidence as to the question of possession within 12 years; and likewise no legal evidence on which the Subordinate Judge could decide in favor of the plaintiff's title. With regard to the issue of limitation, we do not think that the Subordinate Judge was wrong. There is evidence, however meagre it may be, to the fact of the plaintiff having exercised certain rights of possession in this tank. There is one witness at least who deposes to having seen the plaintiff catch fish therein on many separate occasions,—a thing he was not likely to have done had he not been in some sort of possession. There is also the solehnamah of 1273 in which the plaintiff was on the one part, and Gooroo Churn Bhoohya, Dusruth Goohee, Roop Chand Palit and Doorga Ram Panjah on the other part, and in which it is distinctly stated that the plaintiff did get possession of the tank by relinquishment on the part of the defendants in that year. No doubt, as the defendant in this suit was not a party to the solehnamah, no question of right or title could be decided adversely to his interest on the basis of this agreement; but for all that it would be evidence that in the year 1273, by an order of the Court based on that solehnamah, the plaintiff was put into possession of this tank. So far, therefore, we agree with the Subordinate Judge. On the other question, however, we think that the special appellant's contention must succeed. The Subordinate Judge has taken the solehnamah above referred to as evidence of the plaintiff's title. Now this document, it is quite clear, could not be any evidence as against the present defendant, the talookdar. The parties to that suit were in no way connected with him. One of them, it is true, is styled his naib; but there is nothing whatever to show that he was sued as naib of the zemindar or that he acted on his behalf. The solehnamah, therefore, however good evidence it might be against the three persons who were parties thereto, cannot be any evidence against the zemindar, defendant. The other evidence into which the Subordinate Judge has gone are copies of two taidads; and it is alleged that one of these taidads covers one beegah and the other taidad the other beegah, which comprise the two beeghas now in dispute. It is not denied that these taidads do not contain any boundaries or any mention of a tank; and there is no oral evidence which can connect the tank with any of the lands comprised within the boundaries of these taidads. If it could be shewn that these taidads cover lands in which the tank had been subsequently excavated by the plaintiff or his ancestor, it would be something; but this is not shewn, and there is no evidence to connect the two facts together.

It has been contended by the pleader for the special respondent that, under the circumstances of this case, the plaintiff was in no way bound to prove his lakeraj title; and that if he succeeded in showing that he had held as lakherajhar and was ousted by the defendant, he was entitled to be restored to possession, leaving the zemindar at liberty to sue him for resumption if he should be so advised; and two cases have been quoted in suport of this contention. The first is the case of Boodha Mudha *versus* Khyrat Ali and others, to be found in Volume V, Weekly Reporter, page 269; but that case evidently went upon the fact that the plaintiff had been suddenly, wrongfully, and recently turned out of possession when he brought the suit; and therefore that case partook more of the nature of a possessory action; and it is not denied that if the plaintiff had brought the present suit under the provisions of Section 15 Act XIV of 1859 within six months of his being dispossessed by the talookdar, he could have recovered possession without any proof of his lakheraj title. The second case is one to be found in Volume VI, Weekly Reporter, page 190, Sheikh Goburdhun and others *versus* Sheikh Tofail and others; but this case differs very materially from the case before us, inasmuch as in this case the plaintiff came into Court expressly desiring that his title might be declared, and of course before his title as lakherjdar could be declared it was necessary for him to prove that title. Granting, therefore, that the decisions referred to lay down the law correctly, they do not apply to the present case. The plaintiff cannot avoid the general rule of law that where a person comes into Court seeking for a declaration of title, he is bound to prove that he possesses that title. We think that the Lower Appellate Court has come to its finding upon no legal evidence. The decision of the Subordinate Judge is, therefore, reversed and that of the first Court restored with costs of all the Courts.

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The 6th March 1871.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Foreclosure—Notice to Mortgagor—Hindoo widow—Maintenance.

Case No. 1937 of 1870.

Special Appeal from a decision passed by the Officiating Additional Judge of Tirhoot, dated the 17th June 1870, affirming a decision of the Subordinate Judge of that District, dated the 31st December 1869.

Mussamut Khukroo Misrain (one of the Defendants) *Appellant,*

versus

Jhoomuck Lall Dass (Plaintiff) and another (Defendant) *Respondent.*

Mr. C. Gregory and *Baboo Debendro Narain Bose* for Appellant.

Mr. R. E. Twidale and *Baboo Chunder Madhub Ghose* for Respondent.

Omission to give notice to the mortgagor or his representative, is sufficient to vitiate the whole of the foreclosure proceedings.

A Hindoo widow's maintenance is a charge upon the family estate in whosoever hands the estate may fall.

Glover, J.—THE facts of this case were fully set out in the High Court's remand order of the 30th June 1869.*

The lower Court was directed to find (1) whether Madhub's deed of sale was established so as to give him the right to have notice of foreclosure; and (2) whether Mussamut Kukroo, the widow of Purmessur, was entitled to any share of the estate on the ground of her husband's being separated from the family, and therefore entitled as heiress to an equity of redemption over the mortgaged property and to notice of foreclosure.

The Court below found on these issues that Madhub's purchase was *bonâ fide*, and that he was entitled to notice as respect the amount of his purchase, *viz.*, 15 beeghas; and that Mussamut Kukroo had no claim, her husband having lived and died joint with the other members of the family.

* 12 W. R., p. 105.

Mussamut Kukroo appeals to this Court again, on the ground that as the plaintiff's suit had been declared to be bad as against Madhub, on the ground that no notice of foreclosure had been served upon him, it should have been dismissed altogether, the mortgage transaction not being divisible.

If the mortgagor or his representative had preferred this objection, I should have thought it a good one. It is clear from the proceedings which have been taken since the remand, that the mortgagor's representative, *viz.*, Madhub, was not served with notice of foreclosure; and that as regards the amount of his purchase, the mortgagee's right has been disallowed. This omission on the part of the mortgagee would, I think, have been sufficient to vitiate the whole of the foreclosure proceedings and have compelled Jhoomuck Lall to commence proceedings *de novo.*

But it appears to me that the present special appellant, Mussamut Kukroo, is not in a position to raise the objection, inasmuch as she has been declared not entitled to any share in the estate but only to maintenance. Her case was that she succeeded to the separate estate of her husband Purmessur Dutt; and had she succeeded in proving that her husband was separate in estate from his family, she would have had a life-interest in the mortgaged property and have been entitled to notice of foreclosure as her husband the mortgagor's representative. But with the finding that her husband died a member of the joint family, all her claim disappeared and she has no interest whatever in the family estate. It has been contended that her claim for maintenance is a charge on the estate, and that therefore she has an interest in keeping that estate in the family; but, as a matter of fact change of ownership would not affect her lien, and if she failed in getting her maintenance from the members of her late husband's family, she could make the estate chargeable with it into whose hands soever it had fallen under the foreclosure.

Mussamut Kukroo thrust herself into this case as an intervening defendant under Section 73 of the Civil Procedure Code. She has had her claim enquired into, and the decision having been against her I do not see what further interest she has in the matter, or why she should be allowed by a side wind to raise a question which the parties really interested have not thought it worth while to agitate.

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I think that this special appeal should be dismissed with costs.

Kemp, J.—I entirely concur.

The 6th March 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Arrears of rent—Registered tenant—Hindoo Widow—Reversioner—Effect of sale.

Case No. 2286 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Rungpore, dated the 30th July 1870, reversing a decision of the Officiating Moonsiff of that District, dated the 26th February 1870.

Anund Moyee Dossee (Plaintiff) *Appellant,*

versus

Mohendro Narain Doss (one of the Defendants) *Respondent.*

Baboo Grija Sunkur Mojoomdar for Appellant.

Baboo Bykuntnath Paul for Respondent.

When arrears of rent become due, a zemindar is not bound to look beyond his books for the party liable, except when he has recognized other persons as his tenants either by receipt of rent or in other ways.

Where neither the Hindoo widow who has succeeded by inheritance nor the reversioner chooses to pay the arrears of rent which have fallen due upon a tenure, it must, if sold for such arrears, pass to the purchaser by the sale.

Bayley, J.—THE plaintiff in this case alleges that the jote in dispute, named Jote Purikhit, belonged to one Hur Gobind; that on the death of Hur Gobind, his widow Hurry Pria succeeded to it as his heir under the Hindoo Law; that during the illness of Hurry Pria, she caused the name of her father Pursooram to be registered in the zemindar's books; that certain arrears of rent falling due to the zemindar on account of the tenure, a decree was obtained by the latter in a suit against the said Pursooram; that in execution of the said decree the tenure was put up to sale under Act VIII of 1835; that the husband of the plaintiff purchased it at that sale on the 1st April 1861; and that the husband of the plaintiff, and after his death the plaintiff herself, remained in undisturbed possession of it until the 31st July 1869, when the defendant obtained a decree against the plaintiff under the provisions of Section 15 Act XIV of 1859. The plaintiff has, therefore, brought the present suit within one year from the date of the award under Section 15 for the establishment of her title and the confirmation of her possession, no possession having yet been taken by the defendant in execution of that award.

The defendant in his answer urged that neither Purikhit nor his widow, Hurry Pria, had any rights or interests in the property; that the real name of the property was Jote Munsaram; that it belonged to the defendant's father who remained in possession of it down to the date of his death; that the defendant was in undisturbed possession until the date of ouster alleged in the Section 15 case; that the suit was barred by the general law of limitation; that the sale under Act VIII of 1835 relied upon by the plaintiff was collusive and fraudulent; and that even if the property did belong to Hurry Pria, the defendant being the reversioner to the estate of her deceased husband was entitled to hold it after her death; and that the sale of the rights and interests of Hurry Pria could not pass the property to the plaintiff's husband.

The Moonsiff, Baboo Saroda Pershad Chatterjee, in a very elaborate and able judgment, found that the property in question was the property of Purikhit, the husband of Hurry Pria; that Purikhit and Hurry Pria, and afterwards the husband of the plaintiff and the plaintiff herself, were in continuous possession of it; that there was no collusion or fraud of any kind whatever in the sale made under Act VIII of 1835; that Pursooram, the father of Hurry Pria, was the recorded tenant on the zemindar's books; that the arrears sued for by the zemindar were actually due to him; and that the sale was made in due process of law. With reference to the question as to whether the jote was the property of the defendant's father or not, the Moonsiff observed that the evidence on the record was sufficient to prove clearly and distinctly that the real name of the jote was Jote Purikhit, and not Jote Munsaram as alleged by the defendant; and that neither the defendant nor his father had any rights or interests in it.

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The Subordinate Judge, while upholding on appeal the views taken by the Moonsiff on the other questions involved in the case, has reversed his decision upon two grounds, viz., 1st, that the name of Pursooram alone being used in the certificate of sale, the sale of the right, title, and interest of Pursooram did not convey to the husband of the plaintiff any thing more than the rights of that individual; and as Pursooram was a mere *benamedar*, nothing whatever passed under that sale; and secondly, that a sale for arrears of rent during the life-time of a Hindoo widow would convey nothing more to the purchaser than the right, title, and interest of the widow herself, and could not therefore bind the reversioner after her death.

This decision, we regret to say, is entirely erroneous in law. Whatever might have been the motives which induced Hurry Pria to get the name of her father registered in the zemindar's books, there is no proof of any fraud against the zemindar; and if arrears of rent had actually become due upon the tenure, the zemindar was fully justified in suing the registered tenant for those arrears, as well as in selling the tenure as the property of that registered tenant. A zemindar is not bound to look beyond his own books, except when he has recognized other persons (whose names are not entered in his books) as tenants, either by receipt of rent or otherwise; and the zemindar in this case, therefore, was justified in suing Pursooram as the person who was liable to him for the arrears due upon the tenure, and in causing it to be sold as Pursooram's property. It is not even pretended that no such arrears of rent were due to the zemindar, nor has any irregularity of any kind been pointed out in the sale. Under such circumstances it is impossible to make out why the Subordinate Judge should have gone beyond the issues raised by the parties in the Court of first instance, when it is clear from his judgment that he has not come to a conclusion different from that arrived at by the Moonsiff with reference to those issues.

The second ground upon which the Subordinate Judge rests his decision is equally untenable. It has been over and over held by this Court as well as by the Privy Council, that a Hindoo widow who has succeeded to the estate of her deceased husband by right of inheritance fully represents that estate; and if neither the widow nor the reversioners choose to pay the arrears which had fallen due to the zemindar, the tenure must pass to the purchaser by the sale.

If the sale had taken place for arrears of revenue, there could be no doubt whatever that the reversioner could not have been permitted to contend that the estate did not pass to the purchaser, merely because at the time when the sale took place the party representing that estate was a Hindoo widow; and we see no reason whatever for coming to a different conclusion in the case of a saleable tenure caused to be sold by the zemindar for arrears of rent due upon itself—the Hindoo widow being the representative of the estate in both cases, and the land being in both cases equally hypothecated for the arrears referred to.

Considering these errors to be errors in law, we reverse the decision of the Lower Appellate Court and affirm that of the Court of first instance, the defendant being liable to pay to the plaintiff all the costs of this litigation.

The 13th March 1871.

Present:

The Hon'ble G. Loch and W. Ainslie, *Judges.*

Bond-suit—Special appeal.

Case No. 432 of 1870.

Miscellaneous Appeal from an order passed by the Officiating Judge of Backergunge, dated the 25th August 1870, *reversing an order of the Moonsiff of Burrisaul, dated the 11th July* 1870.

Tripoora Soonduree (Decree-holder) *Appellant,*

versus

Koylash Chunder Bose (Judgment-debtor) *Respondent.*

Baboos Anund Chunder Ghossal and *Tarucknauth Dutt* for Appellant.

Baboos Aukhil Chunder Sein and *Hurremohun Chuckerbutty* for Respondent.

Special appeal is not barred in the case of a claim for money due under a bond for less than 500 rupees, where the property pledged under the bond is made liable.

Loch, J.—A PRELIMINARY objection to the hearing of this appeal has been raised

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to the effect that the original claim being for money due under a bond for less than 500 rupees was cognizable by the Court of Small Causes, and consequently no special appeal lies to this Court. But looking at the judgment, we find that though the claim was upon a bond, yet the property pledged under it was made liable for the amount of the decree. Therefore, it is clearly not a case in which special appeal is barred.

With regard to the steps taken by the decree-holder in this case, we cannot concur with the Judge in thinking that they were not *bonâ fide*. We find that referring only to the steps taken in 1868, the Judge has come to the conclusion that the proceedings were not *bonâ fide*, because there was a petition made by the decree-holder which, the Judge says, shows that he voluntarily desisted from issuing proclamation of sale and allowed the proceedings to fall to the ground. Now, even if the decree-holder did so, it does not show that up to that time the proceedings already taken were not *bonâ fide*.

We reverse the order of the Judge with costs of this appeal and of the Lower Appellate Court, and restore the judgment of the Court of first instance.

The 13th March 1871.

Present:

The Hon'ble G. Loch and W. Ainslie, *Judges.*

Mesne profits — Deduction — Execution.

Case No 474 of 1870.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Nuddea, dated the 9th December 1870.

Nubo Coomar Chatterjee (Judgment-debtor) *Appellant,*

versus

Ramdhun Chatterjee (Purchaser of decree) *Respondent.*

Mr. J. S. Rochfort for Appellant.

Baboo Grish Chunder Mookerjee for Respondent.

A judgment-debtor claiming a deduction on account of mesne profits decreed against him should make good his claim when called upon by the Court executing the decree. Failing to do so he loses his remedy.

Loch, J.—We see no ground for interfering with the judgment of the Court below.

It appears that a decree was made in which Rajendur Chunder, Saroda Pershad, and Nubo Coomar, the petitioner now before us, were originally made jointly liable for mesne profits for a period commencing from 1262 to 1266, and the amount thereof was ascertained by an Ameen. The Principal Sudder Ameen after hearing objections to the investigation of the Ameen, found on the 8th December 1866 that a sum of 17,071 rupees was due from these parties jointly. From that order Rajendur Chunder appealed to the High Court, urging that he was entitled to have a deduction on account of Government revenue paid by him; and also that he should not be made jointly liable with Saroda Pershad and Nubo Coomar for the whole of the mesne profits. With regard to the first ground, the Court held that he had not proved that he had paid any Government revenue, and consequently his claim for a deduction on that account was unfounded; and as to the second objection, the Court declared that he was liable for one-half and that Sharoda Pershad and Nubo Coomar were liable for the other half of the mesne profits. Subsequent to this order made by the High Court on the 13th June 1867, Nubo Coomar applied to the Court stating that his share was only 4½ pie, and that he ought only to be made liable to that extent; and further that he should not be made liable jointly with Saroda Pershad; and he also claimed a deduction on account of Government revenue. The High Court on the 25th November 1867 amended its order, making him liable separately for mesne profits to the extent of a 4½ pie share, but did not comply with his prayer for a deduction on account of Government revenue.

The decree-holder afterwards took out execution, and the only objection that Nubo Coomar raised before the lower Court was that he was not liable for mesne profits. But the Subordinate Judge has held that he was liable. He now comes up in appeal to this Court, not upon that ground, but entirely upon a separate ground, namely, that he was entitled to a deduction from the amount of the mesne profits found to be due from him on account of Government

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revenue which he had paid; and he adds that he was not a party to the investigation made by the Ameen as to the amount of the mesne profits.

We think that it is now too late for him to ask this Court to interfere in any way. It is clear from the papers on the record that he was a party to the investigation made by the Ameen; and further there is nothing on the record to show that he has paid any Government revenue: and even if he were able to show that, it is not to this Court that he should make an application for a deduction on account of Government revenue, but he should, when called upon by the lower Court executing the decree to show cause why he should not pay the amount of the mesne profits claimed by the decree-holder, have brought forward that objection and claimed a deduction on account of Government revenue. As he has failed to do so, we see no reason for interfering with the order passed by the Court below.

The appeal is dismissed with costs, two gold mohurs being allowed as pleader's fees.

The 13th March 1871.

Present:

The Hon'ble G. Loch and W. Ainslie, *Judges.*

Certificate under Act XXVII. 1860—Government Promissory Notes.

Case No. 477 of 1870.

Miscellaneous Appeal from an order passed by the Judge of Nuddea, dated the 18th November 1870.

Bidya Soonduree Dossee (Petitioner) *Appellant.*

Baboos Ashootosh Dhur and *Kumola Kant Sein* for Appellant.

A Hindoo widow holding a certificate under Act XXVII of 1870 to collect debts due to the estate of her deceased son, who had been allowed to draw interest on certain Government Promissory Notes which, though entered in the certificate, stood apparently in the name of her late husband, having applied for authority to negotiate those Promissary Notes:

Held that she was bound to show how she got possession of those notes.

Loch, J.—It appears to us that there is no sufficient information before the Court as to the facts of this case to enable it to make any order such as desired by the appellant.

It is stated that certain Government Promissory Notes are in the names of one Radha Kishore Puramanick, who is said to have been the father of Gopal Lall; that Radha Kishore had left two sons, Gopal Lall and Gobind Chunder; that Gopal Lall has deceased; that his mother, Bidya Soonduree, now petitioner before us, has obtained a certificate as heiress to Gopal Lall; and that Gobind Chunder is still alive. It is also stated that there has been a partition of the property left by Radha Kishore, and according to that partition the Promissory Notes have fallen to the share of Gopal Lall.

These are mere allegations on the part of the petitioner, Bidya Soonduree. She has obtained a certificate under Act XXVII of 1860 to collect debts due to the estate of Gopal Lall, and among the property belonging to Gopal Lall these Government Promissory Notes have been entered in that certificate, and she has been allowed to draw interest upon them. She now wants to extend her powers under that certificate, and to have authority to negotiate those Promissory Notes. If she were able to show that these Promissory Notes are her sole property, she might, though she has a limited interest in the property, be entitled to have a power to negotiate those notes. Until we see how it was that she got possession of any property which is apparently in the name of Radha Kishore Puramanick, we can make no order such as she requires.

We, therefore, reject this appeal, leaving her to make a fresh application, if so advised, setting forth clearly and distinctly all the facts of the case.

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The 13th March 1871.

Present:

The Hon'ble G. Loch and W. Ainslie, *Judges.*

Section 15 Act XIV. 1859—Costs.

Case No. 479 of 1870.

Miscellaneous Appeal from an an order passed by the Judge of Jessore, dated the 21st September 1870, *affirming a decision of the Subordinate Judge of that District, dated the 17th December* 1869.

Radha Kristo Chaklanuvis (Judgment-debtor) *Appellant,*

versus

Baboo Kalee Prosunno Roy (Decree-holder) *Respondent.*

Baboo Motee Lall Mookerjee for Appellant.

Baboo Sreenath Doss for Respondent.

In cases under Section 15 Act XIV of 1859, it is in the discretion of the Court to give costs either as provided in Section 1 of the rules passed by the High Court under Act XX of 1865, or (if the proceeding be a miscellaneous case) according to Section 8 of those rules.

Loch, J.—This is a special appeal, and the question before us is whether in awarding costs in this case the lower Courts have in any way acted contrary to law. We cannot say that the orders of the lower Courts in this matter are not warranted by law; for even if we regard this case as a summary suit, which the pleader for the petitioner wishes us to do, there is nothing laid down in the rules made by the High Courts in pursuance of Act XX of 1865 which prohibits the lower Courts giving fees at the rate at which they have given in the present case.

Cases brought under Section 15 Act XIV of 1859 are called "suits" throughout, and it appears to be in the discretion of the Court to give costs, either as provided by Section 1 of the High Court's Rules* or, if the proceeding before it be a miscellaneous case, according to Section 8. It cannot be said that this case comes under Section 8, and therefore we cannot say that the Courts below have acted contrary to law in giving fees under Section 1.

Such being the case, we dismiss the special appeal with costs, and allow sixteen rupees as pleader's fees.

* 5 W. R., Rules, p. 15.

The 13th March 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Conveyance—Minor—Plea of minority.

Case No. 2166 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Hooghly, dated the 29th April 1870, *reversing a decision of the Moonsiff of Hurripal, dated the 19th September* 1869.

Puran Chunder Paul (one of the Defendants) *Appellant,*

versus

Koroona Moyee Dossee (Plaintiff) and another (Defendant) *Respondents.*

Baboo Nil Madhub Sein for Appellant.

Baboo Taruck Nath Sein for Respondents.

The plea of minority can be used to protect a minor but not to injure third parties, e.g., where a sale is deliberately made by a minor at a time when he is sufficiently advanced in years to understand the nature of the transaction, and he receives the full amount of the purchase-money, although the conveyance is invalid by reason of his minority, he must refund the consideration-money before he can get back the property.

Mitter, J.—We are of opinion that before the plaintiff can be permitted to recover the disputed property in this case, he is bound to refund to the purchaser, defendant, the full amount of the purchase-money received by him from the latter, the interest upon that amount being set-off against the profits realized by the purchaser from the date of his purchase down to that of the refund, *i.e.*, of the deposit of the principal amount of the purchase-money by the plaintiff. But the Courts have concurrently found that the sale was deliberately made by the plaintiff at a time when he was sufficiently advanced in years to understand the nature of

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the transaction, and that he had received the full amount of the purchase-money from the defendant. Although, so far as the validity of the sale is concerned, the plaintiff was not quite a major at the time when he executed the conveyance, there is no just reason why he should not refund now to the purchaser the amount of the consideration-money paid by the latter. This then the plaintiff must do before he can get back the property. The plea of minority cannot be used to injure third parties, but it can be used only to protect the minor. We think that under the circumstances, the plaintiff ought to pay to the defendant (the purchaser) the costs of this litigation; and our decree is that the plaintiff should get possession of the disputed property subject to the condition of his paying the amount of the purchase-money to the defendant, or of depositing it in Court within two months from the date of this decree, the purchaser defendant not being held responsible for any profits which he might derive from the property up to that date.

The 13th March 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Defendant as witness.

Case No. 2382 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Rungpore, dated the 13th August 1870, *reversing a decision of the Moonsiff of Ruddiakhalee, dated the 25th February* 1870.

Bhally Mahomed Bukshee (Plaintiff) *Appellant,*

versus

Nobin Chunder Roy Chowdhry (Defendant) *Respondent.*

Baboo Rash Beharee Ghose for Appellant.

Baboo Grija Sunkur Mojoomdar for Respondent.

Where a defendant when summoned as a witness does not appear, the Court is bound to adjudicate upon the question of the sufficiency of his excuse for not appearing.

Bayley, J.—The plaintiff sued to establish his right to, and to obtain possession of, certain lands as lakheraj under a deed of sale.

The defendant's case was that the lands were mâl.

The plaintiff rested his case entirely on the defendant's evidence and undertook to abide by it. The defendant did not appear when summoned. The first Court then decided the case under Section 170 Act VIII of 1859 against the defendant.

On appeal the Lower Appellate Court has reversed that decision. The Lower Appellate Court states that the plaintiff and the defendant were both present before it, and as the plaintiff stated that he would abide by any evidence that would be given by the defendant, and as the defendant when examined stated that the lands in suit appertained to the jote of Jaffer Mahomed, that he received the rents of the said jote, and that he knew nothing about the lakheraj character of the lands, the Lower Appellate Court was of opinion that the plaintiff's suit should be dismissed.

In special appeal the contention on the part of the plaintiff is that there was no sufficient cause shewn by the defendant as to why he did not appear in the first Court when summoned; that the plaintiff did not implicitly rely on the defendant's evidence but summoned him only as an ordinary witness in the case; and that the defendant did not in his depositions shew any personal knowledge of the facts of the case.

We think that both the Courts below have erred in law in their decision. The Court of first instance ought to have gone into and adjudicated upon the question of the sufficiency or insufficiency of the defendant's excuse for not appearing when summoned before the first Court; and the Lower Appellate Court has wrongly considered that it was bound by the fact of the plaintiff relying upon the defendant's evidence, and by considering that if the defendant stated that the lands were not lakheraj, the Court was bound to decide that they were not so. The Court is to come to a finding, independently of the consent of the parties, upon the whole evidence before it. Irrespective of this, we have heard the deposition of the defendant, and it shews that the facts he deposed to are not based upon his personal knowledge.

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We think, therefore, that the case should be sent back to the Moonsiff, who will allow the parties to adduce further evidence that they may choose to give, and upon the whole evidence come to a finding as to whether the lands are lakheraj as stated by plaintiff, or are mâl as stated by defendant.

The costs of this appeal will abide the ultimate result.

The 13th March 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Collectorate peon—Service of notice—Evidence.

Case No. 2396 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Officiating Judge of Rungpore, dated the 8th June 1870, *reversing a decision of the Officiating Collector of that District, dated the 27th August* 1869.

Moinoollah and another (Defendants) *Appellants,*

versus

Goluck Monee Chowdhrain (Plaintiff) *Respondent.*

Baboo Grija Sunkur Mojoomdar for Appellants.

Baboo Rash Beharee Ghose for Respondent.

A Collectorate peon's return of service of notice is not admissible as legal evidence.

Mitter, J.—It is not necessary for us to adjudicate upon the various grounds taken in this memorandum of special appeal. It is sufficient for us to say that the legal service of notice was distinctly disputed by the defendant, special appellant, and the plaintiff has given no evidence whatever to show that the notice was served within the period and in the manner prescribed by law. The return of the Collectorate peon is not admissible as legal evidence, nor was that document put in at the proper time, nor was the peon examined on oath as he ought to have been.

We, therefore, dismiss the plaintiff's suit for enhanced rent upon the ground of non-service of notice, and restore the decree of the first Court, dated the 30th July 1868, the plaintiff being liable to pay to the defendant all the costs of this litigation. The question as to whether the tenure of the defendant is liable to enhancement or not is left open.

The 14th March 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Hajuts or remissions.

Case No. 2399 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Officiating Judge of Rungpore, dated the 18th August 1870, *affirming a decision of the Deputy Collector of that District, dated the 30th November* 1869.

Panaollah Nushyo (Defendant) *Appellant,*

versus

Nubodeep Chunder Shaha (Plaintiff) *Respondent.*

Baboo Kishen Succa Mookerjee for Appellant.

Baboo Issur Chunder Chuckerbutty for Respondent.

A ryot can have no claim in law to hajuts (or remissions), which being acts of grace on the part of the landlord rest solely on his discretion.

Mitter, J.—We think there is no error in law in the judgment of the Lower Appellate Court in this case.

The plaintiff has given evidence to prove the grounds of enhancement mentioned in the notice, and the hajuts (or remissions) referred to by the Judge are exceptional things, for which the defendant in this case, who is a ryot whose tenure was created in 1269 only, can have no claim in law, they being acts of grace on the part of a landlord and rest solely at his discretion in every respect.

We dismiss the special appeal with costs.

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The 15th March 1871.

Present:

The Hon'ble L. S. Jackson and A. G. Macpherson, *Judges.*

Declaratory decree—Execution—Civil Ameen.

Case No. 401 of 1870.

Miscellaneous Appeal from an order passed by the Judge of Patna, dated the 1st July 1870, *affirming an order of the Moonsiff of that District, dated 18th January* 1870.

Kanhya Lall (Judgment-debtor) *Appellant,*

versus

Shaikh Munowur Hossein and others (Decree-holders) *Respondents.*

Mr. R. E. Twidale for Appellant.

Moonshee Mahomed Yusoof for Respondents.

Where a plaintiff had obtained a decree declaring his right to erect a *gurrandee*, HELD that it was not the business of the Ameen in execution to take any part in the erection, and that what was done by the Ameen at the instance of the decree-holder could not be regarded as the act of the Court.

Jackson, J.—THERE is no doubt of the fact that, as the Judge observes, it was not the business of the Ameen in execution of this decree to take any part in the erection of the *gurrandee*, which the plaintiff had got a declaration of his right to erect; and if application had been made in proper time either to the Judge's Court or to this Court to stay proceedings, we think the defendant would have been entitled to an order to stay execution, and the plaintiff would then have been left to erect such a *gurrandee* as the decree of this Court authorized him to erect, and any damage resulting therefrom to the defendant would have been the subject of enquiry in the proper place. At the same time, we do not see our way to making an order now for the taking away of this *gurrandee*; and it does not appear to us necessary that we should make any such order; because the Judge has declared, and we think he has correctly declared, that what has been done in this case by the Ameen at the instance of the plaintiff must be regarded, not as the act of the Court but the act of the plaintiff himself; and consequently anything which results hereafter, and which would be the subject of enquiry, must be dealt with as if the *gurrandee* had been erected by the plaintiff. That being so, we think the appeal ought to be dismissed; but under the circumstances each party must pay his own costs.

The 15th March 1871.

Present:

The Hon'ble L. S. Jackson and W. Macpherson, *Judges.*

Civil Court—Minors—Act XL of 1858.

Case No. 436 of 1870.

Miscellaneous Appeal from an order passed by the Judge of Patna, dated the 23rd August 1870.

Mussamut Mohamudee Begum (Opposite party) *Appellant,*

versus

Mussamut Oomdutoonissa (Petitioner) *Respondent.*

Mr. Mun Mohun Ghose for Appellant.

Mr. C. Gregory for Respondent.

The Civil Court to which the charge of minors and their property is entrusted by Act XL of 1858 is the Court of the Judge of the district.

Jackson, J.—THIS is an appeal against an order made by the Judge in the exercise of the discretion vested in him under Section 21, Act XL of 1858, for removing a guardian previously appointed by the Court.

The care of the persons of all minors and the charge of their property is declared by that Act to be subject to the jurisdiction of the Civil Court, the Civil Court there meaning the Court of the Judge of the district. The Zillah Judge has, as it seems to me, peculiar facilities for ascertaining the fitness of persons who make application to him to be appointed guardians under the Act, and also the fitness and the conduct of persons who may have been appointed; and we should therefore be slow to interfere with a carefully considered order of the Judge in such a matter. But apart from this, it appears to me that in the case before us, no sufficient cause has been shewn by the learned Counsel for the appellant to induce us to interfere with the exercise of the discretion vested in the Court below. I myself am very far from being satisfied from the

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evidence that has been read, that this lady was a proper person to have the custody of her child; and in respect of Oomda Begum also no ground has been made out so as to satisfy us that she ought not to be appointed as guardian.

I think, therefore, that the appeal should be dismissed with costs.

Macpherson, J.—I concur in the proposed order.

The 15th March 1871.

Present:

The Hon'ble G. Loch and W. Ainslie, *Judges.*

Notice—Resumption.

Case No. 1566 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Additional Judge of Nuddea, dated the 18th June 1870. modifying a decision of the Deputy Collector of Ranaghât, dated the 30th September 1869.

Deen Dyal Paramanick (Defendant) *Appellant,*

versus

Maharajah Suttish Chunder Roy (Plaintiff) *Respondent.*

Baboo Romanath Bose for Appellant.

Baboo Unnoda Pershad Banerjee for Respondent.

Where a zemindar after obtaining a decree declaring certain land to be invalid lakhiraj appertaining to his zemindary, serves a notice upon the occupier to pay rent at the rates current in the neighbourhood, such notice does not make the claim one for arrears of rent at an enhanced rate, but is simply a requisition to come to terms.

Loch, J.—We see no ground for interfering with the judgment of the Lower Appellate Court. It is clear that this is not a suit to recover arrears of rent at an enhanced rate, for it does not appear that up to the time of the present suit the defendant had been paying rent at all to the plaintiff. The land held by the defendant was by a decree of Court declared to be invalid lakheraj appertaining to the zemindary of the plaintiff, and the plaintiff having obtained this decree served a notice upon the defendant to pay rent to him at the rates current in the neighbourhood. The mere fact of the service of notice does not, as contended by the pleader for the special appellant, make this a suit for arrears of rent at an enhanced rate. It was simply a requisition out of grace to the defendant in possession to come to terms for the land which has been declared to belong to the plaintiff's estate.

It is also urged before us that the lower Courts have decided the case without requiring the attendance of certain witnesses summoned by the defendant; and though a proclamation was ordered to be issued, the lower Court disposed of the case without waiting for their attendance. We find, no doubt, that there was an order for issuing proclamation for the attendance of certain parties, but the pleader for the special appellant is unable to shew us that he took proper steps for the issue of that proclamation. Under these circumstances, we think that this ground is not valid.

The appeal is dismissed with costs.

The 16th March 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice.*

Court Fees' Act—Old Stamp Law (XXVI of 1867) — Stamps — Valuation.

Case No. 56 of 1871.

Regular Appeal from a decision passed by the Subordinate Judge of Tirhoot, dated the 21st September 1870.

Mussamut Bhugobutty Kooer and others (Defendants) *Appellants,*

versus

Mussamut Kustooree Kooer (Plaintiff) *Respondent.*

Mr. R. E. Twidale for Appellants.
No one for Respondent.

Stamp duty upon an appeal filed after the Court Fees' Act came into operation can only be levied according to the provisions of that Act, even though the original suit was valued on the principles laid down in Act XXVI of 1867.

Note by the Deputy Registrar.—The original suit was valued at rupees 21,000, the market-value of the property in dispute,

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as provided in Act XXVI of 1867 (Note A, Article 11, Schedule B), it having been instituted while that law was in force.

The defendants now appeal from the decree in that suit, and claim to value their appeal under the new law, the Court Fees' Act (Section 7, Clause 5, Note A), at rupees 5103-10 annas and 8 pie, or ten times the annual revenue payable to Government.

It does not appear from the petition of appeal how *ten times* the annual revenue (as stated there) is made out to amount to rupees 5,103-10 annas and 8 pie, while the market-value was estimated at rupees 21,000.

That, however, is a matter of secondary consideration and may probably be easily explained. The point I desire to refer more particularly for the orders of the Court, and which appears to me of some considerable importance, as upon it depends the determination of the fee leviable on the memorandum of appeal, and, as a consequence also, of the sufficiency or otherwise of the stamp upon which the memorandum is engrossed, whether the appellant is at liberty to alter in appeal the value of the property in *dispute* as estimated and fixed in the original suit.

Although there is nothing in the new law against such an alteration being allowed, but on the contrary it would seem to be the natural result of an altered method of estimating the value of property and to be therefore unavoidable, still taking an appeal as part of an entire litigation, a law could hardly be assumed as intended to operate in such a way as to affect the unity and integrity of a suit, by allowing a change of its valuation at a later stage, that of appeal.

Opinion of the Chief Justice.—I think there is no doubt but that stamp-duty can only be levied according to the provision of the Court Fees' Act.

The 16th March 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge.*

Pleading one's own fraud.

Case No. 776 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Nuddea, dated the 28th January 1870, *reversing a decision of the Moonsiff of Kooshtea, dated the 30th October* 1868.

Koylash Chunder Mitter (Plaintiff) *Appellant,*

versus

Dhun Monee Dossia (Defendant) *Respondent.*

Baboo Grija Sunkur Mojoomdar for Appellant.

Baboo Grish Chunder Mookerjee for Respondent.

A person who has deliberately executed a deed by which his own property is bound, is not at liberty to set up as a plea for evading obligation that he did so for the purpose of defrauding other people, but is bound by such deed.

Norman. C. J.—THIS is a suit to establish the plaintiff's title under a mourusee pottah granted by one Ohilla Monee, who was one of the widows of Kristo Dhun Bose, to his (plaintiff's) mother, Bhyrubee Dassee, which was confirmed by the father of the defendant, Dwarkanath Moonshee, by a certain likhun or writing of confirmation which was given in the year 1266. The plaintiff also sues for possession of the property granted by that mourusee pottah to his mother Bhyrubee Dassee.

The first Court raised two issues :—

First.—Whether the suit was barred by limitation, and

Secondly.—Whether the execution of the confirmatory letter was merely a benamee transaction, and whether the defendant can plead it at this stage.

It appears, therefore, to have been admitted by the parties at that time that this

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likhun, or deed of confirmation, was actually written by the father of the defendant at the time it bears date; and we may add that the Subordinate Judge comes to the same conclusion on the facts before him.

The first Court found both issues in favor of the plaintiff, and made a decree declaring the plaintiff entitled to possession and to a declaration that his title under the mourusee pottah should be confirmed.

That decision was reversed on appeal by the Subordinate Judge, Baboo Juggobundoo Banerjee, in a judgment which is not very careful or satisfactory. He first assumes that the plaintiff was not in possession within 12 years before suit. That decision appears to have been mainly based upon a complete mistake as to a decision dated the 20th November 1861, by which the plaintiff obtained a decree for rent against his tenant Alum Mundul. The Subordinate Judge supposes erroneously that that case was decided *against* the plaintiff; whereas so far from that being the case, the plaintiff obtained a decree.

He also relies upon the fact that the defendant is now in possession. Of that there is very little doubt, because the plaintiff appears to have been ousted by a decree on the 24th of July 1867, by which the plaintiff's suit for arrears of rent was dismissed. But that decree affords very little evidence as to what was the state of possession prior to its date.

The substantial defence arises upon the other point. Nobin Chunder Moonshee and Gour Gobind Moonshee purchased the entire 4½ annas of the turuff belonging to the two widows of Kristo Dhun Bose, Ohilla Monee and Ram Monee, in execution of a decree of a Civil Court in Bhadur 1263.

Nobin Chunder Moonshee gave to the plaintiff a writing confirming the mourusee pottah of Ohilla Monee in Bysack 1266. Gour Gobind Moonshee's name also appeared as having executed that confirmatory writing. Kaminee, who was the widow of Gour Gobind, brought a suit against the now plaintiff to set aside the mourusee pottah, so far as it related to the share of her husband in the property which belonged to Ohilla Monee.

That suit resulted in a decree in her favor which established that Gour Gobind Moonshee had not executed the confirmatory likhun.

In that suit the defendant's father, Nobin Chunder Moonshee, and in another suit the defendant himself, have admitted that the confirmatory likhun of Bysack 1266 was executed by Nobin Chunder Moonshee, the father of the defendant.

The Subordinate Judge has disregarded the admissions of Nobin Chunder and of the defendant. He says that the likhun, having been executed while the suit of Punchanun Bose (the reversionary heir of Ohilla Moonee and Ram Monee) was pending, was executed with a "bad motive," and "therefore the likhun cannot be held by "a Court of justice as a real *bonâ fide* "evidence, even if it was actually executed "by the party granting it."

It appears to us, however, that a person who has deliberately executed a deed by which his own property is bound, is not at liberty to set up that he did so for the purpose of defrauding other people. He is bound by the deed to which he has put his hand.

The Subordinate Judge does not come to any distinct finding as to what the fraud was, but seems to have some *suspicion* regarding the *bona fides* of the likhun and therefore rejects it. But suspicion is not enough to warrant a Judge in refusing to act upon proved and admitted facts. It appears to us that the Subordinate Judge has without good or sufficient reason reversed the decision of the first Court, which must be restored and affirmed with all costs.

The 16th March 1871.

Present:

The Hon'ble E. Jackson and W. Ainslie, *Judges.*

Occupancy rights—Transfer.

Case No. 1978 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Tipperah, dated the 15th July 1870, affirming a decision of the Sudder Moonsiff of that District, dated the 25th September 1869.

Doorga Pershad Misser and another (Defendants) *Appellants,*

versus

Brindabun Sookul (Plaintiff) *Respondent.*

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Baboos Doorga Mohun Doss and *Rash Beharee Ghose* for Appellants.

Baboos Romesh Chunder Mitter and *Chunder Madhub Ghose* for Respondent.

Where a proprietor grants permission to a party to build upon and occupy a portion of his land, without any reservation of right to oust him at will or limitation of the grant to him individually, the permission must be construed in the ordinary way: and if the occupation continues for a very long period, the occupant cannot be turned out at a moment's notice or denied the power of transferring his right, though he may be sued for rent.

Ainslie, J.—In execution of a decree against one Seetaram Dobay, certain land with the mud houses built thereon was sold and purchased by the defendant in the present suit. It was then described as the ancestral lakheraj land of the judgment-debtor. The plaintiff has brought this suit to establish his title to the land.

It has been found by the Courts below that the land was not the lakheraj of Seetaram Dobay, but formed a portion of the property belonging to the plaintiff. The claim includes two plots of land, but we have now to deal only with the first plot.

The Moonsiff held that as Seetaram Dobay had been in occupation of this land by living thereon for a period of something like 40 years, the plaintiff was not entitled to eject the purchaser but could only take rent from him. The Subordinate Judge reversed that finding of the Moonsiff, and held that the plaintiff was entitled to take possession of the land itself.

The question which we have to consider is whether the judgment of the Moonsiff or the judgment of the Subordinate Judge on this point is the correct one. It appears to us that this question turns upon the consideration whether Seetaram Dobay himself was liable to be dispossessed at the will of the plaintiff; and if not, whether his right to occupy the land with the buildings was not a right which had become transferable. A case has been cited by the appellant to be found in XII Weekly Reporter, page 496, in which the late Chief Justice, Sir Barnes Peacock, has express an opinion which seems to us to bear directly upon this case. He says—"Independently of this, speaking "for myself, I should say that if one man "grants a tenure to another for the purpose "of living upon the land, that tenure, in the "absence of any evidence to the contrary, "would be assignable. I know of no law "which prohibits a man who gets land for "the purpose of building, from assigning "his interest in it to another."

It is said by the respondent that this is not a case in which the plaintiff created a tenure in favor of Seetaram in order that he might live upon the land, but that he merely gave him permission to occupy a certain space within the *bassabaree i. e.*, within the compound of his own house. No doubt, it is found by the Moonsiff that the house erected by Seetaram immediately adjoins the house of the plaintiff. But it does not follow that the land upon which it stands is a part of what may be called the compound of the plaintiff's house. Although the land in suit may be adjoining that occupied by plaintiff, the occupation of it by Seetaram or any one else need not necessarily interfere with the occupation by the plaintiff of his own house and of the land attached to it. There is nothing to show that it does so.

It is said that the plaintiff allowed other persons to build in the same way in which he allowed Seetaram to do so, and that when they vacated their houses he again took possession of the land. Some evidence to this fact has been read. But there is no evidence put forward to show that in any one instance the holder of any such land has attempted to assign his right to others, and has been interfered with by the plaintiff and failed in carrying out such assignment; nor do we know under what circumstances the houses were vacated. The Subordinate Judge has not found, and apparently there there is nothing to show, that the permission granted by plaintiff to Seetaram was given with any reservation of right to oust him at will or was limited to him individually; and therefore we think that it must be taken to have been a permission to build and occupy in the ordinary way, and that this occupation having continued for a very long period of time, it is impossible to suppose that the plaintiff had any power to turn Seetaram out at a moment's notice, or that Seetaram had not power to transfer his right to any other party.

The appeal accordingly is decreed, the decision of the Subordinate Judge is reversed, and that of the Moonsiff is restored and affirmed.

The appellant will have his costs in this Court and the Lower Appellate Court.

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Jackson, J.—I quite agree with Mr. Justice Ainslie. No doubt it is very difficult to define the rights of parties in cases of this sort, where there is no written document but a mere permission to occupy, and where occupation has been unaccompanied by any payment of rent. Every thing must depend upon the circumstances of the case. No doubt allowing a servant to occupy a portion of the dwelling-house by erecting a temporary building thereon would confer upon him no tenant right whatever: probably even allowing a relation to build any temporary building within a portion of the premises would confer upon him no tenant right whatever. But the present case appears to me quite distinct from all such cases. It is not the case, as I understand it, of a person being merely allowed to occupy a piece of land in the defendant's compound. It was not given to him for any temporary purpose; he has been in possession about 40 years; he has built upon it; he has planted trees upon it; and in fact he has exercised all the usual rights of an occupier upon the land. It seems to me, therefore, that his holding is not a temporary holding. I think it was rightly put in this case that if the plaintiff could not have turned out Seetaram Dobay, he cannot turn out the present defendant. But I am by no means satisfied that under the circumstances the plaintiff could have ejected Seetaram Dobay. I think the first Court was quite right in saying that the plaintiff's proper course was to sue for rent. I would, therefore, set aside the Appellate Court's decision and restore that of the first Court.

The respondent will pay the costs of this and the Lower Appellate Court.

The 16th March 1871.

Present:

The Hon'ble E. Jackson and W. Ainslie, *Judges.*

Finding—Possession.

Case No. 2008 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Tipperah, dated the 20th June 1870 *reversing a decision of the Moonsiff of that District, dated the* 12*th March* 1869,

Shaikh Ashruf and others (Plaintiffs) *Appellants,*

versus

Mahomed Hossein and others (Defendants) *Respondents.*

Baboos Kalee Mohun Doss and *Bhowanee Churn Dutt* for Appellants.

Baboos Nuleet Chunder Sein and *Okhil Chunder Sein* for Respondents.

In a suit to recover the value of trees grown on disputed jungle land, which one party had cut down but the other had carried away, plaintiffs obtained a decree on the ground that, as they had cut the trees, they were entitled to their value until a final decision was passed in the Civil Court with regard to the trial to the land:

HELD that that was not a finding that the successful party was in possession.

Jackson, J.—WE think that this case must be remanded to the Subordinate Judge of Tipperah with directions to him that he will re-consider the case and pass a fresh decision upon it. The plaintiffs preferred this suit to recover possession of a small portion of jungle land which the plaintiffs alleged belonged to their talook, and which was situated on the boundary of their talook and of that of the defendants. It appears that there was a former litigation regarding some trees which stood upon this land, and which the defendant cut down, but the plaintiffs removed them. The defendant, thereupon, brought a suit for the value of those trees and obtained a decree. The plaintiffs, therefore, now bring the present suit alleging that the result of those proceedings was to dispossess them from the land upon which those trees stood, and they accordingly sue to recover possession.

The defendant, on the other hand, denies the plaintiff's title, pleads limitation, and alleges that the land is situated within his talook.

The first Court in deciding the question of limitation pointed out that "the defendant had admitted in his deposition that "he never on any other occasion cut the "trees of the disputed land or sold the same. "The land in dispute is occupied by jungle. "In his deposition the defendant could not "state any other act indicating his ownership." The first Court upon this held that the plea of limitation raised by the defendant was futile, and that the cause of action must be held to have arisen from the time when the defendant sold the trees

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to Ram Churn and the latter cut them down.

The first Court also went on to try the question of title and came to an opinion in favor of the plaintiff.

The defendant appealed to the Subordinate Judge. The Subordinate Judge in stating the facts of the case no where mentions the decision to which the Moonsiff has arrived, either on the point of limitation or upon the merits. He treats the case almost as if it was an original suit instituted in his Court, instead of an appeal from the decision of another Court. He puts down the issues in the case, not the points upon which the appeal was preferred to him. He does not decide whether this land was jungle land, as the first Court had held it, and whether the plaintiff's cause of action arose at the time the first Court had held it to have arisen. But he goes at once to the plaintiff's evidence, and he rejects in the first place four of his witnesses, evidently upon no other reason than that the witnesses came from different villages. Why witnesses' evidence should be rejected because they came from different villages it is very difficult to understand. It is very possible that the inhabitants of an adjoining village may be able to give evidence as to what was the boundary, and more especially whether the plaintiff or the defendant had been in the habit of making use of the trees growing upon the land; and the witnesses in fact did give evidence. It is for the Appellate Court to consider that evidence and to give an opinion upon it.

The evidence of the witness Kalla Gazee is rejected by the Subordinate Judge because the fact that he measured the land on the part of the plaintiff does not prove that the land belonged to the plaintiff. It is very possible that that is not final evidence upon the point, but it is some evidence of an act of ownership upon the land; and if it is the fact that Kalla Gazee went on the part of the plaintiff to measure the land, that fact should be taken into consideration, more especially when the defendant himself states that he exercised no rights of ownership upon this land until he cut the trees.

The Subordinate Judge is equally wrong when he alludes to the former decision which was passed by the Moonsiff regarding the cutting and carrying away the trees. The Moonsiff did not, as the Subordinate Judge says, on that occasion find that the defendants were in possession of the land, but as the defendants cut the trees, consequently they were held entitled to the value of them until the final decision with regard to the title was passed in the Civil Court. That was no finding whatever that the defendants were in possession.

The whole case seems to have been tried in a very summary manner by the Subordinate Judge. We think the case must go back to him in order that he may fully consider the evidence of the witnesses who came from different villages, as well as the other evidence produced by the plaintiff and that produced by the defendant, that he may finally determine when the cause of action arose, and re-decide the qestion both on the point of limitation and also on the merits.

Costs to follow the result.

The 17th March 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Jurisdiction—Mortgaged land—Section 5 Act VIII. 1859.

In the matter of

Ram Lall Mookerjee (Plaintiff) *Petitioner,*

versus

Chittro Coomaree and another (Defendants) *Opposite Party.*

Baboo Umbika Churn Banerjee for Petitioner.

No one for Opposite Party.

A suit to have certain lands declared liable for the satisfaction of an instalment bond is substantially a suit for an interest in land, and as such cognizable by the Courts within whose jurisdiction the property is situated, even though the cause of action has not arisen there and the defendants reside elsewhere.

Kemp, J.—In this case the plaintiff, Ram Lall Mookerjee, sued the defendant for a sum of rupees 8,435 due under a kistbundee, the main object of the suit being to have it declared that certain properties which were mortgaged in satisfaction of the instalment-bond were liable for that sum. In the plaint, the plaintiff states distinctly that the defendants do not reside within the jurisdiction of the Beerbhoom Court, and that the

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cause of action, that is to say, the borrowing of the money, arose in another district; but the plaint states that as the major portion of the mortgaged premises is situated in the Beerbhoom district, the case is cognizable by the Beerbhoom Court.

The Subordinate Judge of Beerbhoom without giving any reasons why the suit should not be cognizable by his Court, inasmuch as the major portion of the mortgaged premises is situated within the jurisdiction of his Court, passes an order to the effect that because the defendants do not reside within the limits of his jurisdiction and the cause of action has not arisen within such limits, the plaint must be rejected and returned to the plaintiff; and the plaintiff now asks the Court to interfere and to direct the Subordinate Judge to recieve the plaint.

Under Section 5 suits for land or other immoveable property are cognizable by the Court within whose jurisdiction the lands or property may be situated. Now, it appears to us that this is substantially a suit for an interest in land, as it is a suit to have certain lands declared liable for the satisfaction of the kistbundee executed by the defendants in favor of the plaintiff. We therefore think that the Subordinate Judge should have proceeded to entertain this plaint; and we accordingly return it to him with directions to receive it on his file, if endorsed on a proper stamp, and if there are no other objections to its admission.

The 17th March 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Ejectment—Pleas—Right of suit—Section 15 Act XIV. 1859.

Case No. 1732 of 1870.

Special Appeal from a decision passed by the Additional Judge of Backergunge, dated the 1st June 1870, *reversing a decision of the Moonsiff of that District, dated the 26th July* 1869.

Kumul Dutt and others (some of the Defendants) *Appellants,*

versus

Mohun Malla and others (Plaintiffs) *Respondents.*

Baboo Rajendro Nath Bose for Appellants.

No one for Respondents.

In a suit to recover possession of property from which plaintiffs have been ousted by defendants who have no title at all, the latter cannot set up the claim of a third party so as to defeat that of the plaintiffs, whose right moreover is not in any way affected by the fact of the suit not having been brought within the time limited by Section 15 Act XIV of 1859.

Norman, C. J.—It appears that there has been quite enough proved in this case to entitle the plaintiff to a decree.

One Doya Ram, the holder of a certain tenure, died leaving certain persons who were his heirs. After his death the plaintiffs were in possession of the tenure, claiming as heirs of Doya Ram, rightly or wrongly it does not very clearly appear. But they were put out by the defendants who have failed to prove that they had any title at all. The result is that the plaintiffs' title is preferable to that of the defendants, and that the defendants cannot set up that somebody else other than the persons whom they ousted have or may have some title so as to defeat the claim of the plaintiffs to be restored to possession as against them. The fact that the suit was not brought within the time limited by Section 15 Act XIV of 1859 does not in any away affect the plaintiffs' right to a decree for possession. In the present suit, if the defendants could have shown a title they would have have been at liberty to do so. In a suit brought within the time limited by Section 15, they could not have set up such title if they had wrongfully ejected the plaintiffs.

The appeal is dismissed.

The 17th March 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges*.

Stamp—Review.

Shahazada Fukeerooddeen Ahmed, *Petitioner.*

Baboo Debendro Narain Bose for Petitioner.

Where an applicant for review is not informed at the time of his application that his petition is insufficiently stamped, he cannot at the time of hearing be refused permission to make up the proper valuation.

Kemp, J.—The application in this case was within time, and the petitioner was not required by the Court to furnish the addi-

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tional stamp requisite to make up the proper valuation until the case come on for hearing. At that time the petitioner offered to furnish the additional stamp, and the Court refused to permit him to do so. If the petitioner had been informed that his application was on a wrong stamp at the time the application was made, he would have had time either to file a petition on the proper stamp, or there and then to make good the difference. No opportunity having been given to him to do so, and the Court not having required him to make good the stamp at the proper time, we think that this is a case in which we ought to direct the lower Court to receive from the petitioner the proper amount of stamp, and to permit him to apply for a review of the former judgment.

The 17th March 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge.*

Irregularity—Section 104 Act X. 1859.

Case No. 1736 of 1870.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 26th May 1870, *affirming a decision of the Moonsiff of Lawkatee, dated the 9th February* 1870.

Mahomed Ayenooddeen (Plaintiff) *Appellant,*

versus

Kalee Doss Chundo and another (Defendants) *Respondents.*

Baboos Bhugobutty Churn Ghose and *Oomesh Chunder Banerjee* for Appellant.

Baboos Kalee Mohun Doss and *Romesh Chunder Mitter* for Respondents.

Want of clearness in the specification of the arrears and costs for which a sale takes place, or in the mode in which the notice is published, is not an irregularity vitiating a sale if fraud is absent.

Norman, C. J.—We see no ground for interfering with the judgment of the Lower Appellate Court. It is quite plain that the Judge has found that there was no fraud in conducting the sale in this case, and there does not appear to us to be the slightest ground for imputing any fraud. Even if there was any irregularity in not specifying as clearly as the parties should have specified what was the amount of the arrears and costs for which the sale took place, or in the mode in which the notice of sale was published, it is provided by the 104th Section of Act X of 1859 that such irregularity does not vitiate the sale. It would be very unfortunate if it were otherwise. As far as we can see, the special appellant has not sustained any injury by the supposed irregularity in the present case.

The appeal is dismissed with costs.

The 18th March 1871.

Present:

The Hon'ble G. Loch and W. Ainslie, *Judges.*

Section 14 Act III. 1857—Damages—Right of action.

In the matter of

Nomaz Mollah, *Petitioner,*

versus

Lall Mohun Tagadgeer and others, *Opposite Party.*

Baboo Khetturnath Bose for Petitioner.

No one for Opposite Party.

Where a person whose cattle have been illegally distrained fails to take advantage of the remedy provided by Section 14 Act III of 1857, he is not thereby prohibited from bringing an action for damages in a Civil Court.

Loch, J.—We think that the view taken by the Judge of the Small Cause Court that a suit for damages will not lie in a case of this kind is not correct.

It is true that Section 14 of Act III of 1857 gives a summary remedy to persons whose cattle have been illegally distrained; but it does not prohibit a person, who is unable from any circumstance to take

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advantage of that remedy, from bringing an action for damages in a Civil Court. Under Section 14 a person may complain against a seizure within 10 days before a Magistrate, but many things may happen to prevent a person from complaining within that time; and if he fails to do so, we do not think that the law intended that he should be deprived of all remedy for the illegal act of the person carrying off his cattle.

In the present case the cattle were impounded; the plaintiff paid the usual fine for their release under the 6th Section: he did not apply to the Magistrate under Section 14, but brought an action for damages in the Civil Court against the defendant.

We think that such a suit will lie in the Civil Court; and we therefore set aside the order of the Judge of the Small Cause Court, and direct him to take up the case and dispose of it in the usual way.

The 20th March 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble E. Jackson, *Judge*.

Admission—Clause 3 Section 66 Act XX of 1866—Evidence.

Reference to the High Court by the Officiating Judge of Backergunge, dated the 8th December 1870.

Mahomed Haneef Meajee and others (Defendants) *Appellants*,

versus

Mozhur Ali (Plaintiff) *Respondent*.

No one for Appellants.

Baboo Woomesh Chunder Banerjee for Respondent.

An admission before a Registrar of the receipt of purchase-money attested by his endorsement, as required by Clause 3, Section 66, Act XX of 1866, though evidence of the strongest and most reliable description, ought not to be treated as conclusive. In the face of such admission, however, the party seeking to get out of its effect must make out his case by very clear evidence.

Case.—PLAINTIFF sold his share of a ryotee jote to the defendants for Rs. 100, and executed a deed of sale on the 12th Falgoon 1276. The document recites that the consideration-money "passed from hand to "hand," and it was attested by five witnesses. It was registered before the Moonsiff of Dowlutkhan (temporarily in charge of the Sub-Registrar's Office) on the 23rd February 1870, and the Registering Officer endorsed upon the document, as required by Act XX 1866, Section 66, Clause 3, that "the executant (plaintiff) admitted receipt "of consideration as stated in the deed."

Plaintiff now asserts that he did not receive the consideration and sues to recover $\frac{5}{6}$ths of it, having unnecessarily, I think, relinquished $\frac{1}{6}$th of the claim on account of the minority of one of the vendees. He could, nothing else withstanding, have recovered the whole sum from the adult vendees.

Two persons have been examined by plaintiff out of the five attesting witnesses to the deed. They both state that for form's sake 10 rupees passed between the plaintiff and Haneeff Mohamed, one of the vendees, but that the plaintiff actually received possession of no part of the consideration-money though he admitted that he had. Plaintiff's other witnesses similarly stated that he admitted to them receipt of the consideration-money, but that they were aware that it had not been paid. Plaintiff's own version is that he was at the time an inmate of Haneeff Mahomed's house, and allowed him to retain the purchase-money instead of paying it to him (plaintiff).

The remaining three witnesses to the deed have been examined by the defendant, and their evidence does not establish the payment of the consideration-money to plaintiff. The first states that Rs. 100 passed from hand to hand, but that plaintiff was only paid Rs. 50 at the time. The second states that Rs. 100 was paid at the time; and the third that Rs. 60 was paid at the time.

As a matter of fact, I find in concurrence with the Moonsiff that the plaintiff did not receive any portion of the consideration-money. But I am of opinion that he is not entitled to come into Court, and that his case should not have been entertained. I know that evidence is admissible to prove that money was not actually received, although it may be stated in the written instrument of sale that it has been received; but I am not

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aware that when a person has orally admitted receipt of the money, as stated in the deed before the Registrar, and thus made a statement which, if not true, renders him liable to seven years' imprisonment under Section 91 of the Registration Act, evidence is admissible from the person who made the statement, or on his behalf, to prove that it was not true. I am, therefore, of opinion that the plaintiff is bound by the admission made before the registering officer and recorded under his hand as required by law; and that his claim should therefore be dismissed and this appeal decreed with costs; but as the point is one of importance as illustrating the effect of an admission before the Registrar, I solicit the favor of an opinion from the High Court under Section 28 Act XXIII. 1861. The appeal is decreed with costs contingent upon such opinion. Reference is made at the instance of (plaintiff) respondent's pleader.

The judgment of the High Court was delivered as follows by—

Norman, C. J.—We think that the admission of the receipt of the purchase-money before the Registrar ought *not* to be treated as *conclusive*. The certificate is *primâ facie* evidence of the facts therein mentioned under Section 68, and amongst other things of the fact of payment of the consideration-money, if it contains a mention that such payment has been admitted in the presence of the Registrar. But it might be shown that such admission had been procured by fraud or misrepresentation; that it was part of the arrangement that the money taken as payment should remain for a time in the hands of the purchasers at interest, or be applied by them in a particular way.

But in the face of a formal admission of payment made before the Registrar, which ordinarily speaking is evidence of the strongest and most reliable description, a party seeking to get out of the effect of the admission should make out his case by *very clear* evidence indeed.

We would venture to suggest that the Judge in this reference seems to treat the fact of payment too much as if it were a matter to be proved by the defendant, rather than that non-payment is a matter only to be established by the clearest proof by one who seeks to avoid the fact of a solemn admission deliberately made by him.

The 20th March 1271.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble E. Jackson, *Judge*.

New trial—Notice.—Section 21 Act XI of 1865.

Reference to the High Court by the Judge of the Small Cause Court at Sealdah, dated the 8th November 1870.

Louisa Vaughan, *Petitioner*,

versus

Lall Chand Ghose and others, *Opposite Party*.

Baboo Tarucknath Sein for Petitioner.

No one for Opposite Party.

A judgment-debtor in a Small Cause Court on the day (28th July) of her arrest in execution of an *ex-parte* decree deposited the amount claimed, and gave notice under Section 21 Act XI of 1865 that on the next day of the sitting of the Court she would file her grounds for a new trial. The Court next sat on the 1st August, and she filed her application on the 2nd.

HELD that the Judge of the Small Cause Court was right in proceeding to hear the application, instead of going through the formality of telling her to first give notice and apply again.

Case.—IN suit No. 2326 of 1867. Lall Chand Ghose and Shama Churn Ghose sued Mrs. S. V. Brown for 105 rupees 6 annas 9 pie on account of goods sold and delivered, and on 5th February 1868 obtained a verdict against the defendant. Subsequently in execution against the said S. V. Brown, the petitioner being arrested on 28th July 1870 deposited the amount for which execution was levied, and on that date gave notice to the Court under Section 21 Act XI of 1865 "that on the "next day of the sitting of the Court she "would file her grounds of new trial." This notice was indispensable in reference to the High Court's Ruling of 5th June 1869, XII Weekly Reporter, Civil Rulings, page 17. On the 2nd of August the peti-

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tioner filed an application for a new trial, setting forth the grounds on which she desired one.

It is contended on the opposite side that the petitioner is out of time, inasmuch as the next sitting of the Court at Sealdah was on the 1st of August, and the application for a new trial was filed on the 2nd idem. If the petitioner be considered a party to the suit the contention is valid, as under the High Court's Ruling of 8th June 1870 the application for a new trial must in all cases be made at the next sitting of the Court. Such, however, is not the case. If the names* used were *idem sonans* with the true ones, the misnomer would have been immaterial, as it is the duty of the party sued by a wrong name not to allow judgment to go against him without attempting to rectify the mistake; but in the present case the misdescription is material in reference to Section 26 of the Code of Civil Procedure—there being a substantial difference between the names S. V. Brown and Vaughan, and it is not alleged that the name and description were not within the knowledge of the party pleading. The descriptive error is not only in the Christian name but also in the surname. The Christian name ought always to be perfect, and the English Law is not so precise as to surnames as it is of Christian names, and in the absence of the body the identity could not be known. The Court therefore holds that Louisa Vaughan was not legally bound to answer to a summons issued in the name of S. V. Brown. A name was invented to make a distinction between person and person, and the petitioner was not so described so as to fix the identity of both names in one person. It is not contended that the petitioner's name by reputation was S. V. Brown, or that she in fraud had transactions under a feigned name. On the contrary, the decree-holder declares her name to be "Beebee Ban." The Court's view of the intent of Rule 5 of the Rules of Practice of Small Cause Courts can afford the decree-holder no vantage ground, 1st, because the petitioner was not commonly known as S. V. Brown; 2nd, the misnomer is only immaterial in the presence of the person and must be pleaded at the time of trial by the party himself who is misnomered, when the record can be corrected. The petitioner is *dehors* the scope of the record, and cannot be affected by any rules applicable to parties within it, as the first portion of Section 21 Act XI of 1865 relates to an *ex-parte* decree against a defendant. For the above reasons, the Court holds that the petitioner is entitled to a hearing, and that the original case should be re-opened. The judgment of the Court in case No. 2326 of 1867 is hereby set aside; and as this ruling involves a construction on Rule 5 of the Rules of Practice for Courts of Small Causes, and as there is no precedent of the High Court bearing on the subject, the above order is made contingent upon the opinion of the Hon'ble the High Court.

The Court held its sittings at Howrah on 29th and 30th of July—the 31st was a Sunday.

* i. e., the surname and the initials or contraction used for the Christian name.

† *Prudentia corporis tollit errorem nominis.*

The judgment of the High Court was delivered as follows by—

Norman, C. J.—I think it clear that the petitioner ought to be heard. Section 21 allows 30 days after process for enforcing the decree has been executed within which notice of an intention to apply to the Court to set aside an *ex-parte* decree may be given. The petitioner came on the 28th of July, the day when she was arrested, and she gave notice of an intention to apply in the first Court day, which turned out to be the Monday following, the 1st of August. Her application was in fact made on the Tuesday, the 2nd. I think the Judge was clearly right in proceeding to hear the application, instead of going through the formality of telling her to first give notice and apply again. Costs of this reference to be costs in the cause for the successful party.

Jackson, J.—I agree.

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The 6th March 1871.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Decree-holder—Assignee—Section 208, Civil Procedure Code.

Case No. 421 of 1870.

Miscellaneous Appeal from an order passed by the Officiating Judge of East Burdwan, dated the 2nd August 1870, *affirming an order of the Subordinate Judge of that District, dated the 18th September* 1869.

Shama Puddo Dutt (Decree-holder) *Appellant,*

versus

Nobin Chunder Bose (Judgment-debtor) *Respondent.*

Baboo Rash Beharee Ghose for Appellant.

Mr. C. Gregory and *Baboo Grish Chunder Ghose* for Respondent.

A party to a suit can enforce any decree he may get as a matter of right; but an assignee of such decree can only do so after obtaining the Court's permission, which depends entirely on the Court's discretion. An assignee, therefore, is not in the same position as the original decree-holder, and is not entitled to have the same privileges.

Glover, J.—THE question in this appeal is whether an order passed under Section 208 of the Civil Procedure Code is appealable.

The decree-holder assigned by sale his decree to Shama Puddo Dutt, and applied to have the purchaser's name substituted for his own. The Subordinate Judge refused this, but allowed the purchaser's name to be associated with his vendor's as joint decree-holder.

The assignee appealed against this order to the District Judge, who under the authority of Megh Narain Singh and others *versus* Radha Pershad Singh* (IV Bengal Law Reports, p. 200) decided that no appeal lay. Shama Puddo Dutt now appeals specially to this Court.

There is no doubt a conflict of decisions on the point. In Huro Lall Doss *versus* Sojawut Ali, VIII Weekly Reporter, p. 197, it is laid down that the words "party to a suit" in Section 11 Act XXIII of 1861 include assignees, and that a purchaser would consequently have the right of appeal.

And much the same principle was decided in Bishtoo Narain Banerjee *versus* Gunga Narain Biswas, XI Weekly Reporter, p. 368.

But in support of the Judge's opinion, there is not only the case he refers to, but the decision of the Full Bench in the case of Sheikh Wahid Ali *versus* Mussamut Jamai, XI Weekly Reporter, F. B. p. 1, where it was held that the term "parties to the suit" in Section 11 Act XXIII of 1861 refers only to those who are parties in their own right, and not to those who are parties merely in their representative character.

And if the words of the law are to be construed literally, they cannot be made to include a person who had nothing whatever to do with the suit, and only obtained an interest after the decree had been passed. The words of the Act seem, moreover, to make a great distinction between the two. A party to a suit can enforce any decree he may get as a matter of right; an assignee of such decree can only do so after obtaining the Court's permission—a permission which depends entirely on the Court's discretion. The Court "may grant the application" "if it think proper"—(Section 208, Code of Civil Procedure). An assignee, therefore, is not in the same position as an original decree-holder, and may reasonably be held not to have the same privileges.

The judgment of the late Chief Justice in the Full Bench case above quoted, and in which the majority of the Judges concurred, goes very fully into the question of "parties to the suit," and decides that "the Legislature intended only parties in their own "right, and not parties in a representative "character." The facts of the case before the Full Bench were no doubt different from those of the case now under consideration, but the reasoning on which the decision was based applies equally to both. I conceive, therefore, that we ought to follow the decision of the Full Bench, notwithstanding the contrary opinion expressed by a Division Bench in Bishtoo Narain Banerjee *versus* Gunga Narain Biswas,—the result being that this appeal is dismissed with costs.

Kemp, J.—I am of the same opinion.

* 13, W. R., p. 224.

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The 20th March 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble E. Jackson, *Judge.*

Bond—Interest.

Reference to the High Court by the Judge of the Small Cause Court at Hooghly, dated the 17th November 1870.

Mirza Mahomed Hossein *alias* Mirza Nowab *Plaintiff,*

versus

Shahazadah Tuqueerooddeen Saheb *Defendant.*

Moonshee Mahomed Yusoof for Plaintiff.
No one for Defendant.

When the rate of interest stipulated for in a bond is exorbitant, and there is no express understanding that the interest is to continue at the same rate after the expiration of the period fixed for re-payment, a Court need not assume that the parties are bound by contract to that rate after such period.

Case.—The plaintiff sues the defendant for the recovery of rupees 200, being only the principal amount on a registered bond, dated 1st July 1868, and payable in September of the same year, and lays no claim for interest which, it is alleged, has been paid to him in full at the rate of 5 per cent. or rupees 10 per month, as shewn to have been duly endorsed on the back of the bond.

The defendant appeared by his pleader, admitted execution of the bond and receipt of consideration-money, but pleaded payment of the whole amount of principal and interest. He says that he paid to the plaintiff from time to time a certain sum of money which aggregated to rupees 250, and which he has every reason to believe has satisfied the loan with interest in full; that he is willing to pay any balance which by calculation will be found by the Court to be still due by him; and that it is not reasonable and just that the whole amount paid by him should be liquidated in payment of interest alone, as it is not binding on him by any covenant in the bond that on default of payment of the loan with interest at the due date he will be liable to pay interest at the stipulated rate of 5 per cent. per month up to the date of payment of the debt.

The point for determination which arises in this case, therefore, is—

Whether the plaintiff is entitled to receive interest at the stipulated rate of 5 per cent. per month for the whole period from the date of the bond up to the time of payment of the loan, or only 12 per cent. interest should be allowed from the due date of payment till the date of action, the stipulated rate of interest in the bond being allowed up to due date.

The plaintiff admits that he has received from the defendant the sum of rupees 250, but argues that the same has been applied to payment of interest at rupees 10 per month as stipulated in the bond, and that the admission of the defendant to pay for the whole period interest at that rate is implied from the fact of the several endorsements of payment on the back of the bond being for interest alone.

From a perusal of the bond itself, it appears that the debt was recoverable in September 1868 with interest at 5 per cent. per mensem, and that there was no special stipulation on default of payment to pay interest at the prescribed rate up to the date of liquidation of the whole debt. In the absence of such an agreement in the bond, I am of opinion that the plaintiff cannot claim interest at the stipulated rate of 5 per cent. from the due date up to the date of action, the plaintiff having been at liberty to demand payment at any time after due date of the deed, as prescribed in the High Court's decision of the 21st April 1862, Surendro Nath Roy *versus* Banee Madhub Muddock, *vide* Sutherland's Small Cause Court References, page 19.

As to the endorsements of payment on the back of the bond, it is admitted by the plaintiff himself that they were not made by the handwriting of the defendant: hence the argument set forth by the plaintiff in respect to the liability of the defendant to pay interest at the fixed rate up to the date of action is of no weight.

The plaintiff's pleader urges further that the decision of the High Court alluded to above can have no bearing upon a question of this nature, as the ruling cited has reference to an action for both principal and interest, this case being for principal alone, and that he can show subsequent adverse decisions of the High Court in support of his plea; but he entirely failed to submit for my inspection any such rulings.

On a calculation of the principal and interest at the rate of 5 per cent. up to the

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date of payment, and thereafter at 12 per cent. up to the date of action, and deducting therefrom the several payments made by the defendant, it appears that the sum of rupees 4-2-0 is the amount still due by the defendant. I would, therefore, give the plaintiff a decree for rupees 4-2-0 only with costs in proportion, *viz.*, rupees 2-1-4, in all rupees 6-3-4, contingent on the decision of the High Court.

The judgment of the High Court was delivered as follows by—

Norman. C. J.—It appears to us that the decision of the Judge of the Small Cause Court is correct. Where by a bond a sum of money is made payable on a particular day with interest at a certain rate, no doubt if the money is not paid on the day named, it may generally be taken that the parties contemplate that the rate of interest stipulated by the bond will continue to be paid.

But no invariable rule can be laid down on the subject. Where it appears from indorsements on the bond in the handwriting of the obligor of the bond that he has continued to pay interest at the rate stipulated on the bond after it has fallen due, that is a strong circumstance to show that both parties understand that the debt is to continue at the rate stipulated in the bond.

When the rate of interest on the bond is exorbitant, and there is no express understanding that interest is to continue at the same rate after the expiration of the period mentioned for re-payment in the bond, we do not think that a Judge must necessarily assume that the parties are bound by any contract that interest should continue to be paid at that rate after the time mentioned in the bond. In the present case, the bond bears interest at 5 per cent. per mensem or 60 per cent. per annum.

There are no indorsements of interest in the handwriting of the obligor to show that he agreed to pay interest at the same rate after the due date of the bond. The Judge under the provisions of Act XXXII of 1839 has allowed interest at 60 per cent. to the time stipulated in the bond, and 12 per cent. from the date when the bond became due till decree. In allowing interest by way of damages at that rate, we think that the Judge has probably done what is just and right under all the circumstances.

The 20th March 1871.

Present:

The Hon'ble A. G. Macpherson and Onoocool Chunder Mookerjee, *Judges.*

Judgment-debtor's representative—Liability—Accounts.

Cases Nos. 296 and 443 of 1870.

Miscellaneous Appeals from an order passed by the Subordinate Judge of Dacca, dated the 29th June 1870.

Aseemoonnissa (Claimant) *Appellant,*

versus

Ameeroonnissa Khatoon (Decree-holder) *Respondent.*

Baboos Chunder Madhub Ghose and *Luleet Chunder Sein* for Appellant.

Baboo Sreenath Banerjee for Respondent.

When a party is proceeded against as the representative of a deceased judgment-debtor, and it is proved that property which belonged to the deceased judgment-debtor has come into his hands, it lies upon him to account for such property and to include in his account mesne profits whether accruing in the shape of rents or of interest.

Macpherson, J.—It appears to me that we need not call upon the respondent in these two cases which in fact arise out of, and form part of, one application for execution of a decree. If the matter had stood as it did at the time when the appeal No. 296 was filed, no doubt appellant would have been entitled to relief; for the order of the Subordinate Judge is bad. But in the proceedings which subsequently took place, the error which was originally committed has been rectified, and the appellant's pleader quite failed to show that any substantial error has been committed. When a party is proceeded against as being the representative of a deceased judgment-debtor, and when it is proved that property which belonged to the deceased judgment-debtor has come into his hands, it lies upon the person against whom execution is so sought to account for all the property of the deceased judgment-debtor which has come into his hands. And in so accounting, mesne profits, —whether they have accrued in the shape of rents collected, or interest on monies which may have come to him from the deceased's estate,—must be brought into the account. In the present instance, the decree-holders who applied for execution showed that cer-

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tain sums accruing from the property of the deceased from time to time reached the hands of the judgment-debtor; and the judgment-debtor did not contradict this part of the case made out by the execution-creditor, or account in any way for the monies so received. Under those circumstances, the Subordinate Judge was justified in declaring that the appellant was liable to make good the amount of the original decree to the extent of the assets which he found had come to her hands and had not been accounted for by her, *i. e.*, rupees 4,700. The execution will proceed in accordance with this declaration: and the former order, which is the subject of the appeal No. 296, will be set aside.

As the appellant did in the appeal No. 296 have a good case, we think, although we affirm the final order made by the Subordinate Judge, we ought to allow no costs in either of these appeals.

Mookerjee, J.—I concur.

The 20th March 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Confirmation of possession—Onus probandi—Form of plaint—Issues.

Case No. 1735 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Tipperah, dated the 19th July 1870, *reversing a decision of the Moonsiff of Comillah, dated the 23rd November* 1869.

Moulvie Abdoollah (Defendant) *Appellant,*

versus

Shaha Mujeesooddeen *alias* Peeroo Meeah (Plaintiff) *Respondent.*

Baboos Romesh Chunder Mitter and *Chunder Madhub Ghose* for Appellant.

Baboos Kalee Mohun Dass and *Sreenath Dass* for Respondent.

HELD (Mookerjee, J., dissentiente,) that the rule that in suits for confirmation of possession by adjudication of title, the plaintiff is bound to prove that he was in possession at the time he preferred the suit, is not so inflexible a rule that it cannot be departed from; as, for example, where plaintiff sues for confirmation of possession and proves that he was in possession for many years and until within a few months of the institution of the suit, he should not be required to bring a fresh suit, merely changing the prayer for confirmation of possession into one for recovery of possession.

Matters in dispute should be ascertained not only from the plaint and answer, but also at the hearing of the suit; and any indistinctness in the form of the plaint does not require that a decision come to upon issues fixed in the Lower Court between the parties should be set aside.

Jackson, J.—I REGRET to be obliged to differ from my learned colleague, but I take an altogether different view of this case from that which he takes. He considers that as the plaintiff has brought this suit for confirmation of possession and for a declaration of his title, he is bound to prove that at the time he preferred this suit he was in possession, and he is bound also to prove the distinct title which he set up. I freely admit that in most suits for confirmation of possession this is the rule. But I am not prepared to hold that it is such an inflexible rule that it cannot be departed from, and that when a plaintiff can prove that he was in possession for twenty years previous to the suit, until within two or three months of the institution of the suit, his claim must be thrown out and he must be required to bring a second suit. This appears to me to be the state of facts in this case. The plaintiff's allegation amounts to this; that of the lakheraj property which stands in the name of Shaikh Ismail, he and his father before him have under a deed of gift from Shah Hamidooddeen and Bunga Haker been in possession for a long series of years to the extent of 10 annas; that the defendants own the remaining 6 annas share; that in that lakheraj estate there was a tenant named Alla Buksh, who held a tenure comprising 1-0-2-2 kraats of land; that the defendants sued him, for the rent of the whole 16 annas share, and obtained a decree both in the Moonsiff's and the appellate Court, notwithstanding the plaintiff's objections and the statement of the tenant that the plaintiff was the holder of the 10 annas share; that this was a wrong decision, and the plaintiff therefore asks that his long possession of his 10 annas share of the estate may be confirmed and his title declared to it. In the course of the argument it was stated to us that the tenant Alla Buksh had been ejected from his tenure by the defendant two or three months before this suit was preferred.

I understand that my colleague would hold that the plaintiff was on his own showing out of possession of any share of the land in

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dispute ever since the year 1272. The suit for rent was for the years 1272 and 1273. It is not quite clear on what date it was instituted, but it was decided in favour of the defendant on the 19th March 1867, and that decision was confirmed on appeal on the 17th August 1868. Sometime after that the tenant Alla Buksh was ejected, and the plaintiff then instituted this suit on the 17th May 1869. I think it would be a great hardship on the plaintiff to dismiss his present suit and to require him to bring a fresh suit, merely adding the words that he was dispossessed when the tenant was ejected and changing the prayer for confirmation of possession into one for recovery of possession. It seems to me that if the plaintiff's statement in his plaint is proved, he would be entitled to succeed. He nowhere in his plaint states that he was in possession when his suit was instituted. His prayer taken with the cause of action alleged by him amounts, I think, to a request that the possession which he had previously held up to the time when the rent-suit was decided against him should be confirmed. Both the lower Courts have taken this view of the case, and independent of my own opinion that it was a correct view, I think it is too late for this Court to interfere on special appeal.

The law lays down that the matters which are in dispute shall be ascertained, not only from the plaint and answer, but also at the first hearing of the suit, and that issues shall then be laid down. It is right that the plaintiff shall be exact in the form in which his plaint in drawn up; but if there be any *indistinctness*, it is not so material as to require us to set aside the decisions which may be come to upon the issues between the parties.

There is no doubt that the plaintiff might have alleged that he was dispossessed when the rent-suit was first decided against his interests; but it is also probable that the plaintiff did not consider that that decision dispossessed him, as the ryot was upon his side, and the decision might be set aside upon appeal. And again he might have considered he was dispossessed after the decision on appeal; but even then there might be some ground for holding that he was still in possession, if the ryot was ready to continue to pay him rents. After that ryot was ejected and the defendant placed a new ryot of his own on the land, I think that the plaintiff was then really dispossessed, and that the proper form of his plaint would have been a request to be restored to possession. But, as I said before, I would not quash all the proceedings in this suit on the ground of informality in the plaint.

It then remains for me to consider whether the decision of the Subordinate Judge is sufficient. Here it is argued on special appeal that the title set up by the plaintiff has not been enquired into, but that the decision has gone wholly upon the question of possession. The Subordinate Juge differing from the Moonsiff finds that the plaintiff and his father have been in possession of 10 annas of the lakheraj estate for more than 20 years, and that the father of Alla Buksh, as well as the tenant Alla Buksh himself, have for that time paid plaintiff a 10 annas share of the rent of the disputed land. Under these circumstances, the Subordinate Judge holds that the plaintiff is entitled to have that 20 years possession confirmed. I am not prepared to hold that he is wrong in this decision. It is supported by ample evidence, a great portion of which has been read to us. It appears to me that even if the plaintiff could not prove his hibbanamah, still this 20 years possession would entitle him to be replaced in the possession from which the decision of the rent-suit had to some extent removed him. The real gist of this suit was to do away with the effect of that rent decision, and for a declaration that the plaintiff was entitled to 10 annas of the rent of the disputed land. The determination of this question would depend upon whether the plaintiff had all along been in possession of the 10 annas share of the lakheraj estate generally. The Subordinate Judge finds that he has been in possession of it and decides it accordingly. I would dismiss this appeal with costs.

Mookerjee, J.—This is a suit for confirmation of possession by adjudication of right. The defendants brought a suit for rent against one Alla Buksh for the years 1272 and 1273 in the Deputy Collector's Court, alleging himself to be the proprietor of the 16 annas of the mouzah in which this jote of Alla Buksh is situate, and therefore entitled to the whole rent thereof. The plaintiff in this case intervened under Section 77 of Act X of 1859, claiming a 10 annas share of the rent on the ground that he was the proprietor to the extent of 10 annas of the mouzahs, and as such entitled to and is in receipt of a similar share of the rent of this jote. The Deputy Collector, as

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well as the District Judge on appeal, however, decreed full rent to the defendant, and hence the plaintiff instituted this suit in the Civil Court on the 2nd Jeyt 1276, corresponding to the 14th of May 1869.

For the defence it is alleged that neither the plaintiff nor his predecessors were ever in possession of the jote or of the mouzah, but that the defendants had been in possession for nearly 60 years; and therefore the present suit for confirmation of possession would not lie. Secondly, that plaintiff has no right at all to the disputed property, his ancestor Kamalooddeen was not a son of Jemal Bibee and was never in possession, and that the hibba, &c., propounded by the plaintiff are not genuine documents.

The Court of first instance dismissed the suit, holding that plaintiff has not only failed to prove his possession at the date of suit, but that the defendants have proved to its satisfaction that they were in sole possession of this property for a period of nearly 60 years as alleged by them; and that consequently the suit is barred by limitation. On the merits that Court likewise held that plaintiff has utterly failed to make out any title whatsoever. On the appeal of the plaintiff, the Subordinate Judge, Mr. Hutchinson, decreed the plaintiff's suit.

He says that "instead of examining ancient "documents devoid of attesting witnesses, "it would be more satisfactory to look at "the evidence of the last 20 years; and if "plaintiff can prove that during that period "the 10 annas share was held by the family, "he ought to get a decree." He then goes on to say that the land is not in the *de facto* possession of either party, but in the possession of one Alla Buksh, who states that he and his father paid rent to both the litigants; and that this "gives the plaintiff title to the "land, in case an uninterrupted duration of "more than 12 years which no rent decision "could easily shake off."

Now, in a suit for confirmation of possession by an adjudication of right when the defendant denies that the plaintiff is in possession, it is incumbent on the plaintiff to prove that he was in possession of the land when the suit was brought. It is clear from the record that plaintiff was not in possession, at least from 1273 to 1276, the year in which he instituted this suit. In fact, it is admitted before us by the pleader for the respondent that plaintiff was not in possession during those years.

The rent-suit was brought in 1273 for the rents of 1272 and part of 1273 by the defendant against the witness Alla Buksh. Plaintiff intervened on the ground that he is entitled to a 10 annas share of the rent for these years. He was however unsuccessful, for the defendants recovered a decree for the full rent for those years. The plaintiff then instituted this suit in Jyet 1276, and it is admitted before us that he has not received any rent at least from 1273 downwards, but that the defendants had.

The witness Alla Buksh was examined by the plaintiff, and he also admits that after the rent decree was passed in defendant's favor, he was turned out by the defendant from his jote. The amdanee and tullub bakee, &c., papers are also for 1270-71 and 1272, and were rejected by the first Court as wholly unattested. There is, therefore, neither an allegation that plaintiff was in possession in those years, nor is there any proof of possession from 1273 to date of suit. It is impossible, therefore, to make out how the Subordinate Judge finds that the plaintiff was in possession, and how he gave him a decree for confirmation of possession.

Then as to title. The plaintiff comes into Court to have a certain specific title declared in him founded on a hibba from a certain person, who by a certain mode of devolution of the property became the owner of 10 annas. The defendants traverse all the allegations of fact made by the plaintiff and impeach the genuineness of the hibba. Consequently, the Subordinate Judge was bound to see whether the title set up was made good by the plaintiff. In a suit for recovery of possession, a plaintiff may succeed on proof of long possession, because a long and uninterrupted possession is some presumption of a title in him. But in suits brought for confirmation of possession on an adjudication of a particular title, the plaintiff is bound not only to show that he was in possession at the date of suit, but that the title set up by him is a good and valid title.

In cases of this nature, which can only be brought on a disturbance or threat of disturbance of the quiet possession which the plaintiff says he has in the land, the plaintiff is bound to prove that he is in possession; and if the Court find on inquiry that plaintiff was not in possession, it cannot give a decree to the plaintiff for confirmation of possession, but must dismiss the suit altogether.

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The plaintiff in this case has evidently mistaken his remedy. The acts of the defendant in successfully preventing him from realizing the rent of the disputed land from the tenant Alla Bukah for the years 1272 and 1273, and the fact of defendant continuing to realize the full rent from the said tenant himself for those years and for others subsequent thereto, and then eventually turning out the tenant from the jote, show that defendant has completely dispossessed the plaintiff. The plaintiff should, therefore, have brought a suit for recovery of possession, and not one for confirmation thereof; for a Court by its decree cannot confirm a thing in plaintiff which he is not in enjoyment of. In this case it is clear that the plaintiff was not in possession, and consequently we cannot decree that he be confirmed in possession. I would, therefore, following an uniform course of decisions of this Court, a few of which I quote in the margin,* dismiss the suit of the plaintiff.

* X Weekly Reporter, page 176. VI Weekly Reporter, page 64.

The appeal, therefore, will be decreed with all costs.

The 20th March 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Enhancement of rent—Excess land.

Case No. 2258 of 1870.

Special Appeal from a decision passed by the Officiating Judicial Commissioner of Chota Nagpore, dated the 3rd August 1870. *modifying a decision of the Assistant Commissioner of Burhee, dated the 13th December* 1869.

Baboo Kunchun Deo Singh (Defendant) *Appellant,*

versus

Tekaet Sidh Nath Singh (Plaintiff) *Respondent.*

Baboo Taruck Nath Dutt for Appellant.

Baboos Mohesh Chunder Chowdhry and *Gopal Chunder Mookerjee* for Respondent.

A suit for a kubooleut at a given rent, where the rate claimed is found to be above what is fair and equitable, is a suit for enhancement to which the Full Bench Ruling at p. 14, Weekly Reporter, Volume X, applies, even though the rent is asked only for excess land.

Glover, J.—We think that this case should be governed by the decision of the Full Bench in the case of Golam Mahomed and another *versus* Asmut Ali Khan Chowdhry, reported in Volume X, Weekly Reporter, page 14. The plaintiff brought his suit for a kubooleut at a certain rate. He said that on measurement the defendant was found to hold 154 beegahs 12 cottahs 19 dans in excess, on which the proper rent at the rate of 3 rupees per beegah was 403 rupees 2 annas 9 pie. The defendant objected that he only held 50 beegahs; and that even if he had held any thing more than 50 beegahs, still the rate claimed was excessive as he had brought the land under cultivation at his own expense and at very considerable trouble. The case was the subject of various remands in the lower Courts, all on the subject of what was a fair and proper rate of rent; and the Judicial Commissioner on the 3rd remand found that the proper rates of rent for the land were 3 rupees, 2 rupees, and 1 rupee 4 annas per beegah, reducing, that is, the plaintiff's claim from rupees 403-2-9 to rupees 345-13-1.

It appears to us that this case exactly comes under the ruling above-quoted. Here, as in that case, the landlord came into Court to obtain a kubooleut at a given rate of rent, and the judgment of the Court below on the evidence was that that rate of rent which he demanded was considerably above what was found to be fair and equitable.

It is contended by the pleader for the special appellant that this is not properly a suit for enhancement; that the measurement was made to find out what excess lands the defendant was in possession of, and it was only on that excess that rent was asked. But neither was the Full Bench decision a suit for enhancement,—it was a case for a kubooleut at specified rates: and this case appears to be precisely the same. Then again it is said that even if the Full Bench ruling does apply, the plaintiff has prevented himself from taking advantage of it by consenting to three successive remands in the lower Courts without taking the objection now taken by him. We may observe that these remands in the lower Court were simply to find what were fair and equitable rates, and this mode of proceeding was taken by the Court at its own instance. It does

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not appear that either the plaintiff or defendant were consulted as to the means the Court thought proper to take in order to arrive at a proper decision; and in any case we do not see how the defendant could have taken any objection until he knew the result of the enquiry, for that enquiry might have resulted in a finding that the fair and proper rent was what he himself was willing to pay.

We think, therefore, that the special appeal must be allowed, the judgment of the Court below reversed, and the suit of the plaintiff dismissed with all costs.

The 20th March 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Notice—Service on Pleaders.

Case No. 2372 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Officiating Judge of Purneah, dated the 24th June 1870, *affirming a decision of the Deputy Collector of that District, dated the 9th February* 1869.

Ishur Dutt Mundul (Defendant) *Appellant,*

versus

Shib Pershad Thakoor (Plaintiff) *Respondent.*

Baboo Khettur Mohun Mookerjee for Appellant.

Baboos Hem Chunder Banerjee and *Taruck Nath Sein* for Respondent.

Service upon a respondent's pleaders is good service upon himself, so far as notice of the appeal is concerned.

Glover, J.—THERE are no grounds for this special appeal. The suit was for rent and was decided against the defendant. He appealed to the Judge, and after a remand the appeal was disposed of in his absence under the provisions of Section 346 of Act VIII of of 1859. The Judge remarks that although notice was duly served on the appellant, he did not make his appearance on the day fixed; and he therefore proceeded to dispose of the case on such evidence as was before him. On that evidence, he found that the plaintiff was entitled to a decree. The special appellant's pleader desires to take a ground which is not to be found in the written grounds of special appeal, to the effect that there is no sufficient proof on the record that notice was served on the appellant. No sufficient reason is is given why we should admit the objection at this stage of the case, the less so as we find that the Judge mentions in his decision that notice *was* duly served. Moreover, it appears that pleaders had been appointed by the appellant to conduct his appeal bofore the Judge, and it is admitted that notice was duly served upon and received by these pleaders; so that under any circumstances, in the spirit of the Code of Civil Procedure, service upon these pleaders would be good service on their employers, so far as notice of the appeal was concerned.

Another objection taken is that the Judge has decided the case winhout fixing or determining the issues laid down by the High Court in its remand order. Looking to that order, we find that the only issue which the Judge was directed to try was whether the defendant was tenant to the plaintiff for the whole of the land or not, as there had been, it appears, certain portions of the land which were claimed by other parties, and in respect of which the defendant claimed exemption from any liability to pay rent to the plaintiff. This issue we find that the Judge did try, for he says distinctly—"I proceed to see what evidence there is as to the plaintiff being the landlord of the defendant for the whole land claimed, and what evidence as to rates." This objection, therefore, falls to the ground.

The last objection that there is no evidence to warrant a decree at the enhanced rent claimed is altogether untenable. There is on the record the report of an Ameen, who went to the spot and made enquiries as to the rates, which report the Judge believes. This report undoubtedly was legal evidence on which the Judge could come to a decision; and if there was no evidence brought forward to rebut it, that was the appellant's own fault. He chose to keep away while the appeal was being heard and must take the consequences.

The special appeal is dismissed with costs.

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The 20th March 1871.

Present:

The Hon'ble H. V. Bayley and G. C. Paul, *Judges.*

Butwarrah—Jurisdiction — Right of action.

Cases Nos. 2420 and 2421 of 1870.

Special Appeals from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 17th August 1870, affirming a decision of the Moonsiff of Soorujgurrah, dated the 18th May 1870.

Koonj Beharee Singh and another (Defendants) *Appellants,*

versus

Neeroo Singh (Plaintiff) *Respondent.*

Baboo Doorga Doss Dutt for Appellants.

No one for Respondent.

A Collector's butwarrah proceedings, though final for the purpose of fixing the proportionate area and assessment, are not to preclude parties from coming into Court for enforcement of their civil right under Section 1 Act VIII of 1859.

Bayley, J.—THERE is no ground whatever for these appeals.

Both the Courts below have come to a finding of fact, whether right or wrong, that the defendants, appellants, have neither title nor possession. The Lower Appellate Court has gone upon the oral and the documentary evidence, has considered the registered leases, Collectorate dakhilas, and other documents produced in the case; and it is after a consideration of the whole evidence that it has come to the conclusion that the plaintiff has made out his case, and the defendant has failed to rebut it.

It is urged that the butwarrah proceedings of the Collector are final. They are so for the purpose of fixing the proportionate area and proportionate assessment of Government revenue, but they are not to preclude parties from coming into Court for the enforcement of their civil right under Section 1 Act VIII of 1859.

Both the appeals are dismissed, as both are admitted to be governed by one decision in special appeal,—special appeal No. 2420 without costs, as no one appears; No. 2421 with costs.

Paul, J.—I quite agree.

The 20th March 1871.

Present:

The Hon'ble H. V. Bayley and G. C. Paul, *Judges.*

Proceedings of lower Courts—Commissions—Section 180 Act VIII. 1859—Evidence.

Case No. 2571 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Rajshahye, dated the 8th September 1870, reversing a decision of the Sudder Moonsiff of that District, dated the 29th January 1870.

Ramrukha Roy Jemadar, (Plaintiff) *Appellant,*

versus

Gobind Doss Byragee and another (Defendants) *Respondents.*

Mr. J. S. Rochfort for Appellant.

No one for Respondents.

In proceedings such as the deputation for a local investigation of a person other than an officer appointed for the purpose of executing such commissions, it must be assumed that what is done by the lower Courts is rightly done until the contrary is proved.

Where an order for a local investigation under Section 180, Code of Civil Procedure, is not objected to by the opposite party at the time it is made, the Court is justified in viewing as evidence the report of the Commissioner and the depositions taken by him, being a part of the record.

Paul, J.—IN this case two points have been taken in special appeal. The first is that the Subordinate Judge was wrong in deputing a mohurir of his Court to make the local investigation. It is said that Section 180 Act VIII of 1859 provides that where the Court considers a local enquiry requisite "it may issue a commission to "an officer of the Court *appointed to exe-* "*cute such commissions*, or if there be no "such officer, to any suitable person," &c. It is argued that the mohurir was not an officer appointed to execute the commission, that there is nothing to shew that there was no officer of the Court who could execute it, and that therefore the deputation of the mohurir by the Subordinate Judge to make the local investigation was illegal and erroneous.

Now, on this point, we have to observe that in all cases like the present it must be

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assumed that all what is done by the lower Courts is rightly done until the contrary is proved. We must take it, therefore, that when the Subordinate Judge deputed the mohurir for the investigation, there was no proper officer of the Court available for the purpose; and in the absence of any such officer he was under the law entitled to depute any suitable person whom he thought fit for the occasion. The first point therefore fails.

The next point taken is that the report of the mohurir was altogether irregular and informal, and that the Subordinate Judge ought not to have considered it.

Now, Section 180 Act VIII of 1859 provides—"In any suit or other judicial proceeding in which the Court may deem a local investigation to be requisite or proper for the purpose of elucidating the matters in dispute, the Court may issue a commission to an officer of the Court appointed to execute such commission, or if there be no such officer, to any suitable person, directing him to make such investigation and to report thereon to the Court." The Section then, after providing that such Commissioner should have power to examine witnesses, documents, &c., goes on to say—"The report and deposition shall be taken as evidence in the suit and shall form part of the record; but it shall be competent to the Court or to the parties to the suit or any of them, with the permission of the Court, to examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or the manner in which he may have conducted the investigation."

In the present case, the question was whether the lands in suit belonged to and were in the possession of the defendant, and with a view to the determination of this question the Court deemed a local investigation necessary. The order that there would be such local investigation was not objected to at the time by the special appellant. The result of that investigation was that it was found that the lands which were formerly the chakran lands of the defendant had been resumed by the zemindar before the mortgage was made, and from this circumstance the Subordinate Judge did not consider it probable that the defendant should have mortgaged such land, and the plaintiff being a resident of the same place and as such fully acquainted with the facts should have advanced money upon the mortgage of such lands. We think that the report of the Commissioner deputed in this case and the depositions of the witnesses taken by him forming part of the record, the lower Court was justified in viewing that report as evidence. Besides, the finding which the Lower Appellate Court has come to in this case is not only based upon the report but also upon the facts and circumstances of the case in evidence. We do not think therefore that the second objection has any force in it.

The special appeal is dismissed but without costs, no one appearing for the respondents.

The 21st March 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Mesne profits—Execution.

Case No. 447 of 1870.

Miscellaneous Appeal from an order passed by the Officiating Judge of East-Burdwan, dated the 10th September 1870, modifying an order of the Subordinate Judge of that District, dated the 25th June 1870.

Janokee Nath Mookerjee and others (Judgment-debtors) *Appellants,*

versus

Raj Kristo Singh (Decree-holder) *Respondent.*

Baboos Bhyrub Chunder Banerjee and *Umbika Churn Banerjee* for Appellants.

Baboos Chunder Madhub Ghose and *Ashootosh Mookerjee* for Respondent.

Where a decree awards mesne profits up to the date of institution of the suit, the Court executing it has no power to give more.

Glover, J.—THE point in this appeal is whether a creditor who has got a decree for possession and for wasilat from the date of ouster to the date of institution of suit, can in execution have the mesne profits calculated and awarded up to the date on which he gets possession.

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The Lower Appellate Court has held that this is a question regarding the amount of mesne profits, and as such can be decided under the provisions of Section 11 Act XXIII of 1861, and that no separate suit for the mesne profits occurring between the institution of suit and possession in execution need be brought. The Judge accordingly awarded mesne profits, as found by the Ameen, up to the date of the decree-holder's getting possession.

We think that the Judge was wrong. The meaning of that part of Section 11 quoted by him has been discussed at some length in the case of Hur Mohinee Chowdhrain *versus* Dhun Monee Chowdhrain, X Weekly Reporter, p.62 ; and we concur in the view of the law taken by the learned Judges in that case that " the words 'payable in respect of " the subject-matter of a suit,' can only be " rightly spoken of that which is due to " some one under an obligation already ex- " isting. Mesne profits, then, which are " essentially of the nature of damages, can " only be payable when they are due under an order of Court."—(Phear, J.)

The point was also considered in the Full Bench case of Modhoosoodun Lall *versus* Bhikaree Singh, VI Weekly Reporter, p. 109 ; and it was held that the questions referred to in the latter portion of Section 11 Act XXIII of 1861 were questions of amount only.

And again in the case of J. P. Wise *versus* Rajendro Koomar and others, XI Weekly Reporter, p. 200, it was laid down that " it is an essential part of a decree " which orders mesne profits to be assessed " in execution to fix the period in respect of " which such mesne profits are to be " assessed."

In the present case, mesne profits were by the terms of the decrees given from the date of ouster to the date of institution of suit only; and that there was no intention of giving more seems probable from the peculiar wording of the order which makes the payment of costs to depend on how much of the plaintiff's claim for wasilat was an injury found to be proved. At all events, it is quite clear that nothing in the decree gave the decree-holder mesne profits for any time beyond the date of institution of suit, and that if he desires to get them for a further period he must bring a suit for the purpose supposing him to be still in time to do so.

That such a suit could have been brought has been already decided by the ruling in Ranee Surno Moyee *versus* Protap Chunder Burroonh, XIII Weekly Reporter, p. 15.

The pleader for the special respondent has referred us to the case of Hokum Bibee *vs.* Khaja Mahomed Moosa Khan, VI Weekly Reporter, p. 14, in which it was held that mesne profits for the period during which the decree-holder executing his decree was kept out of possession by the opposite party could be awarded under Section 11 of Act XXIII ; but the rulings we have referred to above and which we propose to follow, are both of them later in date than the one quoted for the special respondent ; and one of them is the decision of a Full Bench.

We think that the Court executing this decree had no power to do more than assess the wasilat which were decreed, and that the Judge was wrong in holding that it had such power.

The decree is allowed, and the order of the Court below reversed with all costs.

The 21st March 1871.

Present :

The Hon'ble A. G. Macpherson and Onoocool Chunder Mookerjee, *Judges.*

Magistrate's award—Chapter XX Act XXV of 1861—Right of action.

Case No. 1385 of 1870.

Special Appeal from a decision passed by the Judge of Tipperah, dated the 26th May 1870, *reversing a decision of the Moonsiff of Begumgunge, dated the 29th August* 1869.

Madhub Chunder Goolo and others (Defendants) *Appellants,*

versus

Kumla Kant Chuckerbutty and others (Plaintiffs) *Respondents.*

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Baboos Anund Chunder Ghossal and *Sreenath Banerjee* for Appellants.

Baboos Kalee Mohun Doss and *Doorga Mohun Doss* for Respondents.

Where a Magistrate proceeding under Chapter XX of the Criminal Procedure Code removed a bridge, it was held that a suit would not lie for a naked declaration of right without any consequential relief against parties no further interested in the matter than that they had put the Magistrate in motion.

Macpherson, J.—In this case the plaintiffs had erected a bridge extending from one bank of a *khal* to the other, both banks being their own property. This bridge was removed by the Magistrate, who proceeded under Chapter XX of the Code of Criminal Procedure. The Magistrate in removing the bridge is said to have been put in motion by the defendants, whose object in getting the bridge pulled down was to prevent people from going over by it to a *haut*, which is held on the plaintiffs' land. The defendants appear to have a *haut* of their own, which is held some little distance off but in the same neighbourhood. The bridge having been removed, the plaintiffs instituted the present suit. The plaint expressly, on the face of it, seeks to set aside the order of the Magistrate and for a declaration of the right of the plaintiffs to re-construct the bridge pulled down.

The first Court without going into the case decided that such a suit will not lie. The Judge has held in effect that the suit will not lie in the exact form in which it was brought, that is to say, that it will not lie so far as it seeks to set aside the order of the Magistrate, or so far as it seeks to have the bridge re-built, but that it will lie so far merely as it prays for a declaration of the right and title of the plaintiffs. The Judge remanded the case to the Moonsiff to try the question of the right of the plaintiffs to erect a bridge. He says—"I am of "opinion that this suit will lie to try the "plaintiffs' right, from any usage or on other "grounds, to erect a bridge over the river "in dispute. Should they obtain a decree "of right, *i. e.*, declaratory decree, they "should petition the Magistrate accordingly, "who, I have no doubt, would direct what "the height of the bridge ought to be; for "should another bridge be built of the same "description as that ordered to be pulled "down, no declaratory decree of right to "erect a bridge would prevent its being "again ordered to be pulled down if it still "proved an obstruction to navigation."

The Judge, rightly considering that the Full Bench in the case of Oojul Moyee Dassee *versus* Chunder Koomar Neogee, (XII Weekly Reporter, page 18, Full Bench Rulings) only held that a civil suit will not lie to reverse the Magistrate's order, was of opinion that although the order of the Magistrate must stand, the Civil Court could nevertheless go into the question of the rights of the parties, and make such a declaration as to them as the plaintiffs sought.

I am of opinion that the Judge is wrong, and that the suit ought to have been dismissed. In the first place the decree, which the Judge says the plaintiffs may be entitled to, differs substantially from the decree which the plaintiffs sought. They asked for such a decree as would give them back the bridge which had been removed. But the Judge holding them not entitled to such a decree, deems them entitled to a naked declaration of right to have a bridge there. It is very questionable whether upon this ground alone the Judge's order of remand is not bad. However that may be, I think the remand is wrong because such a decree as the Judge contemplates is a mere declaratory decree giving no consequential relief, and from which in fact no relief could be obtained. A declaration such as the Judge proposes would practically in no degree improve the position of the plaintiffs. It at best would be binding only upon the defendants in the present suit, whose sole interest in the matter, as the case at present stands (if it can be said to be an interest), is that they set the Magistrate in motion in the proceedings which he has taken. Supposing such a declaration was made by the Court, what would it avail the plaintiffs against subsequent proceedings under Chapter XX of the Criminal Procedure Code taken hereafter by the Magistrate against a new bridge built by the plaintiffs? The bridge which the plaintiffs had has been removed, and doubtless if they re-build it as it was it will again be removed. But if they build it on a new plan, in such a manner for instance as

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to prevent its being considered by the Magistrate to be an obstruction to the navigation of the *khal*, it is quite possible it may not be objected to by the Magistrate, and that it may answer all the purposes of the bridge the removal of which is now complained of.

The precise question now before us does not seem to have been decided yet. Certainly, it was not decided or even approached in the case of Taruck Nath Mookerjee *versus* the Collector of Hooghly (XIII Weekly Reporter, page 13), which seems to be in some degree relied upon by the Judge as supporting the view which he takes. That was a case which turned wholly upon the proceedings of the Magistrate having been irregular and without jurisdiction. And the point decided in that case was the personal responsibility of the Magistrate for acts done by him irregularly, without jurisdiction, and without due care. The Full Bench decision which has been already alluded to merely decides that the Magistrate's order cannot be set aside. And the case of Buroda Pershad Moostafee *versus* Gora Chand Moostafee, reported in XII Weekly Reporter, page 160, also does not decide this question.

Looking at the decided cases and at Chapter XX of the Criminal Procedure Code, it appears to me that it must be considered now as established that the decision of a Magistrate, when regularly arrived at, (and for the purposes of the present appeal it must be taken that the proceedings were regularly held) is conclusive as regards the particular act done by him; and I do not think that a suit will lie for a naked declaration of right, without any consequential relief, against persons who are not further interested in the matter than that they were the persons who put the Magistrate in motion.

I think the Judge's decree ought to be set aside, and that the plaintiffs' suit ought to be dismissed with costs in all the Courts.

Mookerjee, J.—I concur. The Judge was also of opinion that the Magistrate's order passed under Chapter XX of the Criminal Procedure Code was passed with jurisdiction, and could not be set aside by a civil suit. The Judge should have stopped there and dismissed the suit. His order of remand is clearly wrong and must be set aside.

The 21st March 1871.

Present:

The Hon'ble A. G. Macpherson and Onoocool Chunder Mookerjee, *Judges.*

Right of way—User—Limitation.

Case No. 1400 of 1870.

Special Appeal from a decision passed by the Judge of Tipperah, dated the 30th April 1870, modifying a decision of the Moonsiff of Noornuggur, dated the 25th August 1869.

Joy Doorga Dossia (one of the Defendants) *Appellant,*

versus

Juggernath Roy (Plaintiff) *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.

Baboos Chunder Madhub Ghose and *Bhowanee Churn Dutt* for Respondent.

In order to establish a right of way the person claiming must prove uninterrupted user for a certain length of time; and, if his right is interrupted, must go into Court *at once.*

No length of time can give a party such a right as destroys all the ordinary uses of the servient property, *e. g.*, a straggling right to the promiscuous use of a whole property for the purpose of driving cattle over it.

Macpherson, J.—I AM of opinion that the decision of the Lower Appellate Court ought to be reversed.

The plaint on the face of it shows that the rights of way now claimed by the plaintiff (if they ever existed) were, as regards the plots Nos. 1 and 2, interrupted by the defendant so long ago as the Bengalee year 1268, ; and as regards plot No. 3, were interrupted so long ago as the year 1273.

Now this suit was instituted on the 3rd of March 1869, about 4 years subsequent to the interruption of the right to pass over No. 3, and 8 or 9 years subsequent to the

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interruption of the user of the other rights of way now claimed.

In order to establish a right of way, there is no doubt that the person claiming it must prove uninterrupted user for a certain length of time; and that if his right is interrupted, he must go into Court *at once* if he wishes to maintain the right. The present plaintiff did not come into Court for many years after his enjoyment of his alleged right was put an end to; and I think that his suit was in consequence bad on the face of it.

Further, it seems to me that the Lower Appellate Court was wrong in holding that any legal right of way was proved over No. 3.

The Court of first instance on personal investigation of the property found that the right claimed over No. 3, was a right of driving cattle generally over certain plots of ground that once lay fallow but latterly were cultivated. And the Moonsiff held that there was no right of way established.

The Judge, however, says that the plaintiff's cows have been for very many years driven by him over these lands, and that this must be considered to have given him a right of way which cannot now be interfered with.

If the having driven the cattle over the lands *generally*,—that is to say, not by any particular path but straggling promiscuously over the lands.—which is the right claimed by the plaintiff, be held to give the plaintiff a right in all time to come so to drive his cattle, it would be interfering with the lands to such an extent as to make it impossible that they should ever be used for any useful purpose. But a right of way or other easement must not be so large as to extinguish or destroy all the ordinary uses of the servient property (see *Zumeer Ali*, 1 Weekly Reporter, page 230); and in my opinion no length of time would have given the plaintiff such a right as he claims, namely, a straggling right to the promiscuous use of the whole property for the purpose of driving his cattle over it.

On the whole, I think that the appeal ought to be allowed, the judgment of the Lower Appellate Court reversed, and the suit of the plaintiff dismissed with costs in all Courts.

Mookerjee, J.—I concur.

The 21st March 1871.

Present:

The Hon'ble A. G. Macpherson and Ouoocool Chunder Mookerjee, *Judges.*

Grounds of appeal—Omission by Court — Procedure — Mahomedan law — Husband and wife—Contract—Maintenance.

Case No. 2023 of 1870.

Special Appeal from a decision passed by the Judge of Tipperah, dated the 25th June 1870, *affirming a decision of the Subordinate Judge of that District, dated the 6th December* 1869.

Yusoof Ali Chowdhry (Defendant) *Appellant,*

versus

Mussamut Fyzoonissa Khatoon Chowdhrain (Plaintiff) *Respondent.*

Baboo Kalee Mohun Doss for Appellant.

Baboos Romesh Chunder Mitter and *Sreenath Doss* for Respondent.

Where a ground of appeal stated in the written memorandum is not alluded to when the appeal comes on for hearing, the Court is not at fault if no decision is passed upon it. If, having had his attention called to it, a Judge fails to decide such point, the proper course for the parties aggrieved is to ask him to review his judgment.

In order to satisfy the High Court that a point which the Judge omitted to notice was actually taken in the oral pleadings, a party may put in either an affidavit of some person who heard the point raised, or a copy of the petition to the Judge drawing attention to the omission, with his order.

Where a Mahomedan wife in re-conveying to her husband the property received from him in lieu of dower, took from him a written agreement in which he covenanted to pay her a certain sum of money annually without objection or demur, HELD that the husband could not avoid payment on any of the pleas on which a Mahomedan husband could avoid the payment of maintenance to a wife.

Macpherson, J.—I AM of opinion that the judgment of the Appellate Court is right and ought to be affirmed.

It is contended that we ought to remand the case in order that the Judge may decide the question whether or not the defendant is entitled to the 350 rupees mentioned in the pleadings.

The Judge in his decision takes no notice whatever of this question.

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It is argued that inasmuch as one of the written grounds of appeal filed in the Lower Appellate Court related to this matter, we are now bound to remand the case for an express decision of this point.

I think we are not bound to do any thing of the sort, when there is nothing to induce us to suppose that the Judge was ever asked to express any opinion as to these 350 rupees. Grounds of appeal are daily stated in the written memoranda of appeal which are not alluded to when the appeal comes on for hearing. If they are not then alluded to, it is the fault of the parties and not of the Judge if no decision is passed upon them.

If a distinct issue such as this as to the rupees 350 had ever been urged before the Judge, if his attention had been called to it at all, I have no doubt that he would have decided it. If he, having had his attention called to it, failed to decide the point, the proper course for the appellants to pursue was to ask him to review his judgment and add to it the decision which he had omitted.

The appeal is dismissed with costs.

Mookerjee, J.—I entirely concur. I think it is a serious imputation on a Judge to say that he has not paid any attention to a particular plea distinctly raised before him in argument. It must be shown to us clearly that the point was actually pressed in the Lower Appellate Court before we can remand the case to the Judge for an opinion on that point. It is not sufficient to show that the written grounds of appeal contain the objection; for we find that the pleaders seldom urge all the objections contained in the memoranda of appeal. In the exercise of their discretion, they often abandon many of them which they consider to be untenable or frivolous.

In all cases where the Courts below really omit to notice a particular objection urged, the parties ought to be able to satisfy us that the point was actually taken before the Judge in the oral pleadings. This can be done either by an affidavit of some person actually present in Court who heard the point raised, or by a petition to the Judge drawing his attention to the omission and asking him to pass an opinion on the particular point. A copy of this petition with the order of the Judge may be sufficient to show that the point was raised before him. In the absence of any such evidence, we are bound, I think, to presume from the fact of the Judge taking no notice whatever of the point, said to have been pressed before him, that it was in fact never pressed.

As regards the point of Mahomedan law raised in the case to the effect that the plaintiff is not entitled to the maintenance claimed on the ground of her being a "rebellious wife" who had refused to live with her husband, the defendant, I am of opinion that the contention is entirely untenable. The Judge is right in holding that the contention does not arise in this case.

The plaintiff does not sue for maintenance in right of her being a wife of the defendant under the Mahomedan law for the first time in this suit; but it appears that the plaintiff when re-conveying the property assigned over to her by the defendant in lieu of dower, had taken a written agreement from the defendant in which the defendant had expressly agreed and covenanted to pay annually the sum of 600 rupees to the plaintiff without any objection or demur. This agreement was therefore for a valuable consideration paid by the plaintiff to the defendant. In this suit, the plaintiff is only demanding this sum of money which in the agreement however is called a "sum allotted for her maintenance." The plaintiff, it therefore appears to me, is not claiming a maintenance in the strict sense of that term from the defendant because she was his wife and as such entitled to some maintenance, but she is asking the defendant to fulfil the terms of the contract entered upon by him with her in this agreement. There is no stipulation in this deed that the plaintiff will be entitled to this sum in case only of her living in the same house with the defendant, or that she would forfeit this amount if she lives elsewhere. I think therefore that the point of Mahomedan law pressed upon us does not arise in this case. This is a suit founded on an express contract of the defendant to pay a certain sum of money annually to the plaintiff in consideration of her relinquishing the property she obtained as her dowry for the term of the natural life of the defendant. The fact of plaintiff being the wife of the defendant, or this annuity or allowance being called "maintenance," would not change the real character of the allowance, and enable the defendant to plead any of the pleas on which a claim to maintenance by a Mahomedan wife can be avoided by the husband under the law of that religion. Here are two parties, one has relinquished a valuable

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property on a consideration of an annual payment of 600 rupees, the other accepts the same and covenants to pay this sum without any objection. This appears to me to be clearly a simple case of contract, and plaintiff will succeed exactly as if she was not the wife of the defendant but a stranger who had parted with her property for a consideration of 600 rupees to be annually paid to her by the defendant. The appeal should be dismissed with all costs.

The 21st March 1871.

Present :

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble E. Jackson, *Judge*.

Breach of contract—Liability—Cause of action.

Case No. 2187 of 1870.

Special Appeal from a decision passed by the Additional Judge of Nuddea, dated the 15th July 1870, *affirming a decision of the Subordinate Judge of that District, dated the 6th December* 1869.

Brojo Nath Paul Chowdhry and another (Defendants) *Appellants*,

versus

Bimola Soonduree Dossia (Plaintiff) *Respondent.*

Baboos Taruck Nath Sein and *Mohendro Lall Shome* for Appellants.

Baboos Chunder Madhub Ghose and *Kalee Mohun Doss* for Respondent.

Defendants for a consideration granted to plaintiffs a lease of certain churs, which were an accretion to a zemindary and had been in the possession of Government, but were at the time under temporary settlement with the defendants. Subsequently defendants sold their zemindary to a third party reserving to themselves the chur. Ultimately it was ordered by the Commissioner of Revenue that the churs should be settled, not with defendants but with the purchasers (the third party), as appertaining to the zemindary. Defendants having thus become unable to give plaintiffs possession were sued for a refund of the premium or consideration money.

HELD that it was the duty of the defendants to take steps to call in question the decision of the Commissioner, and that their manager's admission of their liability to re-pay the premium with interest put an end to any claim for damages for the original breach of contract and constituted a fresh cause of action from which limitation ran.

Norman, C. J.—WE think there is no ground for disturbing the decision of the Lower Appellate Court. The facts are shortly these. The defendants by a pottah, which was duly registered, granted a lease, for a consideration of a bonus or premium of rupees 2,537-8 annas, of 1,538 beegahs, odd cottahs, at a rent of rupees 725, in certain churs. These churs were an accretion to a zemindaree called Dehee Powaeen which belonged to the plaintiff. The churs had been in the possession of Government for several years ; but at the time of the making of the pottah, the defendants had obtained a temporary settlement of them. The defendants subsequently sold their zemindaree Dehee Powaeen to Thakoor Doss Gossain, reserving to themselves the churs called Sattrakatee. Thakoor Doss Gossain obtained a settlement of the zemindaree, and the defendants applied for a settlement of the churs. But it was ultimately ordered by the Commissioner, by a letter dated the 16th of February 1863, that the churs should be settled, not with the defendants but with Thakoor Doss Gossein, as appertaining to the zemindaree. The defendants thus became unable to give to the plaintiff possession of the churs comprised in the putnee pottah, and the present suit is brought to compel them to refund the premium.

The evidence on the part of the plaintiff shows that in 1271 an interview took place between the plaintiffs and Brojo Nath Paul Chowdhry, who was the manager and eldest member of the family of the defendants, at which meeting Brojo Nath admitted the liability of the defendants to re-pay the bonus which they had received with interest, inasmuch as the defendants were unable to give possession in accordance with the terms of the pottah.

The first Court on this evidence made a decree in favor of the plaintiffs, declaring them entitled to a return of the bonus together with rupees 200 which had been subsequently paid as rent.

From that decision there was an appeal to the Judge, and the principal point argued before him, and again before ourselves, has been that the suit is barred by limitation.

The first Court finds that the plaintiff's statement that Brojo Nath Paul Chowdhry, as manager of the defendants' family and affairs, had agreed on their behalf to re-pay the money is proved; and if that be so, there is no question whatever that the agreement between the plaintiff and the defendant Brojo Nath amounted to an agreement

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to put an end to any claim that might arise in a suit for damages for the breach of the original contract, and constituted a fresh cause of action; and as this suit was brought within three years from that date, it would clearly in any view of the case be within time.

The defendants, however, preferred an appeal against the decision of the Subordinate Judge on that point, and the Judge on appeal omits to express any opinion as to whether the admission on the part of Brojo Nath, which was denied by him, was really made as alleged.

We, therefore, cannot rest our decision in affirming his judgment on an assumption that the admission was made. It turns out, however, that the pottah being a duly registered pottah and containing a contract to give possession at the commencement of 1268, the suit was originally brought within six years from the commencement of 1268, and is therefore clearly within time.

The defendants have also contended that no breach of contract on their part is shewn. We are of opinion that the objection ought not to prevail. We are certainly impressed, on the facts as stated to us by the vakeels on both sides, with the belief that under the pottah as granted by the defendants, the plaintiffs may have acquired a right which they could probably enforce as against Thakoor Doss Gossain.

We certainly do not understand why the Commissioner should have insisted on giving to Thakoor Doss Gossain a settlement of the entire zemindaree including the accreted churs, when, by the contract under which Thakoor Doss Gossain became owner of the zemindaree, all rights to such accreted churs were expressly excluded.

It appears to us, however, that it was the duty of the defendants, as owners of the zemindaree, as persons who had agreed to give possession to the plaintiffs, to have taken steps to call in question the correctness of the Commissioner's decision in 1863, either by suit or by an appeal to the Board of Revenue. It seems to us that the plaintiff allowed what was a reasonable, and more than reasonable, time to elapse to enable the defendants to take such steps to assert their own title as zemindars and put the plaintiffs in possession; and if it be true, as we are disposed to believe that it must be true, that the defendants through their mouth-piece, Brijo Nath, elected not to pursue their rights and offered to pay back the bonus to the plaintiffs, it was not incumbent on the plaintiffs to fight out a battle which was not their own.

We think, therefore, that the decree in favor of the plaintiffs was correct.

The decree of the Lower Appellate Court is affirmed with costs.

The 21st March 1871.

Present:

The Hon'ble F. A. Glover and W. Ainslie, *Judges.*

Possessory suit—Rent-free title—Onus probandi.

Case No. 2333 of 1870.

Special Appeal from a decision passed by the Officiating Judicial Commissioner of Chota Nagpore, dated the 29th July 1870, *reversing a decision of the Moonsiff of that District, dated the 21st December* 1869.

Ram Narain Singh Deo Bahadoor (Plaintiff) *Appellant,*

versus

Bistoo Thakoor (Defendant) *Respondent.*

Baboo Bhowanee Churn Dutt for Appellant.

Baboo Radhika Churn Mitter for Respondent.

In a suit to recover possession of land within plaintiff's estate, in which defendant sets up a rent-free title, all that plaintiff is required to show is that either he or his predecessor had received rent for the land at some time subsequent to the perpetual settlement, in which case the onus of proving title falls on the defendant.

Glover, J.—THIS was a suit to recover possession of a certain portion of land which is admittedly contained within mauzah Khoodeebank, the property of the plaintiff. It appears that in 1273 one Sreenath Mahton, a ryot on the land, sued the present defendant for damages for the illegal cutting of his crops. This suit failed, and the plaintiff, as owner of the land within which the jote was situated, brings this suit to recover possession from the defendant on the ground that the cutting of his ryot's crops has dispossessed him from a portion of his property. The defence was that the

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land did not belong to the plaintiff at all, but was part of the defendant's rent-free tenure. The first Court found for the plaintiff, holding that he had proved that the land was comprised within his village ; that he had been ousted, as alleged, by the defendant ; and that the defendant had altogether failed to prove his case.

On appeal the Judicial Commissioner refused to attach any credence to the witnesses brought forward by the plaintiff, on the ground that in the former case in which the ryot had sued for damages, he, the ryot, had been unable to prove that the lands now in dispute had been cultivated by him. He found that although in that case proof of Sreenath's cultivation had failed, in this case seven witnesses had come forward to give evidence as to that ; fact and on this account he disbelieves the evidence and says that the depositions of these witnesses cannot in the teeth of the Principal Sudder Ameen's decision prove the plaintiff's possession through Sreenath; and therefore that the plaintiff's case had not been proved.

It appears to us that this decision cannot stand. The land being admittedly within the plaintiff's mouzah and the defendant setting up a rent-free title to it, all that the plaintiff was required to do was to show that either he himself or his predecessor had received rent for that land at some time subsequent to the perpetual settlement, in which case the *onus* of proving his title to the land as rent-free would be on the defendant. In this case the plaintiff produced no less than seven witnesses, who depose to the fact that Sreenath was the ryot cultivating the land on behalf of the plaintiff and that the plaintiff had received rent from him. The Judicial Commissioner's reasons for disbelieving this evidence appear to us altogether insufficient, for whatever may have passed in a previous case between the defendant and Sreenath can be no evidence whatever against the plaintiff in this case ; and even if it were treated as evidence, it would be no ground for disbelieving the evidence of witnesses who have distinctly sworn to the fact of the payment of rent by Sreenath to the plaintiff for the lands in dispute. It is not, moreover, very clear that the original case brought by Sreenath decided this point adversely to the plaintiff's contention in this case. The record of that case has not been filed, and all that the Judicial Commissioner has gone upon is a statement by the Principal Sudder Ameen incidentally made in the course of his decision ; and considering that the first Court in that case had given a decision for the plaintiff on the ground that cultivation of the land by his ryot Sreenath had been proved to its satisfaction, it is certainly not enough, supposing even the former case was evidence, to rely for reversing the decree of the first Court upon a chance remark in the midst of the Subordinate Judge's decision in a case in which the plaintiff in this suit was not a party. In this case, moreover, we find that one at least of the defendant's witnesses proves that part of the plaintiff's case, namely, that Sreenath was in possession of the land.

We think, therefore, that the decision of the Judicial Commissioner has been come to upon what is not legal evidence, and that his decision should be reversed, that of the first Court restored, and this appeal allowed with costs.

The 21st March 1871.

Present :

The Hon'ble H. V. Bayley and G. C. Paul, *Judges.*

Hindoo Law—Adoption—Sudras.

Case No. 2591 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Rajshahye. dated the 12th September 1870, reversing a decision of the Moonsiff of Pubna, dated the 26th April 1870.

Nittyanund Ghose (Defendant) *Appellant,*

versus

Kishen Dyal Ghose (Plaintiff) *Respondent.*

Baboos Mohinee Mohun Roy and *Issur Chunder Chuckerbutty* for Appellant.

Baboo Lukhee Churn Bose for Respondent.

Per Bayley, J.—The ceremonies necessary in the case of adoption in the superior classes are not necessary in the case of adoption by a sudra. Where the adopted son is a member of the family, the mere giving and taking may be sufficient to give validity to the adoption.

Bayley, J.—I AM of opinion that this special appeal must be dismissed with costs. The main question raised before us is that the mere giving and taking of the son was not sufficient for the purposes of adopton, and that there is no proof on the record of the performance of those ceremonies which

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are required by the Hindoo Law to give validity to the adoption in this case, which is admittedly one of a *sudra*.

Another point raised is that the suit is barred by limitation.

I think it is sufficient for the purposes of this appeal to deal with the first point only. Now, it is clear that the adoption was made in 1247, B. C. It is also clear that this suit has been brought 30 years afterwards. It is also admitted that there was no dispute in regard to this property until the year 1256, or, in other words, that from the year 1247 down to the year 1256 there was an uninterrupted enjoyment of all the rights that belong to an adopted son by the adopted son in this case; and it is not denied that the funeral rites of the father were performed by this adopted boy.

It is urged that these funeral rites might just as well be performed by the other members of the family; but this is rather begging the question. Everybody knows that the sapindas are entitled to perform the funeral ceremonies; but it is equally known that an adopted son fully represents the son of the father, and that on the ground of this very representation it is he who is ordinarily looked to for the performance of the funeral rites of the adoptive father.

We are referred to a case reported at page 9, Volume XIII, Weekly Reporter, decided by Mr. Justice Loch and myself; but I think that that case has no bearing upon the question at issue in this case. In that case, although the objection taken was that a sudra adoption is not valid in the absence of certain ceremonies enjoyed by the Hindoo Law, we found that such ceremonies had been performed. It is then ingeniously remarked that in that case we gave our opinion that the performance of those ceremonies was necessary to render the adoption valid, but did not express that opinion with regard to the necessity of the Hindoo Law, but only with reference to the facts of the case. We substantially said there that it was unnecessary to go into the question whether the ceremonies were absolutely requisite or not, because they were performed in that case and were referred to as having been performed. On the other hand, we have not been pointed out any decision, nor are we aware of any authority, ruling that the same ceremonies which are necessary to be observed in the case of an adoption in the superior classes are also necessary in the case of an adoption by a sudra. In addition to this, we have this prominent fact in the present case, that the adopted son is a brother's son, a member of the same family, in regard to whom the mere giving and taking may be sufficient to give validity to the adoption, which has been called into question after the lapse of so long a time in the course of which the question as to whether the necessary ceremonies were performed or not was never raised. The presumption, therefore, is that all that was necessary to render the adoption valid had been performed; and with this presumption on the one side, it entirely lies upon the opposite party to rebut it. Now, what do we find that rebuttal consists of? We have a clear finding of fact by the Subordinate Judge below in the following words:—"The defendant has not been able to adduce any "oral and documentary evidence to show "that the plaintiff is not an adopted son, and "is not in possession of the other properties "left by Nimaye, and also to substantiate his "own pleas."

Under these circumstances, we think we should be wrong if now, after the lapse of so many years when the adopted son has been recognized as such by all the members of the family, has performed the funeral rites and succeeded to the property of his father, we are to declare the invalidity of his position as adopted son.

In this view, we think it is needless to go into the question of limitation. It is sufficient to say that the suit has been brought within 12 years from the date of the alleged dispossession.

The special appeal is dismissed with costs.

Paul, J.—I concur. I consider the decision of the Subordinate Judge to be a sensible and a careful judgment. Without dwelling at present on the question of Hindoo Law raised, I think that question does not arise in the present case; because it is clear that on the death of Nimaye the plaintiff was, by consent of all the male members of the family, allowed to perform the sradh of Nimaye and to succeed and get into possession of all the properties left by Nimaye. Under such circumstance, it would be apparently unjust and an extremely hard case if the defendant is now allowed

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to raise a question in regard to property which, by common consent of all the members, had been allowed to the plaintiff on the death of Nimaye.

With regard to the question of limitation, I have to observe that it has been found by the Lower Appellate Court that the former suit was a fraudulent suit, inasmuch as Gobind was not the proper guardian of Nimaye. That being so the decree is not binding, and limitation commences to run from the date of dispossession, which is within 12 years of the present suit.

The 22nd March 1871.

Present:

The Hon'ble A. G. Macpherson and W. Ainslie, *Judges.*

Certificate under Act XXVII of 1861—Section 404, Code of Criminal Procedure—Section 7 Regulation V of 1799.

Case No. 22 of 1871.

Miscellaneous Appeal from an order passed by the Officiating Judge of Patna, dated the 16th January 1871.

Cazee Abid Hossein (Petitioner) *Appellant,*

versus

Mussamut Reazun (Opposite Party) *Respondent.*

Mr. C. Gregory for Appellant.

M. R. E. Twidale for Respondent.

Case:—A died leaving a widow and two daughters, and property in cash and Government secureties. None of his heirs being present at the time, the Magistrate sent the property to the Collector as *lawaris*. The widow applied for a certificate under Act XXVII of 1861 and obtained it from the Judge, who rejected a similar application from one H. alleging himself to be a cousin of the deceased. The widow then armed with the certificate applied for the property to the Magistrate, who, on a representation from H. that he had appealed to the High Court, refused to deliver the property. The widow then appealed to the Sessions Judge who dismissed her appeal. She then moved the High Court under Section 404 of the Criminal Procedure Code.

HELD that the High Court had no jurisdiction to deal with the matter under the Section referred to,—404 Act XXV of 1561.

HELD that the property taken possession of by the Magistrate ought to have found its way into the custody of the Civil Court in the manner contemplated by Section 7 Regulation V of 1799, and that the Civil Court ought to treat the property as practically in its own temporary care.

HELD (as regard's H's. appeal) that the property might be delivered to the widow who held the certificate, on her furnishing proper security for the purpose of indemnifying the appellant H.

Macpherson, J.—WE think this rule ought to be discharged on the ground that we have no jurisdiction to deal with the matter under Section 404 of the Criminal Procedure Code or otherwise.

We may add, however, that the whole of the proceedings appear to us to have been wrongly conceived throughout, and that the property which was taken possession of by the Magistrate ought to have found its way into the care or custody of the Civil Court in the manner contemplated by Section 7 Regulation V of 1799; and we think that the sooner the Magistrate has the matter dealt with under that Regulation, the better it will be for himself if he wishes to avoid responsibility for the property which is now in his custody.

As at present advised, we see no reason why the Zillah Court should not treat the property in the Magistrate's hands as being practically in the temporary care of the Civil Court.

As to the certificate which is the subject of the Miscellaneous Regular Appeal No. 22, we simply confirm the order granting a certificate to the respondent, without expressing any opinion as to the relationship of the appellant to the deceased. But we shall order that proper security to the fullest extent, that can be required for the purpose of indemnifying the appellant, shall be taken from the respondent (if it has not been already taken). For the purposes of calculating the amount of that security, the rupees 16,000 which the respondent claims as being his own property must be deemed as part of the estate of the deceased.

We make no order as to costs.

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The 22nd March 1871.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Special appeal.

Case No. 1274 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Backergunge, dated the 22nd March 1870, *reversing a decision of the Moonsiff of Dowlutgunge, dated the 29th April* 1869.

Rummeezooddeen Bhooyan (Plaintiff) *Appellant,*

versus

Joymala (Defendant) *Respondent.*

Baboo Luleet Chunder Sein for Appellant.

Baboo Grish Chunder Mookerjee for Respondent.

If the reasons in a judgment are such as can be rightly given, and the inferences such as can be legally drawn, it cannot be set aside in special appeal even if the Appellate Court cannot agree with or support all the reasons given.

Glover, J.—THIS was a suit on a registered bond, dated 16th Bhadro 1268, for rupees 575 principal, and rupees 425 interest, making up the total rupees 1,000.

The defendant denied that she either executed the bond or that she was a party to registering it.

The Moonsiff on the evidence considered the bond to be genuine and gave the plaintiff a decree.

The Subordinate Judge has reversed that decision and dismissed the plaintiff's suit.

It is contended in special appeal that the Subordinate Judge ought to have compared the handwriting of the bond with the admitted handwriting of Tilack Chunder, the son of the principal defendant, on another document, this son being the person who is said to have written out the bond; and that the first Court having decided the case to a great extent on the comparison of handwriting, the Subordinate Judge ought not to have put that circumstance entirely out of consideration.

On referring to the judgment of the Subordinate Judge, we find that this point was considered by him, for he remarks with reference to the Moonsiff's finding on the comparison of handwriting that the conclusion of the Moonsiff does not seem to him sufficient. I understand the meaning of this to be that, in the face of the strong reasons which the Subordinate Judge thought sufficient to enable him to say that the bond was never executed by the defendant, the mere comparison of handwriting was not sufficient to establish an entirely contrary state of things. With reference to another part of his decision on the Moonsiff's finding as to the law laid down in Norton on Evidence, we find that the Subordinate Judge is quite correct, inasmuch as the principle of law laid down in that book regards only witnesses, who either from death or any other circumstance are not in a position to attend. It is urged generally by the pleader for the special appellant that the Subordinate Judge has wilfully shut his eyes to a number of circumstances which are quite sufficient to show that the plaintiff's case is just and that the bond was really executed by the defendant. It is not, however, necessary that we should agree with or support all the reasons which the Subordinate Judge has given for his decision. It is sufficient for the purposes of this special appeal, if we can say on reading the whole judgment that the reasons which he has given, and the inferences which he has drawn, are not such reasons and inferences as he could not rightly give or legally draw under the facts and circumstances of the case. One point on which the Subordinate Judge has laid great stress is, we think, a point of very great importance. We find that at the very time when the plaintiff is said to have lent this money to the defendant on the bond, the plaintiff himself was indebted to the defendant in no less than rupees 606 on account of arrears of rent. The Subordinate Judge has considered this a most extraordinary and incredible circumstance, that the defendant being creditor of the plaintiff in a very large sum should at the same time borrow money from him, and thus put himself in the position of being used for the recovery of the money.

We think, on the whole, that the plaintiff has made out no case sufficient to justify our interference in special appeal, and we therefore dismiss this special appeal with costs.

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The 22nd March 1871.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Joint Hindoo family—Commensality—Presumption.

Case No. 1363 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Nuddea, dated the 27th June 1870, *reversing a decision of the Moonsiff of Kooshteah, dated the 29th May* 1867.

Golam Mustafa Khan and others (some of the Defendants) *Appellants,*

versus

Sheo Soondaree Burmonee (Plaintiff) *Respondent.*

Baboos Kalee Mohun Doss and *Kashee Kant Sein* for Appellants.

Baboo Romesh Chunder Mitter for Respondent.

Where part of the family property is proved to be joint, and the members live in commonsality, there is a very warrantable presumption, according to Hindoo Law, that the family is joint.

Glover, J.—This case was remanded by this Court on the 20th July 1868* in order that the suit, which involved a great number of defendants, might be tried separately as regards each particular party. This has now been done, and both the lower Courts have decided the case in the terms of the order of remand.

The suit was for possession of 12 jotes situated in 27 plots on the ground of inheritance, the plaintiff claiming to succeed to certain shares of ancestral estates heretofore held by her son.

The defence was that the property was not ancestral or joint, and that it was the separate acquisition of the two elder brothers, Ram Narain and Gunga Deen, by purchase at auction-sale.

The Subordinate Judge has held that the property was partly joint and partly ancestral, and that the plaintiff, as heiress of her minor son, was entitled to the share which she claimed.

The points taken in special appeal are, firstly, that the Subordinate Judge has not tried the case as directed by the order of remand, inasmuch as he has not raised separate issues on the point of limitation in regard to each separate parcel of land.

On this point, we observe that although the Subordinate Judge has taken the whole of the lands in dispute into consideration at once, it is quite clear from the decision he has recorded that he considered the question of possession with reference to each particular plot of land, and has in effect found with regard to each plot that the plaintiff has been in possession within 12 years of suit, and that her claim is not barred by limitation.

The second objection is that the mere finding that the plaintiff's husband lived with his brothers in commensality is not sufficient to raise the presumption that they were members of a joint undivided family.

On this point, we observe that the Subordinate Judge has not decided that question simply on the ground that the parties lived in commensality. He found, no doubt, that the parties lived together; but he also found that part of the property was beyond doubt proved to be joint; and taking the two facts together he raised, it appears to us, a very warrantable presumption according to the Hindoo Law that the family was joint and that it was for the defendant to rebut that presumption. He found, however, that the defendant had failed to rebut it.

The third ground is that the Subordinate Judge has come to no finding as regards the defendant's objection as regards plots 7, 9, 12, 22 and 23. It is contended that as these plots were sold under rent-decrees for their own arrears, the tenures passed to the purchaser, and whatever right the plaintiff may have had in them was extinguished by the sale.

With regard to this objection, it is sufficient to say that there is no proof on the record that the tenures were sold for their own arrears. The pleader for the special appellant has not been able to show that such was the fact; and even if it were not so, there is no doubt that the reasons given by the Subordinate Judge in his decision on this point in the 3rd issue are good and sufficient reasons.

The special appeal is dismissed with costs.

* 10 W. R., p. 187.

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The 22nd March 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Benamee sale—Evidence of bona fides.

Case No. 1476 of 1870.

Special Appeal from a decision passed by the Officiating Additional Judge of Chittagong, dated the 29th April 1870, *reversing a decision of the Sudder Moonsiff of that District, dated the 7th June* 1869.

Muthuroollah (Plaintiff) *Appellant,*

versus

Toraboodeen and others (Defendants) *Respondents.*

Baboo Chunder Madhub Ghose for Appellant.

Mr. R. E. Twidale for Respondents.

Where a deed of sale is executed under circumstances which suggest an intention to defraud creditors, it is not sufficient that the sale was formally made and the deed duly registered: the Court must be satisfied as to consideration having actually passed from the purchaser to the former owner, and as to the source from which the purcha e-money was derived.

Mookerjee, J.—We think that this case must be sent back to the Judge for a re-trial. The decision passed by him is far from being satisfactory. The plaintiff's case was that the defendant No. 2, his judgment-debtor, had immediately after executing a bond in his favor, fraudulently executed a kobalah in the name merely of the defendant No. 1, a friend of his son-in-law, but that the defendant No. 2 is the person who was and is really in the enjoyment of the property.

The Court of first instance gave a decree to the plaintiff, giving several reasons for his decision. It found that the consideration alleged to have been paid for the purchase by the defendant No. 1 was far below the real price of the land. He also found that the judgment-debtor was really in possession of the property after the sale, and that the fact of the son-in-law of the judgment-debtor having, only a few months after the alleged sale, taken a lease of the property from the ostensible purchaser, defendant No. 1, is also a circumstance which shows that the transaction of sale was a colorable one. The first Court also found that the witnesses examined by the purchaser were all relatives and dependants of the defendant No. 2, and from the tenor of their deposition it was clear they were supporting the fraud of the judgment-debtor, defendant.

On appeal the Additional Judge reverses the decision of the Court of first instance, and says—"There may be grounds for suspicion of the sale under consideration "having been effected with reference to the "seller's debts, but the sale was *formally* "made and the sale deed *duly registered* "before the decree was issued." In cases of this nature, it is not sufficient to see whether the sale was formally made and the bill of sale was duly registered. What the learned Judge ought to have determined is whether there was an actual sale on payment of consideration, and whether the money, if any was paid, was the money of the purchaser, defendant.

Then the Judge goes on to say—"While "it is now urged that the sale was purposely "intended to evade, and before indeed the suit "was instituted which resulted in the aforesaid decree." It is of no consequence whether the sale was made before or after the decree, so long as the sale itself was made fraudulently in favor of a dependant or a friend in order to evade the payment of a just debt or decree.

The Judge also no where finds that consideration was paid by the purchaser, defendant. His finding as to possession is not very clear. It does not appear who is really in possession of the property. The learned Judge would have done well to follow the directions laid down by this Bench in a case reported in the Volume XV of the Weekly Reporter, page 15, as also by the late Chief Justice in a decision to be found in X Weekly Reporter, page 445. There his Lordship said that the real test to be applied in such cases, is to find whether the purchaser has actually paid consideration for the purchase; whether that consideration-money belonged to the judgment-debtor or to the purchaser; and to find whether the judgment-debtor is really in possession of the property or in any sort of enjoyment of his purchase.

Here in this case, besides the fact of the purchaser being a friend of the son-in-law of the judgment-debtor (which circumstance is of itself not very important,) there are many other facts which throw the greatest

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suspicion on this transaction, and it is incumbent upon the defendant who says that he has made a *bonâ fide* purchase to clear all those suspicions and to establish that he is a purchaser who has paid valuable consideration for his purchase. The Judge does not seem to have looked into those points on which the first Court has founded its decree. He has simply relied for the *bona fides* of the transaction on the circumstance of the bill of sale having been drawn out and duly registered. The bill of sale is of course not denied by the plaintiff. The mere fact of its being registered carries no guarantee of its being a *bonâ fide* transaction.

There appears to be no object in the purchase, and it is not explained why immediately after the purchase the house was let to the son-in-law of the debtor on such a low rate of rent. All these circumstances require a closer sifting of the case than what has been done by the Additional Judge. This son-in-law appears to be also a person who is said to be a *ghur jamaie* of the debtor, which almost signifies in this country that he was a man of very little means, entirely dependant on the bounty of the father-in-law, judgment-debtor. The fact of the father-in-law having sold the house for an inadequate consideration to a friend, and the dependant son-in-law having immediately taken the lease of it, and of both the son and father-in-law living in that house, if satisfactorily proved, would tend in a great measure to brand the transaction as a benamee and colorable one.

We, therefore, send the case back to the Judge for re-consideration, and a proper decision of the case with reference to the remarks made above.

Costs of this appeal will follow the final result.

Jackson, J.—I quite concur in the remand. I do not wish at all to give any opinion on the facts as to whether this sale is a *bonâ fide* sale or not. It is quite possible that it may be *bonâ fide*. But it is for the Judge to find whether it was really a *bonâ fide* sale or not. Of course it is quite possible that the debtor sold the property, worth some 800 rupees, for one-half its value. It is not very likely. The purchaser, too, may have had good reasons for afterwards making it over as a perpetual talook to the son-in-law of the former proprietor, though it is not the usual mode of dealing with purchased property. The result of his doing so is to jeopardize his own right and title to the property, and to put it in the power of the former owner to declare afterwards that there was no real purchase. The real point, which, it seems to me, the Judge has to look to, is not whether the document was executed or whether it was registered, because it would be executed and would probably be registered whether there was a real sale or no sale at all, but whether the sum of 399 rupees not only passed from hand to hand, but was really paid by the purchaser to the former owner, where he got the money from, and so on. He can show very clearly that he really paid so much money, and that he had some good reason for at once allowing the former proprietor's son-in-law to have a permanent talook of it. The result of the purchaser's present proceedings is that he has invested a sum of rupees 400 permanently at 5 per cent., though the property is, it is said, worth a great deal more money.

It is rather difficult to understand what the Judge's intention is in finding as regards the debtor's possession. It seems to be admitted on all hands that the debtor's son-in-law is in possession, and there is no evidence, as far as the Judge alludes to it, to show that the debtor himself removed from the house. Whether the Judge means to say that when he went to the spot he saw that the debtor was not there, or whether he heard from the neighbours that he was not still living there, I cannot ascertain from his judgment. Which ever it may be, neither the one nor the other will be conclusive upon the fact that the debtor was not in possession. The mere statements of the neighbours ought not to be taken into consideration at all unless they are properly recorded.

I think the case must go back to the Judge for a fresh consideration, and I would suggest that he should send for the purchaser and examine him about his purchase and subsequent proceedings, and ascertain whether it was a *bonâ fide* purchase or not.

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The 22nd March 1871.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Section 224, Code of Civil Procedure—Possession—Limitation—Cause of action.

Case No. 1829 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Jessore, dated the 2nd June 1870. *affirming a decision of the Moonsiff of Kooshteah, dated the 31st March* 1869.

Bindoobashinee Dossee (one of the Plaintiffs) *Appellant,*

versus

Mr. J. R. Rainey (one of the Defendants) *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.

Mr. C. Gregory for Respondent.

W obtained a decree against R for possession of a moiety of certain lands appertaining to a shamilah, and as the lands were held by ryots entitled to occupy them possession was delivered under Section 224, Code of Civil Procedure. Subsequently W brought another suit against R for possession of the remaining moiety, and while the suit was pending obtained an award under Act IV of 1840, after which R's pleader appeared in Court and admitted that the only question remaining to be decided was the one of costs.

HELD that after this, limitation could not be pleaded against W, and if R continued to oppose the occupation of the property by a lessee of W, every such act of opposition would give W a fresh cause of action.

Mitter, J.—IT appears that Wooma Churn Ghose and others, the alleged lessors of the plaintiff, instituted a suit against Mr. Rainey, the predecessor of the defendants, for possession of a moiety of certain lands appertaining to a shamilat talook in mouzah Perikhally. This suit was decided on the 25th February 1860, and as the lands covered by the decree were in the possession of ryots who were entitled to occupy the same, possession was delivered to the lessors of the plaintiff under the provisions of Section 224 of the Code of Civil Procedure, by a proclamation issued to the occupants of the property by beat of drum, and also, as the Nazir's report shows, by taking kubooleuts from them. Subsequently, the said Wooma Churn Ghose and others brought another suit against Rainey for possession of the remaining moiety of the lands sued for in the first case on the 12th January 1860. Whilst this suit was pending, a dispute arose under the provisions of Act IV of 1840 between the said Wooma Churn Ghose and others on the one side and Mr. Rainey on the other; and an award was made in favor of the former on the 18th June 1861. After the passing of this award, Mr. Rainey's pleader appeared in the suit and stated to the Court that as possession of the entire lands then in dispute had been made over to the said Wooma Churn Ghose and others under the Act IV award above referred to, the only question which the Court had to decide was whether the plaintiff was entitled to his costs or not. It appears that this application being submitted to the Court, the Court did not make any decree for the possession of the lands, but gave a decree to the plaintiffs for the costs incurred by them in the litigation.

The plaintiff in this suit subsequently took a lease from the said Wooma Churn Ghose and others in the year 1270, and the present action was brought by her for possession of the entire 16 annas of the lands which were in dispute in the two previous suits above referred to. The Lower Appellate Court has now found on remand that although formal possession was given to the lessors of the plaintiff within 12 years prior to the institution of the present suit, yet such possession was not sufficient to save her claim from the operation of the law of limitation, when there was no reliable evidence on the record to prove that either her lessors or she herself had actually received rents from the ryots within 12 years prior to the date of the institution of this suit.

We are of opinion that this decision is altogether erroneous. It does not lie in the mouth of Mr. Rainey or his successors in title to say that the delivery of possession in the execution department, under the provisions of Section 224, was not sufficient in law to prove that the lessors of the plaintiff had obtained possession of the property covered by the decree. If Mr. Rainey or his successors notwithstanding such delivery continued to oppose the occupation of the property by the lessors of the plaintiff, every such act of opposition would give to the plaintiff a fresh cause of action against them, for the old dispute had been already set at rest by the final proceedings of a Court of competent jurisdiction. It was no fault of the lessors of the plaintiff that possession was given to them by a proclamation issued

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under Section 224. The law prescribes a certain mode for the delivery of possession in cases where the lands are in the actual occupancy of tenants entitled to occupy the same ; and it was in that mode that possession was given, according to the Judge's finding, to the lessors of the plaintiff at least of one-half the lands now in dispute. With regard to the other half there was the Act IV award, and the admission made by Mr. Rainey's pleader in the suit instituted on the 12th January 1860, in which he distinctly acknowledged that possession of the lands claimed in that suit had been actually made over by his client to the lessors of the plaintiff. Under these circumstances, it seems to us clear that the point of limitation cannot be maintained in this case. We have some doubts, however, that the identity of the lands has not been properly determined by the Lower Appellate Court, and we therefore reverse the decision of the Subordinate Judge and direct the case to be remanded to that officer for a fresh decision on the merits. If the plaintiff can show either that the lands in dispute are covered by the decree which was passed in favor of her lessors in the suit brought on the 25th February 1860, which decree was subsequently executed in the manner stated above ; or even that they are covered by the award under Act IV of 1840, and the petition filed by the pleader of Mr. Rainey in the second suit, there can be no doubt whatever that the plaintiff would be entitled to recover those lands from the representatives of Mr. Rainey, who appear to be the principal defendants in this case.

The costs of this appeal and of the Lower Appellate Court will abide the ultimate result.

The 22nd March 1871.

Present :

The Hon'ble F. B. Kemp and G. C. Paul, *Judges.*

Permissive user—Revocation.

Case No. 2380 of 1870.

Special Appeal from a decision passed by the Officiating Judge of East Burdwan, dated the 6th August 1870, *affirming a decision of the Moonsiff of Mungulcote, dated the 14th February* 1870.

Gooroo Churn Soor and others (Defendants) *Appellants,*

versus

Sree Churn Ghose (Plaintiff) *Respondent.*

Baboo Oopendro Chunder Bose for Appellants.

No one for Respondent.

Where a party who had enjoyed the permissive use of the water of a tank does not use it for 4 years from the date of its further excavation, the permission may be taken to be revoked.

Paul, J.—In this case the judgment is manifestly wrong. It appears that the plaintiff enjoyed a permissive use of the water of the defendants' tank, and that 4 years ago the tank was further excavated. From that date the plaintiff has not used the tank and we may take it that the permission was revoked. At all events it is revoked now and was revoked at the time of institution of the suit ; and therefore there is no right that the plaintiff can enforce, and the suit must be dismissed with costs.

The 23rd March 1871.

Present :

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Fraudulent conveyance—Bona fides—Lis pendens.

Case No. 1706 of 1870.

Special Appeal from a decision passed by the Additional Judge of Nuddea, dated the 2nd July 1870, *affirming a decision of the Moonsiff of Kooshteah, dated the 27th May* 1869.

Nuffur Merdha (Plaintiff) *Appellant,*

versus

Ram Lall Adhicary (Defendant) *Respondent.*

Baboos Hem Chunder Banerjee and *Pitambur Chuckerbutty* for Appellant.

Baboos Mohinee Mohun Roy and *Luleet Chunder Sein* for Respondent.

Where a conveyance is effected under a fraudulent arrangement whereby nothing is sold, *bona fides* on the part of the purchaser cannot make a title in his vendor.

The doctrine of *lis pendens* is not applicable to the case of a purchaser at a sale in execution.

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Glover, J.—THERE can be no doubt, I think, that the decision of the Courts below is correct.

The plaintiff claims as purchaser from Sreenath Bhuttacharjee, who is alleged to have purchased from Sreenath Sircar and Mussamut Drobo Moyee jointly in 1274.

The defendant claims as purchaser at auction, on the 20th of May 1867, of the rights and interests of Sreenath Sircar which he says extended to the whole of the disputed property, Mussamut Drobo Moyee having no title therein.

The plaintiff in fact came into Court to prove Mussamut Drobo Moyee's title, and he had this in his favor—that in a suit between Mussamut Drobo Moyee and Sreenath Sircar in July 1867, the Civil Court had decreed to the lady a half share in the property as heiress of her deceased husband Suroop Sircar.

Both lower Courts have found that the suit brought by Mussamut Drobo Moyee against Sreenath Sircar was a sham, one got up to protect the latter's property from his creditors; that Drobo Moyee's husband predeceased his father Debee Pershad and that his widow succeeded to no part of the family estate; that Sreenath Sircar was the real owner, and that the decree against him was the result of collusion between the two for the express object of defrauding Sreenath's creditors.

The objection taken in special appeal is that the *onus* of proving that Drobo Moyee took no part of the estate inasmuch as her husband had pre-deceased his father, was on the defendant and not on the plaintiff.

This objection, I may observe, was not taken in the Court below, nor does it appear to me of any force. The defendant is in possession—that seems to be clear; for when Drobo Moyee tried to take possession in execution of her decree, the record shows that she was opposed by the defendant, who was already in possession under his auction-purchase. The plaintiff, who seeks to disturb this possession, can only do so by showing a better title, and this he can only do by showing that Mussamut Drobo Moyee owned a part of what had passed to the defendant as the rights and interests of Sreenath Sircar. The Judge has gone very fully into the evidence on this point, and I think that the conclusion at which he has arrived is a correct one. In any case, it is a finding of fact on the evidence which could not be interfered with in special appeal.

The second objection is founded entirely on the supposition that Mussamut Drobo Moyee got possession under her decree. This has been found as a fact against the special appellant; indeed it is quite clear that the lady never did succeed in getting possession.

The last point taken is that conceding for the sake of argument the collusive nature of the transaction between Mussamut Drobo Moyee and Sreenath Sircar, that cannot affect the plaintiff's right, he being a *bonâ fide* purchaser for value without notice.

The objection is untenable. The Judge has found that the whole arrangement from first to last was tainted with fraud; that Drobo Moyee had in fact nothing to sell and did sell nothing; and the ostensible sale to the plaintiff was a trick on the part of Sreenath Sircar to fraud his creditors of their money. *Bona fides* on the part of the plaintiff, even if we assume it to exist, cannot make a title in his vendor.

I think that the special appeal must be dismissed with costs.

Mitter, J.—I think there is no ground for this special appeal. The question of *onus* does not arise. The Judge has found upon the whole evidence and the conduct of the parties, that there was no foundation whatever for the title set up by the plaintiff. The doctrine of *lis pendens* is not applicable to the case of a purchaser at a sale in execution of decree,—(Gour Monee *versus* Reid). I dismiss this special appeal with costs.

The 23rd March 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge.*

Res judicata—Estoppel.

Case No. 1797 of 1870.

Special Appeal from a decision passed by the Judge of Nuddea, dated the 1st August 1870, reversing a decision of the Moonsiff of that District, dated the 30th November 1869.

Nobin Chunder Mojoomdar (Plaintiff) *Appellant,*

versus

Mookta Soonduree Dabee and others (Defendants) *Respondents.*

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Baboos Mohince Mohun Roy and *Issur Chunder Chuckerbutty* for Appellant.

Baboos Sreenath Doss and *Grija Sunkur Mojoomdar* for Respondents.

S died leaving two nephews (N and G) as his heirs according to Hindoo Law; whereupon one M took possession of the property S had left, alleging herself to be entitled under a will which he had made. G then brought a suit against M for a moiety of the estate, making his brother G (who had refused to join him as co-plaintiff) a defendant in the case. The will being found on the evidence as it then stood to be genuine, the suit was dismissed. N then as heir of S sued M and others for his share of the property.

HELD that N was in no way bound by the finding in the former suit in regard to the validity of the will.

Norman, C. J.—THIS is a very simple case. One Suroop Chunder Mojoomdar died on the 30th of Srabun 1272 leaving two nephews, Nobin Chunder Mojoomdar and Grish Chunder Mojoomdar, as his heirs according to Hindoo Law. After the death of Suroop Chunder, one Mookta Soonduree took possession of that which had been his property, alleging herself to be entitled to the same under a will made by Suroop Chunder in his lifetime. In the year 1867, Grish Chunder, as one of the heirs of Suroop Chunder, brought his suit against Mookta Soonduree to obtain possession of one moiety of the estate of Suroop Chunder. He made his brother Nobin Chunder, who appears to have refused to join as a co-plaintiff, a defendant in that suit. The case was trieo by the Principal Sudder Ameen who dismissed the suit, finding on the evidence as it then stood that the will set up by Mookta Soonduree was genuine, and that therefore Grish Chunder had no title to the property.

The present suit was brought on the 22nd June 1869 by Nobin Chunder for his share of the property as heir of Suroop Chunder, against Mookta Soonduree Dabee and others as defendants. The first Court went into the merits of the case and found that the will was a forgery and declared that Nobin Chunder was entitled as heir of Suroop Chunder to that which he claimed in the suit. On appeal the Judge was of opinion that the claim of the plaintiff Nobin Chunder was barred by the decision in the former suit brought by his brother Grish Chunder against Mookta Soonduree, in which the validity and genuineness of the alleged will of Suroop Chunder was in issue; and accordingly he reversed the decision of the first Court and dismissed the suit.

From that decision an appeal has been presented to this Court, in support of which Baboo Mohinee Mohun Roy has appeared on the part of the plaintiff. We think that that appeal is well founded. The plaintiff Nobin Chunder was no party to the suit brought by his brother Grish Chunder. He could not in any manner have availed himself of a decree in that suit to enforce a claim to the share which he now claims. He could not have appealed from that decree, and we think it perfectly clear that he is in no way bound by the findings of the Court therein. It would be most unjust if this were otherwise. Suppose there are two brothers interested in equal moieties, as these brothers were, in the property of their ancestor. They see reason to doubt the genuineness of a conveyance set up by some third person to the prejudice of their title. One of the brothers, against the will of the other, who thinks that they have not had time to sift out the facts of the case thoroughly so as to be able to place them before the Court satisfactorily, rushes into Court and takes his chance of a decision as regards his share. The one who does not join gets no advantage from that suit. He cannot make use of it to save himself from being barred by limitation, or to enforce any rights of his own. He has a perfect right to stand by and watch the conduct of the litigants in that suit, with a view to assert his own rights at the time and in the manner which he shall judge most prudent and convenient to himself.

The decision of the Additional Judge must be reversed, and the case remanded to him who will probably have very little difficulty in deciding it on the merits.

Costs of this appeal will follow the result.

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The 23rd March 1871.

Present:

The Hon'ble W. Ainslie and G. C. Paul, *Judges.*

Section 246 Act VIII of 1859—Default—Small Cause Courts—Jurisdiction—Mortgage bond.

Case No. 2000 of 1870.

Special Appeal from a decision passed by the Officiating Judge of Tirhoot, dated the 28th June 1870, reversing a decision of the Subordinate Judge of that District, dated the 9th March 1870.

Lalla Goondur Lall (Plaintiff) *Appellant,*

versus

Hubeeboonissa and others (Defendants) *Respondents.*

Baboo Sreenath Doss for Appellant.

Mr. R. E. Twidale and *Moonshee Mahomed Yusoof* for Respondents.

Where an intervenor's application under Section 246, Code of Civil Procedure, is dismissed on default, the order of dismissal is of equal force with a finding on the merits after investigation.

In a suit on a mortgage bond a Small Cause Court has no jurisdiction to make a decree providing, on default of payment, for the sale of the immoveable property pledged, and a Civil Court has no jurisdiction to allow the sale in execution of such a decree.

Ainslie, J.—THE plaintiff in this suit is seeking to establish his right under two conveyances from Mussamut Bhikhun in respect of a one anna share of certain property.

In the first Court he obtained a decree. When the case was taken on appeal before the District Court, the Judge of that Court held that inasmuch as the plaintiff had come in in the course of an execution suit under Section 246 of the Code of Civil Procedure and had failed in his intervention, and had allowed more than 12 months to elapse before he commenced this suit, he was barred by limitation.

In special appeal it has been contended, in the first place, that there was no investigation under Section 246 of the Civil Procedure Code; in the second place, that supposing that there was an investigation under that Section, even then limitation would not apply, inasmuch as the plaintiff is actually in possession; and thirdly, that the sale under which the defendant claims was held under a decree of the Small Cause Court which was in the form of a mortgage decree, and therefore one which that Court had no jurisdiction to make, and that the sale consequently was null and void.

As to there having been no investigation, we find that an application was submitted by the plaintiff on the 1st August 1867 under Section 246; that that application was registered and the petitioner was ordered to produce evidence in support of his case, and the opposite party was called on to reply. On the 25th September of that year, partly with reference to the finding in a similar intervention on behalf of Mussamut Bhikun, but also because the intervenor had failed to produce any evidence in support of his claim, his application was dismissed. This application having been dismissed on default, the order must be treated as of equal force with a finding on the merits after investigation.

I now come to the next ground. Granting that there was an investigation under Section 246, it is said that under the ruling in XIV Weekly Reporter, page 367, limitation will still not apply. On examining that case however, it will be found that there is a very material distinction between it and the present case; because it appears that in that case it was held that there had been no proper adjudication under Section 246 on the question of possession,—the only question which could be investigated under that Section. Such investigation as had taken place had been directed to ascertain title, and was held not to be a proper investigation.

But the third ground taken in special appeal appears to us to be good. The decree under which the sale was held, by which the defendant became a purchaser of this property, was a decree of the Small Cause Court in a suit on a mortgage bond; and the terms of the decree are that the defendant is to pay certain monies to the plaintiff, or, that is, in default of his payment, the plaintiff is to recover the sum by the sale of the property pledged.

This was a decree which, when transferred to the Civil Court for execution against immoveable property, might have been rejected by the Court under Section 288 of the Code of Civil Procedure. It was not so rejected; but as it is patent on the face of the decree that the Small Cause Court had no jurisdiction to make it, and therefore

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that the Civil Court had no jurisdiction to allow any sale to take place under it, I think that we must allow this ground of appeal now, and declare that the sale was made entirely without authority and was a nullity.

Accordingly, we overrule the plea of limitation and remand the case to the Lower Appellate Court to be tried on the merits with reference to the above remarks.

Paul, J.—I quite concur in this judgment.

The 23rd March 1871.

Present:

The Hon'ble W. Ainslie and G. C. Paul, *Judges.*

Fraud—Locus penitentiæ.

Case No. 2030 of 1870.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 30th June 1870, affirming a decision of the Subordinate Judge of that District, dated the 12th March 1870.

Lall Mahomed and another (two of the Defendants) *Appellants,*

versus

Bibee Furhutoonissa (Plaintiff) and another (Defendant) *Respondents.*

Baboo Mohesh Chunder Chowdhry for Appellant.

Baboo Chunder Madhub Ghose and *Moulvie Mahomed Yusoof* for Respondents.

In a suit for confirmation of possession where it was found that plaintiff had executed a fraudulent mokururee conveyance under which, however, possession did not pass but continued with her for three years, after which there was some disturbance by the plaintiff's husband of the possession by an Act X decision:

HELD that as the intention of the conveyance was not carried out by actual transfer of possession to defendant, there was a *locus penitentiæ* left to plaintiff who was consequently entitled to ask to be quieted in possession, which had either been prejudically affected or even invaded by and under the fictitious decision obtained under Act X by her husband for his own ends, and not by reason of the carrying out of the original fraud.

Paul, J.—BABOO MOHESH CHUNDER CHOWDHRY has no doubt ably contended, by the light of the authorities cited by him, that it is not competent to a plaintiff, after having admitted the execution of a deed merely for ulterior purposes, to seek to have it set aside.

It is not necessary to make any comments upon the numerous cases he has cited, because they appear to me to be distinguishable from the present case. No doubt the cases which have been referred to lay down this position, that if property has passed under a fraudulent conveyance, the Court will not ordinarily assist the person executing the conveyance to recover back the property by alleging his own fraud; and where the parties are *in pari delicto*, the Court will assist no one. I am far from saying that if possession had passed, I should hold that the parties were *in pari delicto*. I should like to examine further into the matter before coming to the conclusion that a woman who may be supposed to be under the influence of her husband is *in pari delicto* with him.

But the facts of this case, as found by the lower Court, show that after the execution of the mokururee deed (if this deed was ever executed), possession did not pass to the mokururedar but remained with the plaintiff; and that that possession continued with her for three years subsequently; and that recently there has been some disturbance of that possession by an Act X decision. On the whole, however, the lower Court concludes that, substantially, the plaintiff is still in possession. Under these circumstances, it appears to us that the plaintiff is entitled to a decree by which she is either to be confirmed in her possession, or to be put into possession, assuming she has lost it. Her possession (if she has lost it) has been wrested from her *not* under the mokururee deed, but under certain fraudulent legal proceedings set on foot by the husband for the purpose of carrying out some plan of his own.

Therefore, in this case, the substantial question between plaintiff and the defendant resolves itself into this, namely, did the plaintiff transfer the property to the defendant by, and in consequence of, the conveyance which it is alleged she executed. On that subject the findings of the Court below leave no doubt whatever that she did not transfer possession of this property by or under the deed which she is alleged to have executed. I apprehend that the finding of facts by the lower Courts sufficiently sustains the plaintiff's claim to relief in this case, first, because the Lower Appellate Court does not believe that the deed was actually executed; and secondly, because the Court believes that even if the deed had been executed for some

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nominal purpose, that purpose was not carried out by putting the defendant into possession. If the defendant had been put into possession, the features of this case would have assumed another aspect; but since that intention was not carried into effect by the defendant being put into possession by the plaintiff, I apprehend there is a *locus penitentiæ* left to the plaintiff, in consequence of which she is entitled to ask that she may be quieted in her possession, which has either been prejudicially affected or even invaded by and under a fictitious decision obtained by her husband for his own ends, and not by reason of the carrying out of the improper purpose she had once intended, and from which before its completion she desires to withdraw.

I, therefore, think that the decision of the Lower Appellate Court should be affirmed with costs.

Ainslie, J.—I concur.

The 23rd March 1871.

Present:

The Hon'ble W. Ainslie and G. C. Paul, *Judges.*

Zur-i-peshgeedar—Money decree.

Case No. 2032 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Gya, dated the 27th June 1870, *reversing a decision of the Sudder Moonsiff of that District, dated the 2nd October* 1869.

Gouree Singh (Defendant) *Appellant,*

versus

Fuzl Hossein (Plaintiff) *Respondent.*

Mr. R. T. Allan for Appellant.

Messrs. R. E. Twidale and *C. Gregory* for Respondent.

Where a zur-i-peshgeedar abandons his right to possession under his lease, and sues to recover the money advanced and obtains a decree which gives him no specific remedy against the property leased to him, his lease must be held to have terminated.

Ainslie, J.—The defendant, who is the special appellant before us, was the son of one Raj Roop Singh, who in the year 1840 advanced a sum of money to Sreenam Singh and others on a zur-i-peshgee of a one anna share of a certain mouzah. Whether Raj Roop Singh had obtained possession or not does not appear; but in the year 1857 or 1858, he brought a suit against the mortgagor claiming the original amount advanced, together with an equal amount as interest, from which it is quite clear that he must have been out of possession for a considerable time. On the 21st July 1858 he obtained a decree which was a simple money decree. While that suit was pending, the mortgagor executed two deeds in favor of the plaintiff; one a mokururee of 5 dams for a consideration of 500 rupees with a reserved rent of 8 annas; and the other a zur-i-peshgee lease of 3 dams. Then, seven years after that, the defendant proceeded with the execution of his decree and attached and caused to be sold the rights and interests of his judgment-debtor, and he himself became the purchaser. Apparently the ordinary forms of delivery of possession by proclamation were gone through. The next thing that we find is, that some years afterwards the plaintiff is called upon by the Magistrate to furnish security for keeping the peace in consequence of a quarrel about this land, and he then comes into Court to establish his title under the mokururee and under zur-i-peshgee lease.

The Lower Appellate Court has given a decree to the plaintiff, holding that this mokururee and zur-i-peshgee were duly executed in his favor and are good against the defendant.

The defendant appeals specially and urges two grounds, first, that his lien still continues upon the property notwithstanding the money decree of 1858; and second, that the judgment below has dealt with the evidence in such an unsatisfactory way that it ought to be treated as defective in law.

On the first ground, it appears to me that when the plaintiff abandoned his right to possession under his lease, and instituted a suit to recover the sum that he had advanced, and obtained a decree in that suit and allowed that decree to be so framed as to give him no specific remedy against the property leased to him, his lien must be held to have terminated.

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On the second point, I think that although the judgment of the Court below is not very satisfactory, still it has in effect disposed of all questions of fact, and we cannot interfere with it in special appeal.

Mr. Gregory for the respondent objects under Section 348 Act VIII of 1859 to the decree of the Lower Appellate Court on the ground that it does not award him mesne profits as claimed in the plaint. We think that the lower Court intended to give and that the plaintiff is entitled to get wasilat for the period claimed in the plaint. Decree will be made accordingly, the special appeal being dismissed with costs.

Paul, J.—I concur.

The 24th March 1871.

Present:

The Hon'ble A. G. Macpherson and W. Ainslie, *Judges.*

Remands — Jurisdiction — Sections 354 to 357, Civil Procedure Code— Boundaries—Identification.

Case No. 1670 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Backergunge, dated the 30th December 1869, reversing a decision of the Moonsiff of Madareepore, dated the 27th June 1869.

Gooroo Pershad Dutt and others (Defendants) *Appellants,*

versus

Sreenath Banerjee and others (Plaintiffs) *Respondents.*

Baboos Hem Chunder Banerjee and *Lulcet Chunder Sein* for Appellants.

Baboo Kalee Mohun Doss for Respondents.

Where the Court of first instance decides both on the general merits and the plea of limitation, and the Judge of the Appellate Court considers that the evidence upon the record is not sufficient to allow of a satisfactory judgment, and that he is in a position legally to require further evidence to be taken, he ought to proceed in the manner provided for in Sections 354 to 357 of the Code of Civil Procedure, but has no right to set aside the first Court's decree and remand the case for re-trial.

In a suit for possession, a general consideration of the question of boundaries should not be gone into until the spots of land claimed are accurately ascertained.

Macpherson, J.—This case ought not to have been remanded as it was by the Subordinate Judge. The Subordinate Judge says that the Moonsiff dismissed the case simply on the ground of limitation; and that therefore it was necessary to send the case back under Section 351 of Act VIII of 1859 for a fresh trial. It is not the fact that the Moonsiff dismissed the suit simply on the ground of limitation. The Moonsiff took the greatest possible pains with the case, went to the ground himself, and wrote a long and careful judgment going fully into the case. Of the merits of that judgment, so far as it finds the facts one way or other, I do not at present mean to speak; because it is for the Lower Appellate Court to decide whether the judgment was right or whether it was wrong. But so far as I understand the Moonsiff, he decided against the plaintiffs both on the general merits and on the plea of limitation. That being so, if the Subordinate Judge considered that the evidence upon the record was not sufficient to enable him to pronounce a satisfactory judgment, as contemplated in Section 353 of Act VIII of 1869, and if he considered himself to be in a position legally to require further evidence to be taken, he ought to have proceeded in the manner provided for in Sections 354 to 357. He had no right to go in the teeth of Section 352, and set aside the decree of the Moonsiff and remand the case to be tried over again by him.

In strictness, probably, we ought simply to set aside the order of the Lower Appellate Court, and leave matters as they were before that order was made. But considering the length of time which has elapsed and that further evidence has in the mean time been taken, it appears to me that while we direct that the order now appealed against be set aside, and that the case be sent back to the Lower Appellate Court in order that the original appeal may be heard, we should further direct that the appeal shall be treated as if it were one in which fresh evidence had been called for under Section 354 or 355 of the Civil Procedure Code, so far as regards the new evidence which has been received under the remand order. That new evidence is to be treated as legally upon the record. But in other respects the Lower Appellate Court is to deal with the case as if it were now for the first time in

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the list of appeals in that Court. The Subordinate Judge will decide it on the materials now before him, if he finds that they are sufficient to enable him to pronounce a satisfactory judgment. If he is of opinion that further evidence is still absolutely requisite in order to enable him to pronounce a satisfactory judgment, and that it can legally be taken with reference to the provisions of the Code of Civil Procedure (*see* Sections 351-357)—or if after going into the case he thinks that the defendants should have further opportunity of putting in evidence to rebut the new evidence admitted under the remand order—he may cause further evidence to be taken ; but he must take care that he acts strictly as the law provides. The Lower Appellate Court will take the case up at once out of its turn, and will deal with the subject-matter of each of the three suits separately (although the evidence on record must be taken as on the record of each suit). The Court will consider how far in each suit the plaintiffs have or have not made out their case, and each suit must be dealt with on its own merits and a distinct decision must be given in each. The Lower Appellate Court will bear in mind that which seems to have been rather lost sight of by the Subordinate Judge whose order is now under appeal before us, that it is for the plaintiffs to point out the precise plots of land for which they are suing, and that there is no use in going into any general consideration of the question of boundaries until the precise plots claimed are accurately ascertained. When they have been pointed out by the plaintiffs, it will then be for them to prove their possession within twelve years of these particular plots respectively, and (if they succeed in proving that possession) their title to them. The whole burden of proof lies in the first instance on the plaintiffs. It does not appear to me that there is any thing very special in these suits which should necessitate such very lengthy judgments as the Lower Courts have delivered. But the issues no doubt require to be treated with accuracy and attention.

The order of the Subordinate Judge is set aside, and the hearing of the appeal is to be proceeded with by the Lower Appellate Court at once. The costs which have been incurred in this Court will be costs in the cause, and will follow the result of the appeal in the Lower Court.

Ainslie, J.—I concur.

The 24th March 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Section 119 Act VIII of 1859—Ex-parte decree—Re-hearing—Appeal.

Case No. 1844 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Sylhet, dated the 17th June 1870, affirming a decision of the Sudder Moonsiff of that District, dated the 11th March 1870.

Boro Khosiah (Plaintiff) *Appellant,*

versus

Jata Sirdar and another (Defendants) *Respondents.*

Baboos Romesh Chunder Mitter and *Anund Gopal Paleet* for Appellant.

Baboo Bama Churn Banerjee for Respondents.

A plaintiff having taken out execution of an *ex-parte* decree, the defendant applied under Section 119 Act VIII of 1859 to have it set aside and eventually succeeded. After this the case came on for hearing, and the suit was dismissed both by the Court of first instance and the Appellate Court. The plaintiff then came up in special appeal, contending that sufficient inquiry had not been made before the application for re-hearing was admitted.

HELD (by Jackson, J, whose opinion prevailed) that it would not be doing justice, which the Court is bound to do in administering the law, to restore an *ex-parte* decree which two Courts had on subsequent trial on the merits found should not be renewed ; and that the Moonsiff's order admitting the case to a re-hearing was not open to appeal.

Mookerjee, J.—THE plaintiff in this case sued the defendants for possession of 11 hâts of land with wasilat. The defendants not appearing, the Moonsiff gave an *ex-parte* decree to the plaintiff on the 10th Poos 1274 corresponding to the 24th December 1867. The suit was instituted on the 17th Srabun 1274 or August 1867.

In execution taken out by the plaintiff for costs adjudged in this *ex-parte* decree, certain properties belonging to the debtors were brought to sale, it is alleged in Assar 1276.

The defendants then appeared and by a petition, dated 8th Bhadro of that year, applied to the Moonsiff under Section 119 of the Procedure Code to set aside the *ex-parte*

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decision. They alleged in this petition that they were wholly ignorant of the fact that a suit was instituted against them; that no service of the summons was made on them; and that although their properties were attached yet the sale istahar was not issued, but that nevertheless their properties were sold in Assar 1276.

The Moonsiff fixed a date for the examination of the defendants, but the defendants not having appeared on that date their application under Section 119 was struck off the file on the 18th December 1869, which corresponds to some day in Poos 1276.

The defendants then made a second application on the 23rd of Poos 1276, showing cause for non-attendance and praying that their application may be restored to the file and adjudicated upon. This application was registered on the 7th January 1870. The Moonsiff then examined the defendants, and after having heard witnesses to the service of the summons, was of opinion that the summons was not duly served. The Moonsiff thereupon set aside his judgment and appointed a day for the hearing of the suit. On the case coming for trial, the Court of first instance as well as that of appeal dismissed the plaintiff's suit on the ground that it was not proved to their satisfaction that the defendants had dispossessed plaintiff from his lands; the costs of the defendant were thereupon made payable by the plaintiff.

Dissatisfied with the order of the Courts below the plaintiff appeals specially, and urges that the Moonsiff had no jurisdiction to entertain the application under Section 119, inasmuch as such application ought to have been preferred within 30 days after any process for enforcing the judgment had been executed, which was not done in the present case. Baboo Romesh Chunder admitted that this point was never specifically raised in any of the Courts below; but he contends that in a petition which was filed by his client in the Moonsiff's Court, it was distinctly stated that the defendants were fully aware of the execution of the process of attachment and sale. He also states that in the application made by the defendants themselves, they admit that the process of attachment was executed and that the sale was held in Assar 1276. Baboo Romesh Chunder Mitter contends that therefore, on the defendant's own showing, the application under Section 119 is out of time, having been preferred on the 8th Bhadro following. A decision of the Full Bench of this Court is cited in support of this contention, which is to be found in page 236 of the IX Weekly Reporter. It is contended by the vakeel for the respondents that the process mentioned in Section 119 must be a *bonâ fide* process, but the Moonsiff as well as the Lower Apellate Court has held in this case that there was no *bonâ fide* process executed. On referring to the record, we find that there is a statement of the defendants to the effect that the sale of their properties had taken place in Assar 1276, and that the application under Section 119 was made on the 8th Bhadro of that year. We also find that there is some sort of admission that the properties had been attached in execution, though that is not very clear. This attachment must have been an attachment prior to the sale of the properties; and if it be the case that the properties of the applicants were sold in Assar 1276, the attachment must have been of a date at least a month before the sale, and therefore very much beyond the 30 days allowed by law in Section 119. If it is so, the application would probably be an application beyond time on which the Moonsiff could not have acted.

The law seems to me to be clear. The application to set aside an *ex-parte* decision must be made within "a reasonable time not exceeding 30 days after any process for enforcing the judgment has been executed." Now, if the plaintiffs, the holders of the *ex-parte* decree, had actually and *bonâ fide* executed the process of attachment, the defendant was bound to come within a reasonable time of the execution of that process not exceeding 30 days. The Legislature does not say that the application should be made within 30 days of the knowledge of the judgment-debtors of the execution of any process for the enforcement of the *ex-parte* decree. If, therefore, a process for enforcing the judgment is duly executed, I apprehend that Section 119 requires that the application to set aside the *ex-parte* judgment must be preferred within 30 days of the execution of that process, whether the judgment-debtors were or were not actually aware of the execution of such process. If a property of the judgment-debtor is duly attached, he is presumed to be aware of the judgment in execution of which that attachment was made. The law requires he should know of it, and must come within a reasonable time from that attachment; but that time is not to exceed 30 days. Under this view of the law, I am of opinion that if the process

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of attachment was duly executed, and if the application has not been made within the time limited by the law, the application could not and should not have been entertained by the Moonsiff.

In this case the objection now urged not having been taken in any of the Courts below, there is no clear finding at all as to whether the process of attachment had been executed or not. The case will, therefore, go back to the Court of the Moonsiff. The Moonsiff will lay down an issue as to whether any process to enforce the decree was duly and *bonâ fide* executed or not. He will give full opportunity to the parties to adduce any evidence they desire to produce to show whether any process, and more especially a process of attachment, had been duly executed. The present finding of the Moonsiff does not meet the requirements of the case. He simply finds that summons had not been served, and that the plaintiff was not aware of the sale as it had not taken place at the spot. But whether the summons was served or not, which is a point which affects the merit of the application under Section 119, he is bound to see whether the application is in time, which is a condition precedent to the entertainment of the application itself. I would, therefore, remand the case to the Court of the Moonsiff to try this point, and to decide the case anew according to the result of the enquiry directed. Though we entertain the objection raised for the first time before us, yet considering that this plea ought to have been raised when the application was made under Section 119, I think the appellant must pay the whole of the costs of the defendants incurred up to this stage of the proceedings.

Jackson, J.—I think that this special appeal should be dismissed. If the appellant was dissatisfied with the decision of the Moonsiff admitting the case to a rehearing, he might have raised the question on the appeal to the Judge, He made no allusion to it, and the case having been tried upon the merits both by the Moonsiff and the Appellate Court, it has been found that the plaintiff is not entitled to a decree which he obtained *ex-parte*. I think then that it is too late now for him to contend that there was not sufficient enquiry made before the application for a re-hearing was admitted. It seems to me that we are bound to administer the law in order to do justice between the parties, and it would not be doing justice to restore an *ex-parte* decree which two Courts have on a subsequent trial on the merits found should not be renewed. If the objection which is now raised was a substantial objection, I have no doubt that it would have been raised at the proper time. The Moonsiff's order admitting the case to re-hearing is not open to appeal. It is possible that we may have authority to interfere with it under our extraordinary powers of superintendence, though I am not quite certain even of that. It is not an authority which we are obliged to exercise, and I am of opinion that it would not be for the ends of justice that we should exercise it in this case The appellant is entitled to a special appeal from the decision of the Judge. This is not any ground of appeal against the decision of the Judge ; and though it may be an appeal against an alleged irregularity in the proceedings of the Moonsiff, it cannot be said to be one which affected the merits of the case.

I would dismiss this appeal with costs.

The 24th March 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Agency—Authority (to buy and sell) —Consent.

Case No. 1874 of 1870.

Special Appeal from a decision passed by the Additional Judge of Chittagong, dated the 29th June 1870, *modifying a decision of the Subordinate Judge of that District, dated the 18th September* 1869.

Goluck Chunder Chowdhry (Defendant) *Appellant,*

versus

Kanto Pershad Hazaree (Plaintiff) *Respondent.*

Mr. C. Piffard and *Baboo Kishen Succa Mookerjee* for Appellant.

Mr. R. E. Twidale and *Baboo Aukhil Chunder Sein* for Respondent.

An authority granted to an agent to purchase does not imply authority to sell ; and the mere fact of the principal not questioning his agent's right to sell is no proof that he consents to the latter's exercising such right.

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Jackson, J.—In this case the plaintiff, Kanto Pershad Hazaree, has sued the defendant, Goluck Chunder Chowdhry, for the price of an elephant which he alleges that he sold to the defendant nearly three years previous to the institution of the suit. The answer of the defendant is that he did purchase the elephant but that he never obtained delivery of it; that it remained with the plaintiff and still is with the plaintiff. This fact is admitted by the plaintiff, who states that Goluck Chunder Chowdhry sold the elephant to Gobind Chunder Surmah for one Kalee Narain Roy, and that he exchanged another elephant with Kalee Narain Roy for this elephant. The defendant denies that he ever received the elephant or sold it to Gobind Chunder Surmah. Both the lower Courts have found that the sale took place, and the Judge is of opinion that there is direct evidence of the sale by Goluck Chunder Chowdhry to the agent of Kalee Narain Roy; and though the Judge admits that that evidence goes only to show that Goluck Chunder's agent effected the sale, he is of opinion that the fact of the defendant having allowed three years to elapse before questioning the right of the agent to sell is proof that he consented to the sale.

The special appeal to this Court is that there is no evidence of any actual delivery of the elephant, and no evidence of any consent to the sale by Goluck Chunder to the agent of Kalee Narain Roy. In trying these questions we have been obliged to go through the whole of the evidence in the case, and we are satisfied that upon both points there is a total absence of all proof. The evidence of the defendant's servants, which is unimpeached by any evidence on the other side, is that the defendant's agent, Gobind Nundee, purchased the elephant from Kanto Pershad Hazaree. He also purchased another elephant which the defendant's servants took to their master's house, but this elephant was taken back to the premises of Kanto Pershad Hazaree. And it seems to be admitted on all hands that from that time to this, a period of three years, the elephant has remained with Kanto Pershad Hazaree, and during that time it is not shown that any demand for its price has been made on the defendant. Then the plaintiff has filed with the record a memorandum written to him by Gobind Chunder Surmah, which alludes to this elephant as having been obtained for the plaintiff from Goluck Chunder Chowdhry. Gobind Chunder Surmah has been examined, and he denies that he effected any exchange with the plaintiff for his master Kalee Narain Roy. He says that he bought another elephant from the plaintiff for Kalee Narain Roy for rupees 1,000. He says also that he bought this elephant now in dispute from Goluck Chunder Chowdhry's mooktear, and that he sold it to the plaintiff. His own letter proves that he did not buy it himself, but that he obtained it for the plaintiff. This re-purchase for the plaintiff was effected within a few days of the purchase by the defendant. And under any circumstances, the plaintiff would only be entitled to any difference of price, if any was agreed upon; but there is nothing to show that there was an agreement for any material difference. Even then if we were satisfied that Goluck Chunder Chowdhry re-sold the elephant, the above considerations would lead us to dismiss the present preposterous claim. But it is also quite clear that there is no evidence at all that Goluck Chunder Chowdhry re-sold the elephant. Gobind Chunder Surmah does not depose that he dealt in the matter of the purchase with Goluck Chunder, but with Gobind Nundee who had purchased for Goluck Chunder. Now, though Gobind Nundee may have had authority to purchase, it does not follow that he had authority to sell, and there is no evidence of any such authority or any subsequent consent. The mere fact that the defendant did not question his right to sell is no proof that he consented to it. The re-sale was in fact to the plaintiff, and it is very possible that the defendant did not object to that. The result was to cancel the original sale to the defendant. The plaintiff is not entitled under these circumstances to recover the price of the elephant, which he has since the sale retained in his own possession; and the decision of the Courts giving the plaintiff a decree for its price must be set aside, and the plaintiff's claim dismissed to that extent.

There was also a claim in this suit for the value of the second elephant which was delivered to the defendant. The Judge has given the defendant a set-off on account of certain money which he finds was due to the defendant from the plaintiff on account of the profits of the elephant capturing expedition in which these disputed elephants were captured, and in which both plaintiff and defendant were partners. It is said upon special appeal that a full enquiry upon this question has not been made. The evidence offered by both parties upon it was considered and a decision arrived at on that evidence. We think we ought not to interfere on this point.

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The costs will be calculated according to the proportion decreed and dismissed, both of this Court and the lower Court.

Mookerjee, J.—I concur in dismissing the suit of the plaintiff, as far as the claim to the "koomkee" or female elephant is concerned. I am not satisfied on the evidence, which has been gone through at great length, that the plaintiff had ever delivered the animal to the purchaser Goluck Chunder Chowdhry, or that Goluck ChunderChowdhry after getting possession of it sold it to Gobind Mookerjee. The elephant is still in the possesion of the plaintiff, and I think he has no right to keep the animal and also demand its price from the defendant. His silence for three years throws the greatest suspicion on his case; the omission of the defendant to sue for the animal is accountable. True, he has not got the article he purchased, but he was not called to pay and therefore he might have waited all this time. But the plaintiff's case is that he not only sold the animal to the defendant, but actually gave him delivery of it: no reason is shown for his long silence.

The 25th March 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Share holder's rights—Sale for arrears—Act VIII (B. C.) of 1865.

Case No. 2397 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Midnapore, dated the 26th August 1870, *reversing a decision of the Moonsiff of Nimal, dated the 26th July* 1869.

Huro Narain Giree (Defendant) *Appellant,*

versus

Doorga Churn Giree (Plaintiff) *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.

Baboo Bhowanee Churn Dutt for Respondent.

The purchaser of a partnership in a tenure, in other words of a shareholder's rights, acquires no right to retain possession against a person who buys the tenure itself when sold for arrears under Act VIII (B. C.) of 1865.

Glover, J.—THE plaintiff in this case purchased at an auction-sale held in execution of decree Mullica Daye's right, title and interest in 8 beegahs odd cottahs of land. He says that he got possession and paid the back rent due to the ijaradar from the former tenant.

The farmer afterwards brought a suit against Mullica Daye for arrears of rent, alleged to be due for the years 1271-1272 and part of 1273, got a decree, and sold the tenure under Act VIII of 1865, B. C. The defendant was the purchaser and got possession turning the plaintiff out.

The plaintiff sues to recover possession on the ground of his purchase, and on the allegation that the rent-decree was collusively obtained.

The Moonsiff dismissed the suit, holding that there was no proof whatever of collusion either between the farmer and the defaulting ryot, or between either of them and the auction-purchaser; that the ijaradar had never recognized the plaintiff as his tenant, and never received rent from him and was not therefore bound to recognise his purchase of the land; that the sale under Act VIII of 1865 passed the tenure to the defendant.

The Subordinate Judge on appeal reversed this decision on the ground that a subsequent sale by a Revenue Court could not invalidate a prior one by a Civil Court (Tirthanund Thakoor, appellant, XIII Weekly Reporter, p. 449), and that the farmer by receiving from the plaintiff rent for a period previous to his dispossession, for the years 1274-75 that is, had recognized him as his tenant. The Subordinate Judge also found that the rent-suit brought against Mullica Daye was collusive.

It is contended in special appeal:—

(1.) That there is no evidence to show that the payments of rent made by the plaintiff in 1274 and 1275 extinguished the claim for the back rents of 1271-1272 and 1273, and that the Subordinate Judge's conclusion as to the fraudulent nature of the rent-suit is altogether groundless; and

(2.) That the plaintiff having only purchased Mullica Daye's right and interest in a portion of a tenure, cannot resist the right of an auction-purchaser under Act VIII of 1865, B. C., which comprehended the tenures itself.

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(1.) With regard to the payments said to have been made by the plaintiff to the ijaradar in 1274 and 1275, and which the Subordinate Judge has taken as showing that "there existed no arrears on account of "the years for which the suit had been insti- "tuted in the Revenue Court," we find that one is dated the 23rd Srabun 1274 and is for rupees 3-5, and the other the 2nd Jyet 1275 and is for rupees 8-9. Now, taking the Subordinate Judge's finding as to the genuineness of these documents (a finding opposed to that of the first Court) as one with which we cannot interfere, what after all do the receipts prove? They prove that during the years in question, the plaintiff paid an aggregate sum of rupees 12-13 on account of back rent. No particular year is mentioned, the word used is the general one "bakya." Now, it is quite clear that this payment could not have settled the arrears for 1271-72 and part of 1273, inasmuch as if we put aside the evidence of the rent-decree, the annual rent payable was on the plaintiff's own showing 9 rupees. So that admitting every thing in the plaintiff's favor, the back rents could not, as supposed by the Subordinate Judge, have been cleared off by the payment of rupees 12-13; and as this is the only ground on which the Subordinate Judge has decided that the rent-suit was conclusive, we should be quite justified in saying that the Lower Appellate Court was wrong in reversing the decision of the Moonsiff on this point.

We may remark here that the record shows that at the time the rent-suit was brought the plaintiff had not paid the rupees 12-13 at all. The date of institution of suit and the dates of the dakhillas show this very clearly. So that it cannot be said that the suit for rent was a false one. That rent is shown by the plaintiff's own documents to have been due when the suit was brought.

Then as to the effect of the prior sale at auction to the plaintiff. The decision in Tirthanund Thakoor *versus* Pureshnund Jha, XIII Weekly Reporter, p. 449, quoted by the Subordinate Judge, supposes that what was sold by the Civil Court was a tenure—an entire estate—and on that supposition, and on the fact that the sale was not in any way tainted with fraud, it laid down that the *same* property could not be re-sold in execution of a decree for arrears of rent against the former tenant.

Now, in this case the Civil Court sold not Mullica Daye's right in the tenure, which was afterwards put up and sold by the Revenue Court under Act VIII of 1865, B. C., but her rights in 8 beegahs 14 cottahs of that tenure, the defendant's purchase being of the tenure itself (in the terms of the Act), which (as is stated and not denied anywhere on the record) consisted of 23 beegahs. The bynamah shows that these 8 beegahs were situated in several distinct plots within two separate mouzahs; and all that the purchaser of Mullica's rights, as it seems to us, bought was a partnership in the entire tenure of 23 beegahs to the extent of 8 beegahs 14 cottahs. He became, in other words, a shareholder in the tenure.

Now, being in this position, the only thing for him to have done when the rent-suit was brought against Mullica Daye for arrears of rent, was to have paid up those arrears and then to have sued his co-sharer for contribution. His purchase did not give him any thing more than this privilege, and certainly does not give him a right to retain possession against a person who bought the tenure itself.

The Subordinate Judge's finding that he did pay up those arrears appears to us to have been passed in the teeth of the recorded evidence, and to be therefore an illegal finding; and that being so, there is no ground whatever for supposing the suit for rent to have been collusive.

The decision of the Subordinate Judge must be reversed, and that of the Moonsiff restored with all costs on the special respondent.

The 25th March 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Transfer of intermediate tenures—Acknowledgement by landlord—Division of rent—Act X of 1859.

Case No. 2454 of 1871.

Special Appeal from a decision passed by the Officiating Judge of East Burdwan, dated the 24th August 1870, *reversing a decision of the Moonsiff of Mahomedpore, dated the 22nd April* 1870.

W. O. Allender, General Manager of the Land Mortgage Bank of India (Defendant) *Appellant,*

versus

Dwarkanath Roy and others (Plaintiffs) *Respondents.*

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Baboo Juggadanund Mookerjee for Appellant.

Baboo Kalee Prosunno Dutt for Respondent.

Where rent is recovered without objection by successive landlords from the transferee of an intermediate tenure from the date of transfer, such receipt acts as a full and complete acknowledgement by the proprietor that he accepts the new tenant in the place of the old one.

The provision of Act X of 1859, which requires that every agreement as to division or distribution of rent should be in writing, applies only to division or distribution made after the Act came into operation.

Glover, J.—THE circumstances of this case are as follow :—

Ram Soondur Napit had a tenure consisting of 3 beegahs 10 cottahs cultivated, and 3 cottahs bastoo land, for which he paid to the zemindar, Mr. Elias, sicca rupees 2-15 annual rent.

In Falgoon 1255 he sold the 3 beegahs 10 cottahs to Ram Narain with a rent of sicca rupees 2-3, retaining the bastoo land with a rent of 12 annas himself.

There was another tenure owned by one Gooroo Churn of 10 cottahs at a rent of 7 annas, which likewise passed by sale to Ram Narain in 1260. With this land, however, we have nothing to do in this special appeal.

On Ram Narain's death, his son Nubo sold the entire holding to Mussamut Bhugobutty Debia on the 8th of Chyet 1272.

The zemindar, Mr. Elias, gave a putnee of his estate to Chunder Kant in 1266, and his rights were in 1273 transferred to the Land Mortgage Bank.

Shortly after becoming proprietor, the Bank brought a suit against Ram Soondur, the registered tenant, for arrears of rent due on the years 1272, 1273 and 1274, and obtaind a decree in execution of which the tenure was sold.

The plaintiffs in this case, purchasers of the holding of Ram Soondur, sue to set aside the revenue sale on the ground that the transfer had been recognized by the proprietor, who had taken rent from the purchasers ever since the date of the sale.

The defendant Bank contends that as the sale was not notified in the way authorized by law, no registry of the new transferree being made in his serishtah, he was not bound to recognized any tenant but Ram Soondur, or to take rent from any other person. He also contends that the amount deposited in the Collector's Court by the plaintiffs, was not the whole amount of rent due on the holding and that he was not bound to take it.

The Moonsiff found that the zemindar had, by receiving rent from the plaintiffs from Falgoon 1255 up to the year 1272, acknowledged them as his tenants for the holding, and that the receipts given by him showed that he was aware of and acquiesced in the sale made by Ram Soondur. He also found that the plaintiffs had deposited the rent due for 1273 in the Collector's treasury.

But he considered on the other hand that the zemindar was not bound to take out this money from the Collectorate, the plaintiffs not being the "recognized" tenants in the terms of Section 5 Act VI of 1862, B. C., and not even stating facts which would have enabled the zemindar to know on whose account the money was deposited.

On appeal the Judge concurred with the Moonsiff as to the recognition by the zemindar, but held also that under the circumstances the plaintiffs were entitled to deposit their rent in the Collectorate, and that the defendant Bank ought to have taken it therefrom (he having due notice of the deposit) and not to have brought a suit under Act X of 1859. The Judge held, moreover, that the plaintiffs' tenure was a mere jotedaree holding, the transfer of which it was not under Section 27 of Act X necessary to register in the zemindar's serishtah.

He decided that the plaintiffs had proved their right to the tenure; that the Act X suit was collusive; and that the sale under it should be set aside.

It is contended in special appeal :—

(1) That the Judge was wrong in holding that the tenure was one not requiring registration.

(2) That not being registered, the zemindar was not bound to recognize the alleged transfer, but was justified in suing the original tenant, and (3) That in any case the defendant was not bound to accept the money deposited by the plaintiffs, that not being the full amount of rent

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due on the holding but only the plaintiff's share thereof.

With regard to the first objection, the Judge has found as a fact that the holding was a ryotee one, and from the very small size of it, 3 beegahs 13 cottahs, it can hardly have been an intermediate tenure held between the zemindar and the actual cultivator, as provided for by Section 27 of Act X of 1859. Nothing has been shown us in support of the assertion that the holding was an intermediate one, and every thing is against such a supposition.

But supposing for the sake of argument that it was an intermediate tenure, and that under the law as it stood when this suit was brought registration of transfer was necessary, has it not as a matter of fact been found that the spirit of the Act has been complied with, and that the zemindar for the time being recognized the transfer and its accompanying changes from the very day on which that transfer was made? It is not denied that Mr. Elias, the zemindar at the time in question, received rent from the transferree from the date of the transfer, nor that his successor did the same thing; so that for a period of 18 years the plaintiffs have paid their rent as for a portion of the holding, which had once been Ram Soondur's, without the slightest objection on the part of their landlords. This, it appears to me, acts as a full and complete acknowledgement by the proprietor of the estate that he accepted the new tenant in the place of the old one for a particular share of the rent previously paid. The words of the law in the latter part of Section 27 have been much relied on, and it has been argued from them that even if the transfer of a portion of Ram Soondur's jote to Ram Narain be held to have been acknowledged and permitted by the zemindars, no agreement on their part to divide or distribute the rent would be binding unless made in writing. But this supposes that such division or distribution was made after Act X came into operation. Before the passing of that Act, there was no such provision of law.

If the plaintiffs' case were to be governed by the latter part of Section 27 of Act X, then I should undoubtedly hold that the landlord would not be bound to take anything less than the full amount of rent due upon the entire holding, and that in this case the defendant Bank would have been fully justified in refusing to accept the deposit of the plaintiffs' share of the rent made in the Collectorate, and that he had every right to recover as he did in a suit for rent.

But as I understand the evidence, I think that long years before the Bank became the owner of this putnee estate, there had been a partition of Ram Soondur's holding and a transfer of part of it to Ram Narain, and that both partition and transfer had been recognized at the time and since for 18 years by the proprietors of the estate.

It is not denied that the Bank has no higher rights than the other putneedars, and cannot therefore, in my opinion, have any greater privileges,

These remarks appear to dispose of the second and third objections.

I would uphold the decision of the Lower Appellate Court and dismiss the special appeal with costs.

Kemp, J.—I concur.

The 27th March 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Execution—Manager—Section 243 Act VIII of 1859.

Case No. 5 of 1871.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Tipperah, dated the 17th December 1870.

Mohinee Mohun Doss and another (Judgment-debtors) *Appellants,*

versus

Ram Kant Chowdhry and another (Decree-holders) *Respondents.*

Baboos Kalee Mohun Doss and *Nuleet Chunder Sein* for Appellants.

Baboo Kishen Succa Mookerjee for Respondents.

A Court executing a decree was held to have been justified in refusing to appoint a manager for attached property belonging to the judgment-debtor, where it would have taken 20 years to pay off the debt from the profits of the property. But the High Court saw no objection to the appointment of a manager to dispose of portions of the property by sale, mortgage, and otherwise, under Section 243, Code of Civil Procedure, if the debt could thereby be cleared off in 6 months.

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Jackson, J.—THE decree-holder in this case has obtained a decree against the judgment-debtor to the amount of 37,000 rupees. On suing out execution of his decree, the judgment-creditor applied to attach and sell certain properties belonging to the judgment-debtor. The judgment-debtor, thereupon, applied to the Subordinate Judge of Tipperah before whom the proceedings were pending, asking that a manager might be appointed under Section 243 Act VIII of 1859, and added that he was willing to place all the estates in his possession under the manager, in order that the manager might recover from them the amount of the decree. An inquiry was thereupon instituted as to the profits derived from these properties; and Mr. De-Launey, who was appointed to make the enquiries, gave his opinion that a sum of 8,500 rupees was the annual receipt of rent from these estates. The Subordinate Judge says that as the debt would not be satisfied in 6 years, the application must be rejected.

Before us the application has not been restricted solely to the question of allowing a Court manager to manage the properties, but we have been asked to delay the present sale by the Court in order that the Court manager may take measures to sell certain portions of the property and give mortgages and mokururee leases of other portions; that by these means a probably better price may be obtained than by selling the property on sight at public auction by the Court.

We think that the Subordinate Judge was right in refusing to appoint a manager to manage the whole property until the debt was liquidated, because it would appear after deducting the expenses for the defendant and the Government revenue, the actual amount of assets which would probably be recovered would be sufficient to pay off only the interest of the total sum and a sum of about 2,000 rupees per annum of the principal of the debt. It would, therefore, take nearly 20 years before the debt would be paid off. But we see no reason to reject the petition of the applicant that the Court manager may be appointed to sell and mortgage and otherwise dispose of some portions of the property, and thereby recover the amount of the debt. If, with the assistance of the judgment-debtor, the Court manager can effect this within six months, these estates may be placed under the manager for that purpose for that period. If within six months the whole debt can be cleared off, the decree may be considered to have been realized with sufficient expedition, and it may be to the benefit of both the parties. We see no reason to interfere with the decision of the Subordinate Judge, but we think that the Subordinate Judge should give effect to this order and appoint a manager to act accordingly. The manager will dispose of some portions of these properties by selling, mortgaging, and otherwise dealing with them under Section 243. The vakeel for the opposite side does not object to this arrangement; and it seems to us to be a fair and proper one. If at the end of six months the whole debt has not been realized, or if in the meanwhile proper measures have not been taken to carry out the order, the Subordinate Judge will pass fresh orders on the case.

We think that the costs of these proceedings should be costs in the cause, and should be paid by the judgment-debtors.

Mookerjee, J.—I concur.

The 27th March 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Documentary evidence—Mistakes of Court's officers.

Case No. 213 of 1870.

Regular Appeal from a decision passed by the Subordinate Judge of Beerbhoom, dated the 15th August 1870.

Ram Runjun Chuckerbutty (Plaintiff) *Appellant,*

versus

Anund Coomar Mookerjee and others (Defendants) *Respondents.*

Baboo Mohinee Mohun Roy for Appellant.

Baboos Kishen Succa Mookerjee and *Taruck Nath Sein* for Respondents.

A Civil Court is bound to receive as evidence authenticated documents named in the plaint and filed by the plaintiff's pleader on the day appointed for fixing issues, even though through inadvertence of the Amlah they were not made part of the record.

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Kemp, J.—THIS is a suit on the part of the plaintiff for contribution. It appears that the plaintiff, formerly a ward of Court and who of late has come of age, sues a number of defendants, against some of whom a decree has been passed for contribution.

None of the defendants appear to have disputed the amount of jumma payable by the plaintiff. What they seem to have contended is, that they have paid in more on account of their share than the plaintiff has given them credit for.

The Subordinate Judge of Beerbhoom found that the plaintiff has not proved even that he has paid the amount due on his own share, much less any amount due on the shares of his co-sharers, the defendants. He therefore dismissed the plaintiff's claim, with the exception of certain sums which he decrees against the defendants Nos. 6 and 7, 11 and 12 and No. 17 ; the result of the decree of the Lower Court being that the plaintiff gets a decree for a sum of Rs. 1,387 odd annas, out of Rs. 5,706 2 annas 3¼ claimed. The Subordinate Judge says that the plaintiff has failed to prove that he has paid the Government revenue in respect of the shares of the defendants, his co-sharers, over and above that due on account of his own share.

In appeal, the second ground of appeal only has been urged upon the Court, namely, that the plaintiff, according to the practice of the sheristah of the Court below, filed certain "sehah" papers, or transfer papers, authenticated copies of which he had obtained from the Collector's office, which proved the payments made on his behalf on account of the Government revenue of the joint estate, Lot Koondheet Korya, as alleged in the plaint ; that these exhibits were not made part of the record through the inadvertence of the Amlah, but mislaid in the record-room in which they were afterwards found ; that these documents would have proved the plaintiff's case, and therefore, he submits, that they ought to be allowed to be received in evidence.

Now, it is clear that with the plaint a petition was filed to the effect that a certain number of challans are put in, and that copies of the "sehah" papers had been applied for from the Collectorate and would be put in when received. We have the evidence of Dwarkanath Baboo, the pleader of the plaintiff below, to the effect that on the 30th April last, the day on which the issues were to be fixed, he did receive from the plaintiff a petition and a list of these "sehahs" to file. There is that petition on the record which bears the signature of the aforesaid Baboo ; and these "sehah" papers all bear his initials, and are dated 30th April with one exception. It is true that there was an enquiry made as to whether the plaintiff's mookhtear had or had not smuggled these documents into the sherishta or whether they were really missing ; and the result was that the Subordinate Judge sent the mookhtear to the Fouzadaree Court on a charge of criminal trespass. That charge however fell to the ground and the mookhtear was acquitted.

It appears to us that these papers ought to have been received by the Subordinate Judge. They are authenticated copies from the Collectorate records, and if the sums shown therein have been transferred from the account of the plaintiff, when he was a minor, to payments on account of the revenue of the estate, and these payments on the aggregate are more than the plaintiff would have to pay for his own share in the estate, the Lower Court is bound to enquire into this point and decide the case afresh.

We, therefore, remand the case to the Subordinate Judge. He will receive these papers and re-decide the case with reference to the defendants Nos. 1, 2, 3, 4, 5, 8, 9, 10, 13, 14, 15, 16, 18, 19 and 20.

His decision with reference to the other defendants against whom a decree has been passed will stand.

Costs to follow the result with reference to the defendants whose case has been remanded.

The 27th March 1871.

Present :

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Possession—Succession—Hindoo Law.

Case No. 1378 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Tipperah, dated the 21st May 1870, *affirming a decision of the Moonsiff of Nassirnuggur, dated the 28th July* 1869.

Raj Chunder Burmun (Defendant) *Appellant,*

versus

Rama Kant Chuckerbutty (Plaintiff) *Respondent.*

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Baboos Kalee Mohun Doss and *Mohinee Mohun Roy* for Appellant.

Baboo Rajendro Nath Bose for Respondent.

Where a plaintiff sues for possession as heir of his uncle, if it be proved that the uncle left daughters entitled under the Hindoo Law to succeed to his property, plaintiff would not be entitled to a decree, even if defendant were in wrongful possession of the shares of the daughters.

Mookerjee, J.—The plaintiff instituted this suit for possession of 8 kanees and odd gundahs of land on the allegation that his father was the owner of a moiety of this land, and that his father's cousin, one Radha Kant, was the owner of the other moiety; that the plaintiff's father died in 1255 and the cousin of his father died in Assin 1256, leaving no other person but him as their the legal heir; and that the plaintiff thus becoming the owner of this property was dispossessed in 1258 by the defendant. The plaintiff also stated in his plaint that inasmuch as he was born in Magh 1255, and was a minor up to the 13th Magh 1273, the suit instituted on the 20th Magh 1275 was in time.

The defendant raised the plea of limitation, contending that the date of the birth of plaintiff in 1255 as given in the plaint is false, but that plaintiff was really born in 1252. The defendant thus contended that the plaintiff being born in 1252, and he not being a zemindar and therefore entitled only to 15 years minority, his time for bringing this action expired in 1269, not having sued within 3 years of his attaining majority. As regards the amount of land claimed by the plaintiff, the defendant contended that 4 kanees 8 gundahs of land sued for belonged to the plaintiff's father and uncle; that his father conveyed his share to his cousin, Radha Kant, and that thus Radha Kant was the holder and owner of the whole of the 4 kanees 8 gundahs of land; that Radha Kant having by a disposition in his life-time made over this property to his two daughters, the defendant as purchaser from those two daughters is rightly entitled to and is in possession of the same. It was further contended that the plaintiff's father during his life-time having given away to one Nobin Chunder 12 gundas 1 cowree and 1 krant of the land held by him, his father's share was only 3 krants 16 gundahs. As regards the remainder of the land claimed, the defendant denied that it ever belonged to the plaintiff's father or to his uncle; he said he purchased it from another party.

The first Court gave the plaintiff a decree for the lands sued for after deducting 8 gundahs 1 cowree which it found the plaintiff's father had given away to Nobin. The defendant appealed, and the Subordinate Judge has confirmed the decision of the Court of first instance.

On the point of limitation the Subordinate Judge says—"On the completion of the "18th year, a Hindoo attains his majority; "therefore, according to defendant's own "showing, plaintiff is in time."

But it appears that the Subordinate Judge is evidently in error in his calculation, for the case of the plaintiff is that he was born in 1255. If that is correct, of course he is in time. But the defendant's case is that he was born in 1852. If that is correct, plaintiff is barred even if 18 years are given to him as the period after which he would attain his majority, the suit having been instituted in 1275. We think, therefore, that on this point the Subordinate Judge has committed a mistake, and that he ought to have found from the evidence in this case whether the date given by the plaintiff or that given by the defendant was the correct date of the birth of the plaintiff.

As regards the claim of the plaintiff over and above the 3 kanees 17 gundahs admitted by the defendant to have once belonged to the plaintiff's family, there appears to be no adjudication whatever by the Subordinate Judge. He nowhere finds how the plaintiff is entitled to it. The only point he seems to have decided is that the kobalah of the 2nd Bysakh 1255 has not been proved to his satisfaction. That is a kobalah by which the plaintiff's father is said to have conveyed his half share of 3 kanees 16 gundahs to his cousin, Radha Kant. But even if that is not proved, it does not assist the plaintiff in recovering the entire amount of land decreed to him. The plaintiff ought to prove what was the amount of land of which his father and his uncle were the owners; whether it was 3 kanees 16 gundahs as admitted by the defendant, or 8 kanees 17 gundahs as alleged by the plaintiff.

Then, it appears that the defendants based their title upon two kobalahs said to have been executed by two daughters of Radha Kant; while the plaintiff's case is that Radha Kant died leaving only a childless widowed daughter, and that the plaintiff is the sole heir and therefore he is entitled to succeed to his uncle's property. We do not find that the

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Subordinate Judge has in any way disposed of this point, namely, whether according to the plaintiff his uncle Radha Kant died leaving a childless widowed daughter and therefore the plaintiff was the heir, or according to the defendant that he left two daughters who succeeded him, and consequently plaintiff was not an heir; of this uncle. The plaintiff, we think, is bound to prove his statements as to how he came to be entitled to 8 kanees 17 gundahs claimed by him. The Subordinate Judge says—"The kobalahs of the daughters of Radha Kant "have not been registered either, and it "is not likely that these females would "have sold their lands to a stranger like the "appellant." But whether the daughters really conveyed their inheritance to the defendants or not was not the first question to try. The question which should have been tried first, and which the Subordinate Judge has utterly omitted to decide, was whether the plaintiff, under the peculiar circumstances alleged by him, was the heir of his uncle. This point was a material point in the case, for if it be proved that the uncle, Radha Kant, left a daughter or two daughters entitled under the Hindoo Law to succeed to his property, the plaintiff would not be the person who would succeed in this action, as far as the share of the uncle is concerned, even if the defendant was in wrongful possession of the share of the daughters of Radha Kant.

We think, therefore, that this case should go back to the Subordinate Judge to be retried by him with reference to the remarks made above.

Costs of this appeal will abide the result.

I would take this opportunity of calling the attention of the Subordinate Judge to the clear provisions of Section 359 of the Code of Civil Procedure. That law requires that the Appellate Court shall in its judgment state the point or points for determination and record its reasons for the decision of those points. The judgment of this Judge are always peculiarly meagre and seldom contain reasons for his decision. In this case the Subordinate Judge does not at all state how, "according to the defendants "own showing, plaintiff is in time." He himself, when summoning up the defendant's contention on the plea of limitation, says the defendants plead that plaintiff was born in 1252, and that he should have sued within 1269; and not having sued within that period is barred by limitation.

Then, as to the merits of the case, several objections, evidently of a valid nature, were pressed both before the Court of first instance as well as before him. It was objected that plaintiff was not the heir of his uncle, and therefore is not entitled to claim that share. This objection is not at all noticed by the Subordinate Judge, and he gives no decision on it. There is also no adjudication as to the plea that plaintiff is not entitled to a decree for the whole of the land claimed by him, inasmuch as that never belonged either to plaintiff's father, or to his uncle in right of whom the present suit is instituted. These omissions necessitate our remanding the case to him for a proper decision, which entails a great deal of trouble and expense to the parties. But if the Subordinate Judge had carefully recorded the points raised before him for determination and determined them on the evidence, we could have finally disposed of them here in special appeal, applying the law to the facts found.

Jackson, J.—I quite concur in the remand of this case.

The 28th March 1871.

Present:

The Hon'ble L. S. Jackson and W. Ainslie, *Judges.*

Form of decree—Section 189 Act VIII. 1859.

Case No. 2075 of 1870.

Special Appeal from a decision passed by the Officiating Additional Judge of Tirhoot, dated the 10th August 1870, reversing a decision of the Moonsiff of Durbhangah, dated the 12th May 1870.

Purmessuree Dutt Jha (one of the Defendants) *Appellant,*

versus

Joynath Thakoor (Plaintiff) *Respondent.*

Baboo Bhowanee Churn Dutt for Appellant.

Baboo Debendro Narain Bose for Respondent.

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A copy of the judgment with the schedule of costs appended, does not constitute a proper decree such as is required under Section 189, Code of Civil Procedure.

Jackson, J.—THE special appellant in this case was no party to the suit as originally brought. It was a suit by Joynath Thakoor against Kumloo Roy, and the object of this suit was to have it declared that certain property must be sold under a bond-debt.

Upon this the present appellant by a petition intervened, alleging that he had purchased the property from the defendants, and that with the help of an old stamp, plaintiff had fabricated the bond to get the property for himself, having inserted in the bond a date anterior to that of the appellant's purchase. On this petition he was made a defendant. The suit was at first dismissed by the first Court; but on appeal the Judge reversed that decision, and, as he says, decreed the appeal.

The intervenor appeals specially to this Court.

The decision of the Judge, I am bound to say, was not very satisfactory. The reasons which he assigns are of the least possible value; but they certainly amount to a decision on the facts; and if the intervenor had been properly a party to the suit, it is difficult to say how we could have set it aside in his favor. The intervenor was not a party interested in the subject-matter and likely to be affected by the result of the suit. It was therefore irregular to make him a party, plaintiff having asked for no relief against him. And therefore the decree of the Court below as against him must be set aside, and the special appellant's name erased from the record as defendant.

It is proper to add that no separate decree has been drawn up by the Lower Appellate Court. What has happened in this instance is that a copy of the judgment has been prepared with the schedule of costs appended to it, and no proper decree has been drawn up as required by Section 189 of Act VIII of 1859. The Judge is directed to draw up a proper decree in this case as between the plaintiff and defendants. He will also take care that in future cases the proper decree is drawn up.

The special appellant having of his own accord intervened, he must bear the costs of this appeal and of all proceedings which have resulted from his intervention.

Ainslie, J.—I concur.

The 28th March 1871.

Present:

The Hon'ble E. Jackson and Onooocool Chunder Mookerjee, *Judges.*

Sections 230 and 231, Act VIII. 1859—Jurisdiction.

Case No. 2220 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Furreedpore, dated the 4th August 1870, *affirming a decision of the Moonsiff of that District, dated the* 13*th December* 1869.

Mussamut Ehsan Khatoon (Plaintiff) *Appellant,*

versus

Ramnath Sein Lushkur (Defendant) *Respondent.*

Baboo Debendro Narain Bose for Appellant.

Baboo Luleet Chunder Sein for Respondent.

When an application under Section 230, Code of Civil Procedure, has been registered as a suit, the Court is bound to investigate it as an ordinary regular suit, and to try not only the question of possession but also that of title, and its decision will be final and complete for both purposes.

Mookerjee, J.—IN this case the plaintiff applied under Section 230 Act VIII of 1859 on the allegation that the defendant, Ramnath Lushkur, who had recovered a decree against Gholam Kadir Chowdhry, had in execution of that decree dispossessed the plaintiff from his land. This application appears to have been numbered and registered in the register of suits, and issues were framed as in an ordinary civil suit for possession of land. At the time of the hearing of the case, however, it appears that the Moonsiff fixed the following new issues:—

"Whether the plaintiff was in *bonâ fide* "possession of the disputed property; if so, "whether she can derive any benefit under "Section 230?" The Moonsiff tried this single issue, and coming to the conclusion that the plaintiff was not in actual possession, dismissed the suit, it is said, "in the shape of non-suit."

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Plaintiff appealed, and the Appellate Court affirmed the Moonsiff's decision, being of opinion that the sole matter the Court have to see in an application under Section 230, is whether the plaintiff was *bonâ fide* in possession of the property, and was dispossessed by the decree-holder defendant in execution of his decree.

Both the Courts referred to a decision of the 18th March 1869, as guiding them in the disposal of this suit. But it appears to me that an application under Section 230, when once registered and numbered as a suit, should be tried as an ordinary suit between the appellant as plaintiff, and the decree-holder as defendant. According to the terms of Section 230, "the Court shall proceed to investigate the matter in dispute in the same "manner and with the like powers as if a "suit for the property had been instituted by "the applicant against the decree-holder."

The subsequent Full Bench decision (V Bengal Law Reports,* page 708), which had been passed on a reference made by the same learned Judges who remanded the case on the 18th March 1869, has decided fully as to the manner in which suits under Section 230 are to be dealt with by the Courts. We should think that when a suit has been registered as a suit under Section 230, the Courts are bound to investigate that suit as if it was an ordinary regular suit brought by the applicant in the Civil Court, and to try not only the question of possession but also the question of title. Turning to Section 231, it appears to us that the decision must be a final and complete decision both for possession and title, for that Section bars any fresh suit upon the same cause of action between the same party or parties or those claiming under them.

We think, therefore, that the case ought to be sent back to the Court of first instance to be tried as an ordinary civil suit between the parties, in which the question of possession as well as that of title should be enquired into, and the suit decided according to the result of that enquiry. Both parties should be allowed the fullest opportunity of adducing any evidence that they think fit to adduce in support of the issues fixed by the Court.

Costs of this appeal will abide the final result.

* 13 W. R., F. B., p. 80.

The 29th March 1871.

Present:

The Hon'ble L. S. Jackson and W. Ainslie, *Judges.*

Certificate of administration—Nephew—Deceased son's daughter's son.

Case Nos. 19 and 20 of 1871.

Miscellaneous Special Appeals from an order passed by the Judge of Sarun, dated the 3rd December 1870.

Aree Murdun Bhuggut (Petitioner) *Appellant,*

versus

Jannath Bhuggut and others (Opposite Party) *Respondents.*

Mr. R. T. Allan for Appellant.

Baboo Mohinee Mohun Roy for Respondents.

A nephew is entitled to a certificate of administration in preference to a deceased son's daughter's son.

Jackson, J.—THE appeals before us are both appeals by the same person, relating to the certificate granted by the Judge of Sarun in respect of the estate of one Roopa Kooer, deceased.

This Roopa Kooer was the widow of Bhuggut. Gungun and Roopa had a son named Priagnath Bhuggut, who pre-deceased both his parents and left a daughter named Nowruttun Kooer; and the appellant is the son of that daughter.

The person to whom the certificate had been given is Jannath Bhuggut, the son of a brother of Gungun.

It is contended that in respect of the estate proper, so to say, of Roopa Kooer, namely, that estate which consists of her *stridhun*, Aree Murdun Bhuggut, the appellant, as being lineally descended from her, was entitled preferably to Jannath Bhuggut.

It appears, however, that the contest before the Zillah Court had no reference at all to the *stridhun* of Roopa Kooer, but really related to the estate which she had as the widow of Gungun; and it was as heirs of Gungun and reversioners that Jannath and some other persons claimed the certificate.

Now, that being the state of the case, we think there is no reason to doubt that the

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Judge made the proper order. Jannath, as nephew of Gungun, is certainly entitled to represent Gungun in so far as the estate had been the estate of Gungun, in preference to Aree Murdun Bhuggut, who was Gungun's deceased son's daughter's son. It seems, therefore, unnecessary to alter in special appeal the order made by the Judge.

But the question of Roopa Kooer's *stridhun* having been raised, it may be as well to add that the appellant really does not make out any title to represent her *stridhun* estate.

The order of the Judge, therefore, must be affirmed with costs.

The 29th March 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Sale under Act VIII. 1835—Hindoo widow — Joint decree — Execution sale—Judgment-debtor's rights.

Case No. 75 of 1870.

Regular Appeal from a decision passed by the Officiating Subordinate Judge of Rungpore, dated the 28th December 1869.

Chowdhry Zuhoorul Huq and others (Defendants) *Appellants,*

versus

Gooroo Churn Roy and others (Plaintiffs) *Respondents.*

Mr. C. Gregory, Baboo Romesh Chunder Mitter and *Moulvie Syud Murhumut Hossein* for Appellants.

Baboos Unnoda Pershad Banerjee and *Issur Chunder Chuckerbutty* for Respondents.

Where a tenure inherited by a Hindoo widow from her deceased husband is sold for arrears of rent under Act VIII of 1835, the purchaser does not acquire merely her personal rights, nor do the rights acquired by him cease at her death.

Where a joint-decree for contribution which had been passed against a Hindoo widow and the reversioner was executed against the latter as the sole surviving judgment-debtor, by the sale of his rights and interests in the property, the joint property was held to have passed even though the sale-certificate omitted the word "property."

Bayley, J.—THE plaintiff in this case sued for possession of certain landed property on the allegation of his right of inheritance from his uncle, one Kalee Pershad Roy. The plaintiff alleged that on the death of Kalee Pershad, his widow Ruttun Monee held the property till her death on the 11th Assin 1266. The property, as for the purposes of this appeal, may be stated as consisting of five several lots. In regard to lot No. 5, we have before us the appeal of Chowdhry Zuhoorul Huq, the defendant purchaser, against the decision of the lower Court, holding "that the right of the widow, "Ruttun Monee, was purchased by the de- "fendants, and on the death of the said widow "her right according to Hindoo shastras "ceased to exist; and consequently the right "purchased at auction-sale ceased to exist "also," and that plaintiff was accordingly entitled to plot No. 5.

In regard to the other plots 1, 2, 3, and 4, we have a cross-appeal against the decision of the lower Court, holding that the plaintiff was barred by limitation in respect of those plots, inasmuch as he was bound to sue within one year from the order of the 11th September 1860, rejecting the objections raised by him in execution of the decree of the 24th August 1859.

It may here be mentioned that there was a decree obtained by the zemindar against Ruttun Monee for arrears of rent, and in execution of that decree plot No. 5 was sold on the 27th August 1858 under Act VIII of 1835, and the remaining plots were also sold on the 7th January 1861 in execution of a decree obtained in the Court of the Principal Sudder Ameen for contribution and purchased by the defendants.

Now, in regard to plot No. 5, it is quite clear from the record that it was not merely a personal decree against Ruttun Monee, that is, a decree solely and exclusively personal against her, affecting only her rights and interests as a Hindoo widow irrespective of her husband's estate in her hands. She inherited the entire property, as of right of inheritance, from her deceased husband and held it in that capacity. After her death, the property would go to the next heir if no other rights supervened. Further, the tenure was liable for its own arrears, and it was for the realization of those arrears that it was caused to be sold by the zemindar.

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Under these circumstances, the lower Court was quite wrong in holding that the rights were personal to the widow, and in saying that in consequence thereof the purchaser's rights ceased to exist at her death. We, therefore, reverse the decision of the lower Court on this point.

In a case decided by this Bench on the 8th March last, and in another decided by Mitter and Hobhouse, J.J., to be found at page 504, Weekly Reporter, Volume XII, we find that the view now taken by us was there taken. It was held in those decisions that in such a case as this, the property itself passed under the sale and not the mere personal liability of the widow herself.

In regard to plots 1, 2. 3, and 4 the whole question is whether this is one of those cases contemplated by Section 246 Act VIII of 1859, where the remedy must be sought in a civil suit within one year from the date of the order passed under that Section. It is argued that as Section 246 was not expressly cited as the Section under which the objection was disallowed in execution, one year's limitation does not apply. We would observe that so long as substantially the case is one arising under that Section, the mere expression of the exact number of the Section is not material ; but the real question which we have to decide is as to *what* passed under the sale,—whether it passed merely the rights and interests of Ruttun Monee as a Hindoo widow, or the property itself as represented by the plaintiff, who had at that time succeeded to it as the heir of Ruttun Monee's husband, Ruttun Monee being dead and the plaintiff being jointly liable with her for the decree. It is clear that the decree was a joint one against the present plaintiff and his aunt, Ruttun Monee Debia, and both were held jointly responsible. The plaintiff was so as the heir of Umbica Churn, and then Ruttun Monee having died the plaintiff represented the entire property, as the sole survivor of the above two joint judgment-debtors. He, therefore, as thus representing the entire property, was held liable for the joint decree. It is strongly contended that the sale-certificate is silent as to any property, and merely uses the words মৃত দায়িকার স্বত্ব স্বার্থ গত, that is, the rights and interests left by the deceased judgment-debtor. This, we have to observe, is quite contrary to the usual practice, which is to state that the thing sold is the right and interest of the judgment-debtor in the *property left*. Although here the word " property " is omitted in the actual sale-certificate, we must read the certificate by the light of the proceeding in execution and the decree to which that proceeding has to give effect in execution. It is clear when the certificate is so read by the light of the proceeding in execution and by the light of the decree, that the joint property was liable for the decree, and that the plaintiff, Gooroo Churn, as the sole surviving representative of the property of the once joint judgment-debtors, was properly declared to have that property sold.

A decision of the Lords of the Judicial Committee of Her Majesty's Privy Council has been quoted to us, reported in Weekly Reporter, Volume VIII, page 7, as showing that the widow's personal liability only was contemplated ; but that case is clearly distinguishable from the present. There the sale was specially under Section 9 Act I of 1845, then the law for sale for arrears of Government revenue. Here there is a joint decree, both as against the widow representing the estate as well as against the reversioner, the whole property eventually merging in him as the sole surviving judgment-debtor. Besides, there is in this case, as stated above, the proceeding in execution of the 11th September 1860, and alleged acts of dispossession under it on various dates of Assin 1266 and Cheyt 1267. Thus it is clear that for 10 years the plaintiff took no action whatever in this matter. We cannot in this place omit to notice an extremely objectionable feature in this litigation. It appears that the plaintiff, Gooroo Churn Roy, sold a 12 annas share of the property in suit to one Kristo Soonduree Debia, the female cousin of a vakeel of the Rungpore Court, under a deed of sale, the terms of which were that the sale was not in consideration of any money representing the value of the property, but in consideration of the vakeel carrying on this litigation to the extent of a charge of 1,000 rupees. The claim, therefore, is not only a stale one, but it is fairly presumable that had it not been for the speculative action of the vakeel in regard to supplying funds for carrying on the litigation the action would probably not have been brought. We think it is most indecent and most mischievous that vakeels of the districts in which they practice as such should have any direct personal interest, as shown here, in the litigation in Courts in which they are professionally employed. No doubt there are exceptions to this rule, as when a vakeel or professional law agent is forced into law by reason of holdin

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property his right in which is disturbed, or when he is otherwise compelled to go to Court on honest and reasonable grounds; but in this case no such exception presents itself, because on the plaintiff's own case and conduct it is quite clear that the vakeel had contracted speculatively to carry on the litigation at a cost of rupees 1000, not impossibly relying upon the most technical objection as to the omission of the word "property" after the words "left by" in the sale-certificate.

Under all the circumstances of the case, we reverse the decision of the lower Court and decree the appeal as to plot No. 5, and dismiss the plaintiff's cross-appeal as to the properties Nos. 1, 2, 3 and 4.

The plaintiffs must pay all the costs of this litigation.

The 29th March 1871.

Present:

The Hon'ble L. S. Jackson and W. Ainslie, *Judges.*

Arbitration—Revocation of consent.

Case No. 2078 of 1870.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 1st July 1870, *affirming a decision of the Moonsiff of Sasseeram, dated 31st March* 1870.

Mussamut Ablakhee Kooer and another (Plaintiffs) *Appellants,*

versus

Oodun Singh and others (Defendants) *Respondents.*

Baboo Anund Chunder Ghossal for Appellants.

Baboos Mohesh Chunder Chowdhry and *Doorga Doss Dutt* for Respondents.

A suit having been referred to arbitration was dismissed by the arbitrators for default; whereupon the plaintiff objected to the award and charged the arbitrators with collusion. The Judge finding that the charge was not made out, referred the matter back to the arbitrators for a proper award.

Held that the plaintiff's revocation of his consent to the reference did not put an end to the arbitrators' power.

Jackson, J.—The point raised here in special appeal is that the proceedings under the arbitration were null and void in consequence of what occurred. When the arbitrators to whom the matter had been referred by order of the Court sent up what they considered a decision of the matter dismissing plaintiff's suit for default, it appeared that the arbitrators had joined with them certain other persons in the matter of the reference, and sent in as their joint award a decision of the kind I have mentioned.

The plaintiff, who had originally consented to the reference, objected to what had been done and charged the arbitrators with collusion. The Judge on enquiry found that there was no sort of collusion made out, and referred the matter back to the arbitrators giving them instructions how to proceed with the matter of the arbitration and make the proper award. Thereupon an award was made and judgment entered in accordance with the award.

It has been contended that after the plaintiff had revoked his consent to the reference the arbitrators' powers were at an end. But there is an express decision to the contrary by the Privy Council in the case of Pestonjee Nussurwanjee against Manockjee & Co., to be found in XII Moore's Indian Appeals, page 112.*

The special appeal therefore fails, and the decisions of the Court below is affirmed with costs.

The 29th March 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Usufructuary mortgage (Bhog-bundhuk) — Registration—Valuation—Sections 13, 14, and 16, Act XVI of 1864.

Case No. 2211 of 1870.

Special Appeal from a decision passed by the Officiating Additional Judge of Chittagong, dated the 21st July 1870, *reversing a decision of the Moonsiff of Raojan, dated the 9th December* 1869.

Ishan Chunder and others (Plaintiffs) *Appellants,*

versus

Sooja Bebee (Defendant) *Respondent.*

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* 10 W. R., Privy Council, p. 51.

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Baboo Aukhil Chunder Sein for Appellants.

Mr. G. A. Twidale for Respondent.

Where, in consideration of a loan received, a party agreed that his property should remain in the hands of the lender for a term of years, by which time it was understood the whole amount borrowed would be liquidated, the transaction was held to be not a lease but a *bhog-bundhuk* or usufructuary mortgage.

The registration of such a deed, where the amount advanced is less than rupees 100, is optional under Sections 13 and 16 Act XVI of 1864.

Section 14 of that Act does not apply to cases in which the value of the right is distinctly stated in the instrument, but contemplates only cases in which no fixed or definite value is stated in the deed creating the interest.

Mookerjee, J.—THE only point submitted for consideration in this special appeal is, whether the Judge was right in rejecting the document on which the suit was based for want of registration. The Judge considers that although the document is described as a *bunducknamah*, yet as possession is given to the plaintiff for six years on payment of a certain sum of money recited in that document, the document should be considered as a lease and not an usufructuary mortgage. He says:—"There was then a transfer, or the deed in "question purported to create a transfer for "six years of immoveable property, and the "transfer cannot I consider be described as "not being a lease. The transaction repre-"sented by the deed is a temporary transfer "of land in consideration of the receipt of a "certain sum of money, and differs only from "the more ordinary form of lease in the "money equivalent being paid in a lump sum "in advance, instead of by yearly payments "in arrear."

We have carefully perused the document; we find there is nothing to shew that it is a lease, there being no stipulation for payment of any rent. The document appears to be a common *bhog-bundhuk* or usufructuary mortgage of the property given by the plaintiff to the defendant for a loan of 99 rupees. It is distinctly termed a *bunducknamah*, and all the conditions contained in that deed show that the plaintiff, in consideration of the loan that he received from the defendant, agreed that this property should remain in the hands of the defendant for a term of six years, by which time, it appears, it was understood that the whole of this amount would be liquidated. There is no stipulation for payment of rent, and there is no statement that the sum of 99 rupees received was the rent for six years. We can see no difference between this deed and a *bhog-bundhuk* or usufructuary mortgage.

Now, if this is a mortgage and the amount advanced is only 99 rupees, then under Section 13, as well as under Section 16, Act XVI of 1864, registration was merely optional, and the Judge was not right in refusing to admit the document as evidence in the case. Section 13 says:—"No instrument being "a deed of gift of immoveable property; no "lease of immoveable property for any period "exceeding one year; no instrument (other "than a deed of gift or lease as aforesaid) "which purports or operates to create, de-"clare, transfer, or extinguish any right, title, "or interest of the value of 100 rupees or "upwards in any immoveable property; and "no instrument which acknowledges the "receipt or payment of any consideration on "account of the creation, declaration, trans-"fer, or extinction of any right, title or "interest as above, of such value as afore-"said, in any immoveable property, shall be "received in evidence in any Civil proceed-"ing in any Court, or shall be acted on by "any public Officer, if such instrument "shall have been executed on or after the "date on which this Act shall come into "operation, &c."

This appears to us to be a creation of a right in the defendant to hold this property in his possession for a term of six years in consideration of 99 rupees advanced by the defendant to the plaintiff. We think, therefore, that the document is not a lease, but it is an usufructuary mortgage; and being a mortgage below 100 rupees, its registration was not compulsory but optional.

It is contended that Section 14 enacts that "the value of the right, title, or inter-"est in any immoveable property created, "declared, transferred, or extinguished by "any instrument, shall be taken to be the "value indicated by the stamp affixed there-"to or impressed thereon under Act X of "1862;" that the stamp on which this document is engrossed being of the value of 1 rupee, the value of the right created must be, according to this Section, considered to be of the value above 100 rupees; and that therefore even if it be a mortgage, it ought to have been registered and could not be received in evidence not having been duly registered under this law.

But it appears to us that, looking to Act X of 1862, the Stamp Law then in force, the stamp requisite for such a mortgage-deed would be a stamp of 8 annas and not 1 rupee. The amount of the loan is also

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clearly stated in the document to be 99 rupees. This Section does not appear to apply to cases where the value of the right is distinctly stated in the instrument which creates that right. But it appears to us that this Section contemplates only cases where there is no fixed or definite value of the interest created stated in the deed. For the purposes of this Act, the Legislature have laid down that the stamp on which such a deed is engrossed shall be taken to indicate the value of the interest created. It cannot be disputed that this mortgage could have been engrossed on a stamp of 8 annas, the amount of the sum advanced being 99 rupees, according to Art. 12 Schedule A of Act X of 1862; and if either from the ignorance of the Stamp Law, or from the fact that 8 annas stamp was not then available, the parties engrossed the deed on a higher stamp, we think it cannot be contended that merely from the circumstance of the stamp used being a stamp used for a transfer of an interest of the value of a sum above 100 rupees, the deed becomes a deed registration of which is compulsory under Act XVI of 1864. We think, therefore, that the deed being a mortgage-deed, and that mortgage being for a sum less than 100 rupees, the registration of such a deed was optional, and the fact of its not having been registered does not render it inadmissible in evidence in the cause.

The case is, therefore, remanded to the Court of the District Judge for a decision on the merits.

Costs to abide the result.

The 1st April 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Creditors—Heirs or assigns—Benameedar's acts—Liability.

Case No. 4 of 1870.

Regular Appeal from a decision passed by the Subordinate Judge of Purneah, dated the 30th September 1869.

Baboo Lekhraj Roy (Plaintiff) *Appellant*,

versus

Motee Madhub Sein and another (Defendants) *Respondents*.

The Advocate General and *Baboo Grish Chunder Ghose* for Appellant.

Messrs. J. Graham, J. W. B. Money, and *R. E. Twidale* and *Baboo Khettur Mohun Mookerjee* for Respondents.

The creditor of a deceased proprietor is not prevented, in the way in which the deceased would have been were he alive, from questioning acts done by the said proprietor's benameedar; for the rule of law by which an heir or assignee stands in no better position than the party through whom he derives his title admits of an exception in favor of those who would be themselves aggrieved or defrauded by the party through whom they claim.

Norman, C. J.—This is a suit for confirmation of the plaintiff's possession in respect of certains mouzahs in Pergunnah Dhurmpore.

Plaintiff alleges that Rajah Beejoy Gobind Singh being in possession of the mouzahs in dispute, borrowed money of the plaintiff and pledged these mouzahs with other properties to him; that the plaintiff obtained a simple money decree, in execution of which he caused the mouzahs in dispute to be sold and bought it himself; that under this purchase he obtained possession which he still retains; that Ranee Binodebutty, second wife of the Rajah, brought a suit against the plaintiff to establish her title, which was dismissed on the 16th of February 1869; that notwithstanding this decision, the defendant, who had obtained a decree against Ranee Binodebutty, having sought to bring the estate to sale as her property, or rather as having been pledged by her to him by a bond dated in 1268, the plaintiff objected; and on an investigation held under Section 246, the plaintiff's objections were disallowed on the 22nd of May 1869. The plaintiff, therefore, sued to establish his title to the mouzahs in question, and to restrain the defendant from bringing them to sale.

The Subordinate Judge on the 27th of September fixed one issue:—"Whether or not "the deceased Rajah would have been, and "whether his representatives are bound in "law by the mortgage created by Ranee "Binodebutty over the disputed properties "on account of the loan she took from the "defendant, Motee Madhub Sein?"

Without taking any evidence from either party, the Subordinate Judge decided the case on the 30th of September, by reiterating his decision of the 22nd of May.

Strange to say the decision of the 22nd of May appears also to have been pronounced

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by the Judge without taking any evidence, basing his judgment, apparently, mainly on his recollection of the facts proved before him on the enquiry on the 16th of February.

The plaintiff appeals.

The Subordinate Judge's decision assumes that because the Rajah, if alive, might have been unable to dispute a title acquired by a purchaser from Ranee Binodebutty, that therefore the plaintiff, a creditor of the Rajah and purchaser of his rights and interests in the property, would be equally prevented from questioning acts done by the benameedar of the Rajah. If the rule of law were as the Judge supposes, it would come to this,—that the creditors of a person who makes a benamee, pursuing their remedies with the utmost diligence and bringing his property to sale, would be bound by the acts of the debtor done for the express purpose of defrauding them. The rule of law applicable to such cases is not that supposed by the Judge.

Taylor on Evidence, Section 77, speaking of the case of heirs and assignees, says :—The heir or assignee "shall stand in no "better position than the party through "whom he derives his title; if the latter "is not at liberty to contradict what he has "formerly said or done, the former shall "be subject to a like disability. An ex-"ception, however, to this rule is admitted "in favor of those who would be them-"selves aggrieved or defrauded by the party "through whom they claim." He gives an instance :—"Where a man executed a deed "with the fraudulent intention of defeating "the Statutes of mortmain, the Court "held that his heir-at-law was not estop-"ped from questioning the validity of the "indenture, since his claim to the land was "founded not on the deed but on his title "by descent."

It is clearly impossible for this Court to pronounce any opinion on the merits of the case upon the record as it stands. The advance by the plaintiff, the decree in his favor, and the fact of his purchase in execution of that decree are admitted. The case must go back to the Subordinate Judge for the trial of the following issues :—

1.—Whether in his life-time and up to the time of his death, Rajah Beejoy Gobind Singh was in possession of the mouzahs in dispute as his own property ?

2.—Whether after the death of Rajah Beejoy Gobind Singh, Ranee Binodebutty and Ranee Brijbutty were in possession as guardians of the infant son of Rajah Beejoy Gobind ?

3.—Or, whether Ranee Binodebutty was in possession of the land in dispute as her own property ?

4.—Whether the defendant, Motee Madhub Sein, made an advance of money to Ranee Binodebutty in 1861, and took a mortgage of the mouzahs in dispute, really and honestly believing, in good faith, that Ranee Binodebutty was the owner of the same in her own right ?

5.—Whether in taking such mortgage, the said defendant was acting in collusion with Ranee Binodebutty or others to defraud the creditors of the Rajah ?

6.—Whether in taking such mortgage, the said defendant did so after making such enquiry as to the title of the Ranee as, in the ordinary course of business, a prudent purchaser buying such property would make ?

7.—What did Motee Madhub acquire under his purchase in execution of the decree of the day of ?

8.—Whether the plaintiff purchased the rights and interests of the Rajah without knowledge of or participation in any fraud that may have been practised by the Rajah ?

9.—If so, whether, as such purchaser, the plaintiff has a preferential title to the property over the defendant Chundessury, the purchaser of the rights and interests of Motee Madhub ?

10.—Was plaintiff in possession previous to and at the date of the suit ?

The Subordinate Judge will return his finding with the evidence to this Court.

The plaintiff must pay the costs of the appeal and the defendant's pleader's fees on the original hearing. Each party will bear his own costs of the review.

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The 1st April 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Costs—Interest—Execution.

Case No. 7 of 1871.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Bhaugulpore, dated the 19th December 1870.

Rajah Leelanund Singh (Judgment-debtor) *Appellant,*

versus

Maharajah Joy Mungul Singh (Decree-holder) *Respondent.*

Mr. R. E. Twidale for Appellant.

Mr. R. T. Allan for Respondent.

Where the decrees of the Sudder Court and of the Privy Council made no provision for interest on the costs awarded in those Courts, the lower Court cannot in execution allow interest on such costs.

Mitter, J.—We are of opinion that the lower Court was wrong in awarding interest upon the costs, there being no provision for the payment of such interest either in the decree of the late Sudder Court or in that of Her Majesty in Council. The lower Court says:—"Costs always carry interest; so the decree-holder is entitled to interest on the amount of costs awarded to him." This view, however, has been overruled by a Full Bench decision of this Court, reported in Volume VI, page 109 It is true that the question determined in that case related to interest upon mesne profits, but the principle is the same. It has been argued that, according to the practise prevailing in the late Sudder Court at the time when the decree in question was passed, a decree for costs *ipso facto* carried with it an award for interest. We are of opinion that the pleader for the respondent has failed to make out the existence of any uniform and recognized rule of practice in this matter; and we, therefore think that we are bound to follow the principle laid down by the Full Bench ruling above referred to.

We reverse the order of the Subordinate Judge, so far as it awards interest upon the costs awarded by the decrees of the late Sudder Court and of the Privy Council. Each party will bear his own costs in this appeal.

The 1st April 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover *Judges,*

Intermediate tenure—Enhancement of rent—Notice—Protection.

Case No. 1944 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Tipperah, dated the 25th July 1870, *affirming a decision of the Deputy Collector of that District, dated the 25th April* 1870.

Sreemutty Jannoba (Defendant) *Appellant,*

versus

Grish Chunder Chuckerbutty (Plaintiff) *Respondent.*

Baboos Romesh Chunder Mitter and *Nulleet Chunder Sein* for Appellant.

The Advocate General and *Baboos Kalee Mohun Doss, Doorga Mohun Doss* and *Hem Chunder Banerjee* for Respondent.

In a suit to enhance the rent of an intermediate tenure after a notice which stated distinctly and affirmatively that the talookdar could collect so much rent from the ryots: HELD that it was for the talookdar to support his claim to protection, if he had one, on the ground that he could not in his turn obtain from the ryots the rent which the superior holder claimed from him.

Where a zemindar seeking to enhance the rent of an intermediate tenure gives notice stating the plaintiff's right to enhance according to the special custom of the district it is a good notice.

Glover, J.—This was a suit to enhance the rent of an intermediate tenure, styled a "taksheeshee" talook, after notice.

The defendant alleged that the talook had been held from the date of the perpetual settlement at a fixed rent which could not be enhanced; that as the rent had not varied for the 20 years previous to the institution of suit, defendant was entitled to the presumption of law arising under Section 4 Act X of 1659; that the notice served was informal; that the Collector's Court had no jurisdiction; and that the zemindar could not

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enhance the rent of the tenure, although he might put an end to its existence.

Both the Courts below found for the plaintiff. The Judge held that although the rent paid by the defendant had not varied for the 20 years preceding suit, it was clear that the talook had been created subsequent to the decennial settlement, and was not therefore protected from enhancement.

The first ground of special appeal, namely, that "there being no agreement between the "parties whereby the plaintiff was entitled "to demand enhanced rent in the terms of "his notice, the present suit must fail,"—was not taken in the Court below, and cannot, we think, be allowed in special appeal.

The second is that the notice served by the plaintiff was informal, and does not disclose any legal ground of enhancement.

The notice is to this effect:—"You, "Sreemutty Jannoba, hold a tuksheeshee ta-"look, the rent of which has always been "of a varying nature; that you have been "called upon to make a settlement with "your landlord at the pergunnah rates; that "by the immemorial custom of the pergun-"nah, the holders of such talooks as yours, "after deducting 10 per cent. of the fair "jumma for collection charges and 10 per "cent. for malikana, are bound to pay the "residue as rent to the zemindar; that you "hold so much land, which, according to "the rates paid for similar kinds of land "in the same and adjacent villages, ought "to pay such and such a gross rental; from "this, deducting your 20 per cent. on ac-"count of malikana and collection charges, "the remainder, so much, ought to be paid "to me as my rent, and you are hereby call-"ed upon to pay that amount."

It is argued that this notice is bad in law, inasmuch as it does not set forth the grounds of enhancement with sufficient clearness; that it ought to have stated that the amount at which the zemindar had calculated the gross assets was recoverable by the talookdar from the ryots in the same proportion, they not being protected from the middleman's right to enhance any more than the middleman was protected from the zemindar.

In support of this contention, we have been referred to the case of Dinonath Doss *versus* Guggun Chunder Sein, decided by this Court on the 30th August 1870.*

* 14 W. R., p. 274.

Mr. Justice Phear says in this case:—"It "is not a good ground of enhancement of the "rent of any tenure that the holder of it "may possibly, having regard to the quality "of the land, be able to increase the profits "which he derives from it; it must at least be "shown that he is able so to increase the "profits. Now not only, as I understand the "notice, does it omit to state affirmatively "that the defendant is in a position to rea-"lize this increase, but there is not a par-"ticle of evidence on the record which "could establish a conclusion of that "sort."

The circumstances of this case are not before us, nor have we been shown what was the precise wording of the notice served on the talookdar. It is alleged that the case before us is of a precisely similar character to the one alluded to above; but we are not shown that this is so. And from the translation given by Mr. Justice Phear of the words of the notice, we should doubt the fact. In the notice which the plaintiff in this suit served upon his tenant, it is distinctly alleged that such and such rates are obtained from such and such descriptions of land; that you, the tenant, have been found to hold so much of each description of land, and must therefore for the future pay so much rent. The notice states distinctly and affirmatively that the talookdar could collect so much rent.

That being so, it was for the tenant, we think, to support his claim to protection, if he had one, on the ground that for some reason or other,—mokururee pottahs, lakheraj holdings, and the like,—he could not in his turn obtain from the ryots the rent which the superior holder claimed to receive from him. But he never made any such objection from first to last; never put it forward in his written statement; never made it one of his grounds of appeal to the Judge. He objected, no doubt, to the jurisdiction of the Collector as he did to the legality of the notice, but that was upon other grounds. And his substantial defences to the suit were that the tenure was protected from enhancement, because it had paid one uniform and unvarying rate from the date of the permanent settlement, and that the measurement of the land was wrong and the rates of rent fixed on the different sorts of land improper.

It is further objected that the notice does not specify that the adjacent lands of a similar kind are held by a similar class of

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tenants. No doubt this last clause of the sentence is omitted in the notice; but as it is quite clear from the record that the defendant knew perfectly well what the nature of the case was against him, and that the plaintiff's claim was based on this fact as well as the others, we do not think that what was evidently a clerical omission, which in no way prejudiced the talookdar, should operate to make the notice bad for incompleteness. The object of the law is that a party who is called upon to pay more rent than he has hitherto done, should know the grounds on which the extra demand is made; and there is no doubt in this case that the defendant perfectly understood why he was called upon to pay more than he used to. It may very well be doubted whether a zemindar, seeking to enhance the rent of an intermediate tenure such as this, is bound to give any other notice than the one contemplated by Section 51 Regulation VIII of 1793. There no rule laid down in Act X of 1859 for the enhancement of the rents of undertenures, and the notice would, we think, have been a good notice if it had merely stated the plaintiff's right to enhance according to the special custom of the district.

But assuming that notice in the terms of Section 17 Act X of 1859 was necessary, it has been argued that the facts necessary to given the plaintiff a decree for enhancement have not been proved; that it has not been proved that the defendant's lands pay less than similar lands in adjacent localities held by the same class of tenants.

The case of Kalee Nath Chowdhry *versus* Husnee Bibee, XII Weekly Reporter, p. 506, is quoted to show that such an omission is fatal to the plaintiff's claim.

This case, we observe, refers to omissions of necessary particulars from a notice of enhancement, and would apply to the special appellant's previous objection as to the formality of the notice. The point now before us is one which the lower Court decided on the evidence, and we cannot interfere with that finding in special appeal.

Lastly, it is contended that the Court below has decided that the talook is not protected from enhancement on purely conjectural grounds.

The Judge was wrong, no doubt, in supposing that it was necessary to prove the existence of the talook from before the perpetual settlement. It would have been sufficient, as the law stands at present, to show that it was in existence at and from the date of that settlement. But as regards proof of variation of rent, we think there has been a legally sufficient finding. Even if the first dowl (which, however, is shown to have come from proper custody, and is of an age to dispense with the usual strict proof,) be put aside, the second has been proved by at least one witness; and this alone would be sufficient to establish the fact that the rent had varied.

The question as to the terms on which tuksheeshee talooks are by the custom of the Tipperah Zillah held is one of fact, which the Courts below have decided on evidence which is legally sufficient for the purpose.

We see no ground on which we can interfere with the Judge's decision in this case; and we therefore dismiss this special appeal with costs.

The 3rd April 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Lien—Execution—Section 243 Act VIII of 1859.

Case No. 15 of 1871.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Sylhet, dated the 19th November 1870.

Nuddyabashee Doss (Decree-holder) *Appellant,*

versus

Reza Chowdhry (Judgment-debtor) *Respondent.*

Baboo Ashootosh Dhur for Appellant.
No one for Respondent.

Where a decree declares a decree-holder's lien on certain property without distinctly declaring his right to sell the same, it may be executed as against that property specially; but the usual course of attachment and of sale on the one hand, or of attachment and management under Section 243, Code of Civil Procedure, on the other hand, must still take place.

Jackson, J.—We think that no sufficient facts have been shown to us which neces-

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sitate interference in this case. There is a discretion in the Courts executing decrees under Section 243 Act VIII of 1859, and that discretion has been exercised by the lower Court in this case *primâ facie* upon sufficient ground. Debts to the amount of 40,000 rupees are to be recovered from the properties which have been attached and placed under the management of a manager, and those properties yield rupees 12,000 per annum, so that in 3 years the debts can be realized. The debts it is true are large, but the properties also are large, and *primâ facie* if these facts are correct, there seems to be a good ground for the exercise of the discretion given under Section 243.

But it is said that the decree-holder in this case held as security for his debt one special property, and that he has obtained a decree to recover his money from that property, and that he has a preferential claim as regards that property to recover the amount of debt which is due to him. It is said also that under his decree he was entitled to sell this property.

It would appear, however, that the decree only declared his lien on the property, and did not distinctly declare his right to sell the property. His lien being declared, the decree could be executed as against that property specially; but the usual course of attachment and sale on the one hand, or of attachment and management under Section 243 on the other hand, must still take place. If we had been shown that the decree-holder in this case had been prejudiced in any way by the present proceeding, and that he did not in fact obtain the proceeds of this one particular property, there might have been some ground for our interference. But for all we know, all that appears from the record and all that has been stated to us, it may be that he is now receiving all the profits which can be obtained from this one particular property, though these facts may not be distinctly stated. Upon the whole, we think that no sufficient case has been made out for our interference, and we see no sufficient ground to interfere with the discretion of the Judge in allowing time to the judgment-debtor, so that his debts may be paid off by a careful and proper management of his property. As the case stands at present we dismiss the appeal, but without costs as the respondent has not appeared.

Mookerjee, J.—I concur.

The 3rd April 1871.

Present:

The Hon'ble L. S. Jackson and A. G. Macpherson, *Judges.*

Plaint—Plaintiff's evidence.

Case No. 188 of 1870.

Regular Appeal from a decision passed by the Judge of Patna, dated the 20th June 1870.

Dullil Sing (Plaintiff) *Appellant,*

versus

Shitab Lall (Defendant) *Respondent.*

Mr. R. E. Twidale for Appellant.

Baboos Mohesh Chunder Chowdhry, Sreenath Doss and *Boodh Sein Sing* for Respondent.

Where a plaintiff starts such a case as that in purchasing certain property he was deceived by the vendor, the knowledge of an existing encumbrance having been fraudulently withheld, it is his business to tender himself as a witness and pledge his oath to the truth of the allegation.

Jackson, J.—It appears to me that the decision of the Judge, who dismissed the plaintiff's suit, is entirely justified by the evidence. The Judge states, no doubt, in the conclusion of his judgment, that "before "we come to criticise defendant's case, we "must have a fair *primâ facie* case made out "by plaintiff; whereas he has simply proved "nothing." This might lead to the inference that the Judge had thrown the onus of proof entirely upon the plaintiff, and had considered that no case was made out by him; whereas the truth is that both parties had given their evidence, witnesses had been examined on both sides, and the Judge has believed the witnesses called by the defendant. It appears to me that the evidence on the defendant's side is not merely not discredited in any way, but it is apparently probable and consistent with the facts which are indisputable.

But in addition to this, there is another circumstance which I must say has great weight with me in inducing me to affirm the judgment of the Court below, that is to say, the plaintiff's case rests very mainly upon the allegation that in purchasing this pro-

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perty he was deceived by the vendor; that knowledge of an existing incumbrance was withheld from him by fraud; and that, being thus ignorant, he paid the entire amount of the purchase-money stated in the deed.

Now, it appears to me that to start such a case as this, it was the plaintiff's business to tender himself as a witness, appear in the witness-box, and pledge his oath to the truth of that allegation. But he has done nothing of the sort. He has called the defendant no doubt, and the evidence of the defendant has certainly not been favorable to the plaintiff.

We have been asked to cure this so-called error of the plaintiff, by ordering him to be summoned and to attend here for the purpose of given evidence. But no reason whatever has been shown why we should allow the plaintiff's case to be added to or amended in that way. On the contrary, it seems to me to be unadvisable to accede to this application. It would be very undesirable the we should allow parties, who have not thought proper to come forward and be examined in the zillah, to be examined here at this distance from the place where the trial was held, and from the possible means of contradicting statements which they may make. This application, therefore, must be disallowed, and the appeal must be dismissed with costs.

Macpherson, J.—I concur.

The 3rd April 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Section 246 Act VIII. 1859—Appeal—Rights of worship—Hindoo idol.

Case No. 410 of 1870.

Miscellaneous Appeal from an order passed by the Judge of Dacca, dated the 18th July 1870, affirming an order of the Sudder Moonsiff of that District, dated the 16th June 1869.

Kalee Churn Gir Gossain (Judgment-debtor) *Appellant,*

versus

Bungshee Mohun Doss and another (Decree-holders) *Respondents.*

Baboo Motee Lall Mookerjee for Appellant.

Baboo Doorga Mohun Doss for Respondents.

No appeal lies from an order on an application under Section 246, Code of Civil Procedure, which can only be contested by a regular suit.

The rights of worship of a Hindoo idol cannot be sold in execution of a decree for the personal debt of a shebayet.

Mookerjee, J.—In this case the judgment-debtor appeals against the order of the Judge of Dacca, affirming an order of the Moonsiff rejecting plaintiff's objection to the sale of certain properties belonging to a *deb-sheba*, and especially to the sale of certain *pallahs* or rotation of service of a certain idol. Objection is taken by the respondents, judgment-creditors, to the effect that as the application was virtually under Section 246, the order of the Court of first instance was final, and it can only be contested by a regular suit.

We think that this objection is valid, and that there does not lie an appeal to this Court, nor did an appeal lie to the District Judge. But we find on referring to the order of the Moonsiff, that the Moonsiff has found that the properties Nos. 1 to 9 were not proved to his satisfaction to belong to the *deb-sheba*. His order as regards those properties appears to be perfectly correct. But it is said that the Moonsiff then proceeded to order that certain *pallahs* or rights of service in the judgment debtor ought to be sold exempting the right to perform the actual *poojah*. We do not see how rights of worship of a Hindoo idol can be sold by a Court to the highest bidder in execution of a decree for the personal debt of a *shebayet*. It has been held all along that such a right of service or *pallah* cannot be sold, for it may happen that the purchaser of the rights of the *sheba* may be of a different religion and may not be disposed to perform the services; the object of the endower in creating the endowment may thus be defeated and rendered null and void. We perfectly agree with the principle laid down by a Division Bench of this Court in a case to be found in III Wyman's* Revenue Civil and Criminal Reports, page 176; and we hold that the Moonsiff in execution of the decree against the judgment-debtor, a shebayet, should not proceed to sell his rights of service of a Hindoo idol. We are not, however, quite certain that the Moonsiff has passed an order ordering the sale of the *pallah*. If he has, he is certainly wrong in

* 7 W. R., p. 266.

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ordering a sale of a right of that nature. If it was the intention of the Moonsiff to sell the *pallah*, we hope that after this expression of our opinion he will not proceed to sell the *pallah*.

We reject this appeal with costs, two gold mohurs being allowed for pleader's fees.

The 4th April 1871.

Present:

The Hon'ble L. S. Jackson and A. G. Macpherson, *Judges.*

Purchaser of fraudulent decree—Vakeel's evidence—Section 24 Act II. 1855.

Case No. 49 of 1871.

Regular Appeal from a decision passed by the Moonsiff of Seetamoondee in Tirhoot, dated the 15th January 1870.

Doolar Jha (Plaintiff) *Appellant,*

versus

Runjeet Roy and others (Defendants) *Respondents.*

Baboo Debendro Narain Bose for Appellant.

Moonshee Mahomed Yusoof for Respondents.

The purchaser of an *ex-parte* decree strongly tainted with fraud cannot be allowed to profit by it.

Section 24 Act II of 1855 does not warrant a vakeel's exclusion from the witness-box, though it may excuse his answering certain questions relating to communications between him and his client.

Jackson, J.—It seems to me that the decision of the Moonsiff dismissing this suit was a right decision and ought to be affirmed. The conduct of Heera Lall appears to be characterized with the grossest fraud. He has sold this property on behalf of himself and his minor brother, and then after receiving the purchase-money he brought a suit as heir of his brother, alleging that his own act had been done without authority, and seeking, as heir of that brother, to recover the one-half which he had himself sold. During the pendency of that suit, the purchaser negotiated with Heera Lall and agreed actually to pay a further sum, in consideration whereof Heera Lall was to execute a second kobalah for the same property.

It is alleged in the written statement, although there is no proof of the fact, that Heera did promise, in consideration of receiving this further sum, to withdraw the suit that he had brought; and that the defendant, in reliance on this promise of his, took no steps; and that in consequence of his omission to look after the case, the suit went on and was decreed *ex-parte*, and the present plaintiff purchased the decree so obtained of Heera's whole right.

Now, although no formal proof as to what Heera promised to do is on the record, there can be no difficulty whatever in coming to the conclusion, which is irresistibly suggested by the facts, that the purchaser, defendant before us, placed himself in Heera's hands and relied entirely upon him and his assurances.

The second bill of sale from Heera to this defendant was registered, and the evidence goes to show that the money paid to Heera on this second occasion passed through the hands of the plaintiff's brother. That seems to create a very strong suspicion that the plaintiff himself knew what was going on. At any rate the plaintiff cannot claim to stand higher than Heera did, and that decree which Heera obtained was strongly tainted with fraud.

I think it impossible, as the facts stand, that we should allow the purchaser of such a decree to profit by it, and that the decision of the Moonsiff which dismissed the present suit ought to be affirmed.

It appears that the defendant, now respondent, sought to examine one Tripoordharee, who had been Heera Lall's vakeel and had also acted for him in the matter of the second conveyance, but that an objection was raised under the 24th Section of the Evidence Act (II of 1855) to that being done.

Now, it might very well be that Tripoordharee would be excused from answering certain questions relating to communications between him and his client, but that would be no reason for excusing Tripoordharee from being put in the witness-box. He ought to have been placed there and to have been examined, subject of course to objection being made to particular questions, which

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questions the Court might probably have disallowed.

The defendant will get the costs of this and of the previous hearing, as well as the costs of the Lower Appellate Court.

Macpherson, J.—I concur.

The 4th April 1871.

Present:

The Hon'ble A. G. Macpherson and Onooocol Chunder Mookerjee, *Judges.*

Section 105 Act X of 1859—Execution—Attachment.

Case No. 1298 of 1870.

Special Appeal from a decision passed by the Judge of Tipperah, dated 7th April 1870, reversing a decision of the Moonsiff of Begumgunge, dated the 19th August 1869.

Dowlut Gazee Chowdhry and another (Plaintiffs) *Appellants,*

versus

Moonshee Munwar and another (two of the Defendants) *Respondents.*

Baboos Sreenath Doss and *Kalee Kishen Sein* for Appellants.

Baboos Nuleet Chunder Sein and *Kashee Kant Sein* for Respondents.

In executing a decree for arrears of rent, a Court, under Section 105 Act X of 1859, has power only to seize and sell that which at the time is the property of the judgment-debtor. Where therefore a decree was obtained against persons who were originally proprietors of the land, but who at the time of the decree and subsequent sale had ceased to have any interest therein, the purchaser at the sale in execution of such decree took nothing.

Macpherson, J.—This is a suit for possession of, and declaration of title to, a seven annas share of a certain small talook, numbered 53, and registered in the names of Mushruffooddeen and Shujatooddeen, who were originally the proprietors of it.

In 1270, in execution of a decree of a Civil Court against Mushruffooddeen and Shujatooddeen, the talook was attached and sold. At the sale it was purchased in the name of a third party by the plaintiff Kureemunnissa and the defendant Manik Bibee, each of these women having an eight annas share in the purchase. In 1274 Manik Bibee's eight annas share was purchased by the plaintiff Dowlut Gazee Chowdhry, at a sale held in execution of a decree of a Civil Court against Manik Bibee. No mutation of names was ever made in the books of the zemindar; but rent for the seven annas share, which is the subject of this suit, was received for 1271-72 from Kureemunnissa and Manik Bibee, who in the receipt granted to them are described as the auction-purchasers.

Subsequent to the purchase by Dowlut Gazee Chowdhry, the holder of the seven annas share of the talook instituted a suit under Act X of 1859 for the rent of 1273-74. This suit was not against Kureemunnissa and Dowlut Gazee Chowdhry (the persons really interested in the matter), but against the original recorded proprietors, Mushruffooddeen and Shujatooddeen and against Manik Bibee, not one of whom any longer had anything to do with the property. An *ex-parte* decree was obtained; a seven annas share in the talook was sold in execution of it; and at the sale the defendant, Amjud Ali, was the purchaser. Amjud has since been put in possession by the Court.

The plaintiffs then sued. In their plaint they allege the suit under which the defendant Amjud Ali purchased to be fraudulent as against them, and pray that the sale may therefore be set aside, &c. The Moonsiff gave them the decree they sought, finding that the fraud alleged was proved.

The Lower Appellate Court held that no fraud was proved, reversed the decree of the Moonsiff, and dismissed the suit. Before the Lower Appellate Court it was urged on behalf of the plaintiffs, that even if fraud were not proved they were entitled to succeed, as Amjud Ali had in fact bought nothing, the persons against whom the decree (under which he purchased) had been obtained having at the time of the decree and sale no interest whatever in the tenure. As to this, the Judge says:—"But "in this suit there is no question of what "was sold or bought, the only question be- "ing whether there was any fraud in putting "up the talook to sale, &c."

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In special appeal it is contended before us, that the Lower Appellate Court was wrong in refusing to consider the question of what was sold or bought, and in holding that the suit necessarily failed if the fraud alleged were not proved.

It appears to me that the appellants are entitled to our judgment, and that the decree of the Lower Appellate Court should be reversed. On the face of the transaction, there is strong evidence in support of the allegation of fraud which is made in the plaint, and it is not much to be wondered at if the other question, as to whether anything passed by the sale of Amjud Ali, was not specially put forward. When the Judge reversed the Moonsiff's finding as to fraud, I think he should have decided the question as to whether Amjud Ali purchased anything, which question was then raised distinctly, and for the decision of which there were ample materials upon the record.

I am of opinion that under Section 105 of Act X of 1859, the Court had power only to seize and sell that which at the time is the property of the judgment-debtor (*see* X Weekly Reporter, pp. 434-446-494). The decree under which Amjud Ali purchased was against persons who at the time had no interest in the tenure which was sold, and nothing therefore passed to him.

The decision of the Lower Appellate Court is reversed, and the decree of the Moonsiff is restored and affirmed. The appellants are entitled to their costs in all the Courts.

Mookerjee, J.—I concur. I also think that the Judge ought to have tried the point distinctly raised before him as to the respective rights of the parties under their purchase. I find from the sale-certificate of the defendant that he merely purchased the right, title, and interest of the old proprietors of this jote, who had no title at all at the time of the decree or the sale.

Whatever right and title those persons possessed had completely passed to the plaintiff in a previous execution sale. The defendant therefore purchased nothing. The right of the plaintiff must, therefore, I apprehend, prevail over that of the defendant. I would, therefore, allow this appeal with all costs.

The 4th April 1871.

Present:

The Hon'ble G. Loch and W. Ainslie, *Judges.*

Analogous cases—Consent of parties.

Case No. 1827 of 1870.

Special Appeal from a decision passed by the Additional Judge of Nuddea, dated the 21st May 1870, *affirming a decision of the Moonsiff of that District, dated the 29th January* 1869.

Soorendronath Roy (Defendant) *Appellant,*

versus

Purmanund Ghose (Plaintiff) *Respondent.*

Baboos Grish Chunder Mookerjee, Mohendro Lall Shome, and *Kashee Kant Sein* for Appellants.

Baboo Issur Chunder Chuckerbutty for Respondent.

A Judge should not, without the consent of the parties, allow his judgment in one case to govern his decision in another, even if the subject of dispute is of a similar nature and the evidence similar in character, when the parties are not the same and the subject-matter of the suit is different.

Loch, J.—In this case, the Judge commences his judgment with a manifest error. He says that the parties are the same as in Case No. 51. But on referring to Case No. 51, it appears from the record that the plaintiff is a different person. It is true that the subject of dispute is of a similar nature, but the suit is for a separate plot of land; and although the evidence in that case may be of a similar character, as has been put forward in this case, yet the Judge should have decided each case upon the evidence recorded in each, and should not, without the consent of the parties, have allowed his judgment in the one case to govern the decision in the other.

The case is accordingly remanded to the Judge to be disposed of upon the evidence recorded in this case.

Costs will follow the result.

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The 4th April 1871.

Present:

The Hon'ble G. Loch and W. Ainslie, *Judges.*

Section 24 Act X of 1859—Cause of action—Jurisdiction.

Case No. 1862 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Judge of 24-Pergunnahs, dated the 28th July 1870, *reversing a decision of the Deputy Collector of that District, dated the 31st March* 1870.

Prosunno Chunder Bose (Defendant) *Appellant,*

versus

Prosunno Chunder Roy and another (Plaintiffs) *Respondents.*

Baboos Chunder Madhub Ghose and *Mohinee Mohun Roy* for Appellant.

Baboos Annund Chunder Ghossal and *Obhoy Churn Bose* for Respondents.

The superintendent of two estates situated in different sub-divisions gave an ekrar to the zemindar that he would make good any retrenchment made by the zemindar in the accounts. The zemindar after examining the accounts refused to admit certain items and sued the superintendent under Section 24 Act X of 1859.

HELD that as the terms of the kubooleut, given by defendant when he was appointed superintendent, required him to make the zemindar's principal cutcherry his place of business, that must be considered to be the place where the cause of action arose, and the suit ought to have been instituted in the sub-division in which the defendant's principal cutcherry was situated.

Loch, J.—THE question before us in this case is in itself a simple one. It is—What is the place where the case of action arose between the parties, and in what Court should the suit have been instituted?

The suit is clearly one under Section 24 Act X of 1859. It is a suit by a zemindar against an agent for the recovery of money in the hands of the said agent. Whatever may be the allegations in the plaint, we see clearly that this is the nature of the suit.

It appears that in Aughran 1272, the defendant executed a kubooleut in favor of the plaintiff when he (defendant) was appointed superintendent of two estates,—one called Chalmaree, within the sub-division of Diamond Harbour, and the other Alipore, within the sub-division of Alipore.

The defendant held the office of superintendent till Pous 1275, and then for some reason or other which does not appear, he gave an ekrar to plaintiff, dated the 19th of Pous 1275, to the effect that he would make good any retrenchment which the plaintiff made in the accounts of the estates committed to his (defendant's) charge.

The plaintiff after examining the accounts did make retrenchment, refusing to admit certain items debited in the accounts aggregating to a sum of rupees 3,400, to recover which this suit is instituted under Section 24 of Act X of 1859 in the sub-division of Alipore, apparently upon the ground that as one of the estates was in that sub-division, plaintiff was entitled to bring his suit in that Court.

Subsequently, however, on the 18th January 1870, plaintiff filed a petition before the Collector, praying that as the greater portion of the land to which the suit referred was situated in the Diamond Harbour Sub-division, the suit might be transferred to the officer in charge of that sub-division; and on the 29th of that same month, the defendant filed a petition praying that the plaint might be dismissed, because it had been filed in the Alipore Court which had no jurisdiction to try the case.

On the 8th February 1870 plaintiff put in a petition, saying that it was by mistake that he had made the application to transfer the suit to the Deputy Collector of Diamond Harbour; and he prayed, therefore, that it might be tried in the Court in which it was instituted.

On the first of these applications the Collector appears to have directed the Deputy Collector to report whether he had jurisdiction to try the case; and on the subsequent petition presented by the plaintiff, he held that no action need be taken then.

The Deputy Collector of the sub-division, of Alipore tried the question of jurisdiction and he held that as the Mokamee or principal cutcherry where the zemindar's treasury was, and to which all remittances were sent and where the accounts of both the estate were kept, was situated in Mouzah Badehgorah or Naraintollah in the Diamond Har-

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bout Sub-division, the suit should have been instituted in the sub-division of Diamond Harbour, as the cause of action must be considered to have arisen in the Mokamee cutcherry.

The Judge, on appeal, appears to consider that the suit being one against a gomastah under Section 24, as the estates in his charge lie in different sub-divisions, the zemindar was entitled to bring his suit in either Court within the jurisdiction of which any of the land was situated; and he did not determine where the Mokamee cutcherry was situated, as he seemed to think that it was not necessary to decide this point in determining the question of jurisdiction. The law is silent on the subject, and the latter part of Section 20 Act VI of 1862, Bengal Council, will not assist us in determining the question of jurisdiction; but looking to the purport of the pleadings as stated to us, it would appear that both parties consider it necessary to have it determined where the Mokamee cutcherry is situated, as both parties say that the cause of action arose there. The plaintiff alleges that the Mokamee cutcherry is in Bardowla, within the Alipore sub-division; and the defendant alleges that it is in Baralgolah or Narsintollah, within the Diamond Harbour sub-division; and we think looking to the terms of the kuboolcut given by the defendant, which required him to make the principal cutcherry his place of business, that must be considered to be the place where the cause of action arose. It was to the Mokamee cutcherry that all monies were remitted; it was there that all the accounts were prepared; and it was there that the money first came under the control of the defendant, where by his order it would be disbursed, and where in fact, according to his accounts, the money *was* disbursed.

We, therefore, do not agree in the opinion expressed by the Judge, that the plaintiff was at liberty to institute his suit in either one or the other sub-division, for he ought to have instituted it in that sub-division where the defendant had his place of business. We, therefore, remand the case to the Judge to determine whether the Mokamee cutcherry is, as is stated by the plaintiff, in the Alipore sub-division, or whether it is in the Diamond Harbour sub-division, as is alleged by the defendant, and to dispose of the case accordingly.

Costs will follow the result.

The 4th April 1871.

Present:

The Hon'ble G. Loch and W. Ainslie, *Judges.*

Zemindar's rights—Assignee's right of action.

Case No. 1897 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Additional Judge of Nuddea, dated the 2nd June 1870, affirming a decision of the Assistant Collector of Meherpore, dated the 15th January 1870.

Reedoy Monee Burmonee (Plaintiff) *Appellant,*

versus

Mr. Hugh Sibbold (Defendant) *Respondent.*

Baboo Issur Chunder Chuckerbutty for Appellant.

Baboo Bhowanee Churn Dutt for Respondent.

The assignee of a zemindar's right to receive rent has a right to sue in the Collector's Court, whether the assignment has been effected by the intervention of the Civil Court or by the private act of the zemindar.

Loch, J.—We think that the lower Courts have come to a wrong decision in this case, and we would refer to two judgments of this Court; one reported at page 199 of Marshall's Reports; and the other in Volume XIV of the Weekly Reporter, page 456. In the first of these cases, it is clearly laid down that when a zemindar has assigned his right to receive rents to a third party, such third party has a right to sue and may bring his suit in the Collector's Court. The second case is to the same effect.

In the case before us, the only difference is that the assignee has obtained his rights by the intervention of the Civil Court, and not by the private act of the zemindar. But this makes no real difference. If in the one case the assignee under a private transfer can sue, there is no reason why he should not be able to do so when he is an assignee by auction-purchase in execution of a decree.

We, therefore, reverse the decision of the lower Courts, and remand the case to the first Court for trial on the merits.

The appellant will have his costs of this appeal.

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The 4th April 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Resumption—Section 10 Regulation XIX of 1793—Assessment—Clause 1 Section 23 Act X. 1859.

Case No. 2281 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Officiating Judge of East-Burdwan, dated the 25th July 1870. *reversing a decision of the Deputy Collector of that District, dated the 26th February* 1870.

Rohinee Nundun Gossamee and others (Plaintiffs) *Appellants,*

versus

Rutnessur Koondoo and others (Defendants) *Respondents.*

Babbo Ashootosh Dhur for Appellants.

Baboos Kishen Succa Mookerjee and *Umbika Churn Banerjee* for Respondents.

Where a zemindar had obtained an *ex-parte* decree declaring certain lands to be his mal lands, it was held that his only remedy was to have the rates at which he was authorized under Section 10 Regulation XIX of 1793 to collect the rents determined and to obtain a kabooleut, and his only course was to sue in the Collector's Court under Clause 1 Section 23 Act X of 1859.

Kemp, J.—This was a suit under the provisions of Clause 1, Section 23, Act X of 1859 for determination of the rates of rent and for the delivery of a kabooleut. The first Court gave the plaintiff a decree, apparently not for the sum claimed but for a smaller sum, namely, for rupees 17-2-10 pie.

No question or plea as to the jurisdiction of the Court was raised either in the first Court or in appeal to the Judge; but the Judge, without going into the case at all, holds that a decision to be found at page 442 Volume XII, Weekly Reporter, is on all fours with the present case. He, therefore, decreed the appeal and reversed the decision of the Deputy Collector.

In special appeal it is contended that the Judge ought not to have raised the point of jurisdiction when it was not raised in the Court of first instance or in appeal; *2ndly*, that the Judge ought to have held that the resumption decree was conclusive evidence of the right of the plaintiff to demand rent from the defendant, and also of the relationship of landlord and tenant; and *3rdly*, that the precedent quoted by the Judge is not applicable to the circumstances of this case.

We think that the Judge was right in raising the question of jurisdiction, although not raised in the first Court or in appeal; but on the 2nd and 3rd grounds we differ from the Judge. It appears that the plaintiff in this case sued to have 18 beegahs 1 cottah of land declared to be mâl land appertaining to his zemindaree. We may observe here before proceeding further, that the suit to have this land declared mâl was originally brought by the zemindar; that subsequently the plaintiff as putneedar stands in the shoes of the zemindar; that the decree was passed in the absence of the defendant who did not appear, and the plaintiff proved that the land was mâl; and therefore it was ordered that a decree should issue in favor of the plaintiff, and that it be held that the land was the mâl land of the plaintiff. On obtaining this decision, the plaintiff now comes in for a declaration of the rates of rent to be paid by the defendant and for the delivery of a kabooleut at these rates, claiming the sum of rupees 36-6 annas as the fair and proper rate to be charged, and demanding a kabooleut at that jumma. The first Court did not give the plaintiff a decree for what he asks, but for the lesser sum of 17 rupees odd annas. Whether under the Full Bench ruling this decision will stand or not, it is for the Judge to decide if it is raised before him.

With reference to the ruling to be found at page 442, Volume XII, Weekly Reporter, we think that that decision does not apply to the circumstances of the present case. It is clearly mentioned by Mr. Justice Mitter in that decision, that the plaintiff in that case obtained a decree under the provisions of Sections 30 Regulation II of 1819. In the present case, the decree was not passed under that Section; the decree was simply to the effect that the lands in suit were the mâl lands of the plaintiff.

We may observe further that there is a decision of the late Sudder Court, of the 13th July 1861, Raikes and Trevor, J. J., which applies precisely to the circumstances of this suit, and in which those learned Judges held that the provisions of Clause 1, Section 23, and Section 31 apply, that the

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zemindar, or putneedar as in this case, was entitled to bring a suit for determination of rates and delivery of a kubooleut. We also fail to see how it can be argued in the face of the decision which distinctly declares the defendant's lands to be the mâl lands of the plaintiff that the plaintiff is not entitled to rent for these mâl lands. His only remedy was to have the rates at which he is authorized under Section 10 Regulation XIX of 1793 to collect the rents determined, and to obtain a kubooleut according to such rates as may be found to be fair and equitable; and to enable him to do so, the only course open to him was that which he has pursued, namely, to sue in the Collector's Court, under Clause 1 Section 23 of Act X of 1859, to have it determined what are fair and equitable rates payable on the land and for delivery of a kubooleut at those rates.

We, therefore, remand the case for the Judge to try it on the grounds raised in the first Court, and also to take into consideration, if necessary, whether under the Full Bench Ruling and with reference to the claim having been made for a kubooleut at a fixed jummah of rupees 36-6, and the Court of first instance having decreed the delivery of a kubooleut for a lesser sum, namely, rupees 17, odd annas, the suit of the plaintiff is liable to dismissal or not.

Costs to follow the result.

The 4th April 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Section 246, Code of Civil Procedure—Cause of action—Section 354—Remand—Procedure.

Case No. 2475 of 1870.

Special Appeal from a decision passed by the Second Subordinate Judge of Hooghly, dated the 3rd September 1870, reversing a decision of the Moonsiff of Sulkea, dated the 19th February 1870.

Shumboo Chunder Surnokar (Defendant) *Appellant,*

versus

Russick Chunder Chung and another (Plaintiffs) *Respondents.*

Baboo Bhowanee Churn Dutt for Appellant.

Baboos Hem Chunder Banerjee and *Umernath Bose* for Respondents.

Where the success of a party in summary proceedings under Section 246, Code of Civil Procedure, is grounded upon his being in possession as of his own right, that is a sufficient cause of action to the opposite party.

Where an Appellate Court finds that there is no evidence upon the record to enable it to decide a question at issue between the parties, and remands the case under Section 354 of the Code for additional evidence, it ought to require such evidence with the finding of the first Court to be sent up to it for decision.

Glover, J.—It appears that in execution of a certain decree against the plaintiff in this case, the judgment creditor, one Thakoor Monee Dassee, attached 1 beegah 10 cottahs of land as the property of her judgment-debtor. The defendant intervened, under Section 246 of the Code of Civil Procedure, and his claim was allowed.

The plaintiff, therefore, brings this suit to have his right and title declared in this 1 beegah 10 cottahs, and to have the summary order under Section 246 declared invalid. The plaintiff claims this land as his mourussee tenure under an amulnamah, dated the 21st Falgoon 1199. The defendant claims to hold the disputed land under a pottah from the zemindar, dated the 19th Assin 1276, and his allegation is that the 1 beegah 10 cottahs in dispute are not included within the plaintiff's amulnamah.

The first Court decreed for the plaintiff; but the Subordinate Judge finding that the land mentioned in the amulnamah was 8 beegahs 4 cottahs 11 chittacks, whereas the suit was brought on the said amulnamah as for 9 beegahs 9 cottahs 11 chittacks, he, the Subordinate Judge, not being able to account for this discrepancy, and not finding any evidence on the record whereby he could find whether or not the disputed land was covered by the amulnamah, remanded the case to the first Court to have that question tried, and he directs the Moonsiff "to institute a due enquiry, and try the case "on its merits after examining the witnesses "of the defendant, if he is prepared to "adduce any."

The defendant appeals against this order, urging in the first place that the plaint discloses no cause of action and that the suit should be at once dismissed; and 2*nd*, that as the first Court had fixed and tried the proper issue, the order of remand was illegal. The first objection was not taken at any previous stage of the proceed-

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ings, and we do not think that we ought to allow it to be taken now in special appeal; but even if it were taken in the grounds of special appeal, it appears to be worth very little, inasmuch as there can be no doubt that the defendant's success in the summary proceedings was grounded upon the fact that he was in possession of the disputed land as of his own right, which would of itself cast such a slur on the plaintiff's title as would justify him in coming into Court to have his title declared.

On the second objection, we find that there is nothing illegal in what the Subordinate Judge has done. Section 354 of the Code of Civil Procedure gave him the right to remand the case to the lower Court, if he thought that any question of fact essential to the right determination of the suit on the merits had not been decided. In this case, the area mentioned in the amulnamah filed by the plaintiff, and the amount of land said to be held under that amulnamah in the plaint, differed from each other in the precise quantity of land which is the subject of dispute in this case, namely, 1 beegah 10 cottahs, and it seems to have been a very proper question to decide whether that particular plot of land was or was not covered by the amulnamah.

It is contended that as the first Court framed the proper issue, the Subordinate Judge ought to have decided the case himself without a remand; but whether or not the proper issues were framed, the Subordinate Judge clearly states that there was no evidence upon the record which could enable him to determine the question raised between the parties. The only mistake that we can find in his decision is, that he has directed the Moonsiff to take evidence and decide the case *de novo*, whereas he ought, under Section 354, to have directed that such additional evidence with the finding of the Moonsiff should be sent up to him for decision.

With this modification, we uphold the decision of the Court below and dismiss the special appeal with costs.

The 5th April 1871.

Present:

The Hon'ble L. S. Jackson and A. G. Macpherson, *Judges.*

Collector as Receiver—Procedure—Jurisdiction.

Bissessuree Debia, *Petitioner,*

versus

Sookram Doss Mohunt and others, *Opposite Party.*

Baboo Kalee Mohun Doss for Petitioner.

Mr. R. T. Allan for Opposite Party.

Where property is seized and retained by a Collector in his capacity of Receiver, his acts cannot be disputed by way of motion to discharge or get rid of the attachment.

Jackson, J.—It appears to me that this rule ought to be discharged.

In the long pending suit relating to the Akhrah of Rajgunge in the district of Burdwan, the plaintiff applied to this Court for an order under the 92nd Section of the Civil Procedure Code, and upon his application the Court thought fit to appoint a Receiver and manager of the property of the Akhrah, and the Collector of Burdwan was accordingly appointed. The petitioner before us complains that, under color of that order and appointment, certain property which was in the hands of the petitioner, some of it under purchase on the occassion of a sale for arrears of putnee rent and some of it by way of mortgage, was seized by the Collector as such Receiver, and that, upon representation made to the Collector, he at first released the property in question but afterwards, on receiving from this Court a letter of the Deputy Registrar accompanied by a schedule of the property belonging or alleged to belong to the Akhrah, the Collector again seized the property and now retains it in his possession.

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I do not express any opinion at present as to whether the schedule, forwarded to the Collector along with the letter of the Deputy Registrar, ought to be looked upon as part of the order of the Court, specifically directing the Collector to attach particular properties.

The Sections of the Procedure Code relating to attachment before judgment contain, amongst other things, provision for a claim to property attached before judgment being preferred and enquired into by the Court which has ordered attachment; and the Sections relating to injunctions and to the sort of order which has been made in this suit do not expressly provide for the preferring of such claims. It may be that it was the intention of the legislature that no such claims should be preferred by reason of the different nature of the order to be made under the provisions of Section 92 and Section 81 respectively. I do not wish to decide here whether a claim could be preferred in respect of an order made under Section 92 or not. It is sufficient to say that the application before us is not such a claim.

It seems to me that the Collector, having been appointed Receiver of the property in suit and having accepted the appointment and proceeded to act under it, acts upon his own discretion in respect of the property which he takes under his care; and that the application before us being by way of motion to discharge or get rid of the attachment, is not the proper form in which the acts done by the Collector in his capacity of Receiver should be disputed. That, it seems to me, is sufficient to dispose of the present application.

I, therefore, think that the rule should be discharged with costs, rupees 50.

Macpherson, J.—I wish simply to say that I do not consider that the Receiver has taken possession of the property, which is the subject of this application under any special order of this Court, and that I think that the Court cannot on such application as the present dispose of the questions raised between the applicant and the plaintiff.

The 5th April 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Consent to evidence in another case—Witnesses—Costs.

Case No. 2338 of 1870.

Special Appeal from a decision passed by the Judge of Dacca, dated the 18th July 1870, affirming a decision of the Subordinate Judge of that District, dated the 24th Augest 1869.

Sreenath Roy and others (Plaintiffs) *Appellants,*

versus

Goluck Chunder Sein and others (Defendants) *Respondents.*

Baboos Chunder Madhub Ghose and *Ashootosh Dhur* for Appellants.

Baboos Romesh Chunder Mitter, Kalee Mohun Doss and *Doorga Mohun Doss* for Respondents.

Five suits having been brought to recover a balance of accounts from defendants, who were alleged to be partners of a trading concern and as such liable, certain witnesses were examined in four of the cases in which the plaintiff in one of the suits was not a party, and at his request the evidence taken in those cases was allowed to be used as evidence in his case and then the witnesses were discharged. Two days after this he applied to have the witnesses re-examined, giving no reason for his application, which was refused.

HELD that the refusal was justified in the absence of any new reason for the re-examination.

Where a party's admissions and conduct induced the supposition of his liability for a claim, the Court refused him his costs although the suit against him founded on such claim was dismissed.

Mookerjee, J.—THIS is a suit to recover rupees 3,349 as balance of account from the defendants, who are seven in number, on the ground that the defendants were all partners of an *aurut* or trading concern, and as such are liable for this sum advanced by the plaintiffs to that firm.

One of the defendants, Goluck Chunder Sein, pleaded that he was not a member of the firm; that he never took any money from the plaintiffs, nor had he authorized any person to borrow money from the plaintiffs; and that, therefore, he should be exonerated from the claim. He also pleaded that the plaintiffs' claim was barred by the Statute of Limitation.

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Both the Courts have released this defendant, Goluck Chunder Sein, from any liability, holding that he was not a partner in the defendants' firm. The lower Courts have held that a portion of the plaintiffs' claim is barred by limitation. They have only decreed a sum of 501 rupees, the claim for which was not barred by lapse of time; but they have decreed that sum against the Paul defendants only.

The special appeal to this Court is on the following points:—

First.—That the Courts below were wrong in not examining certain witnesses of the plaintiffs, for whom a special application was made to the Court.

Secondly.—That the Courts below were wrong in exonerating Goluck Chunder from this claim.

Thirdly.—It was contended that the Lower Appellate Court has misconstrued the evidence of Ram Kinkur, who, it is said, has proved the fact that Goluck Chunder was a partner of the defendant's *aurut;* and lastly, that there are other evidence in the case which prove the said fact, but that the Judge has overlooked them altogether.

As regard the first objection, we find that there were five suits instituted against the defendants in the Court of the Subordinate Judge. The suit out of which this appeal arises was numbered 31. There were four other suits by other plaintiffs against these defendants. Certain witnesses were examined on the 28th July last by the Subordinate Judge in the other cases in which the appellant was not a party. It also appears that at the request of this plaintiff the evidence taken in the other cases of these witnesses was allowed to be used as evidence in this case, and then the witnesses were discharged. Two days after this an application was made by the appellant before us, asking the Subordinate Judge to re-examine these witnesses in the case instituted by him, giving no reason at all why it was necessary to examine them again, specially when it appears that he was quite satisfied with the order passed on the 28th July that the evidence taken in the other cases should be used as evidence in his case. The Subordinate Judge on this application of the 30th July passed an order that the evidence taken in the other cases would be treated as evidence in the plaintiff's case, and that all the five cases would be tried together. There appears to be no other application made to the Subordinate Judge, and no reason shown to him why it was necessary that they should be examined again in this case. It is now alleged that it was necessary to examine these witnesses on the point of limitation, which point was not raised in the other cases. But it appears that there is nothing to show that that was the object of the request. On the 28th July when the witnesses were examined, the plaintiff knew the facts to which they had deposed, and knowing that was content with the order then passed,—that the evidence of those witnesses would be used as evidence in his case; he thus allowed the Court to dismiss these witnesses. Surely the Subordinate Judge, in the absence of any new reason assigned for their re-examination, was justified in refusing to call them again. It appears also that after the order of the 30th July was passed, the plaintiff seemed perfectly satisfied with that order; and he did not bring the fact which is now stated to us to the notice of the Subordinate Judge, that he wished to examine them on a point quite separate from that on which they had been examined in the other cases. The plaintiff having thus allowed the witnesses to go away without any request to have them examined in his case, should not, we think, be allowed without any new reason to call the same witnesses again. His suit has been dismissed by both the Courts on limitation; and it is now stated that these witnesses, if examined, would have proved that the claim was not barred. Nothing of this sort was urged before the Court below; and we do not think that the witnesses should be harassed by being repeatedly summoned before the Court, when the plaintiff after perusing their testimony was satisfied that it was sufficient for the purposes of his case that that evidence should be used as evidence in his cause.

As regards the point of limitation, the Judge finds that there is no evidence to prove that the adjustment of accounts took place at the end of the year 1272; and as the claim is preferred beyond three years, we think that the Judge was perfectly right in overruling the contention that the claim was not barred.

With reference to the point as to whether the Judge has misconstrued the evidence of the witness Ram Kinkur, we find on a perusal of that evidence that there is no ground for such a contention. Ram Kinkur does not prove that Goluck Chunder was actual-

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ly a partner in the firm. A great portion of the testimony of this witness consists of his own opinion which is no evidence. On his being asked whether Goluck Chunder was a partner, he stated in his deposition in chief that he heard that Goluck Chunder was a partner. This is no legal evidence at all. It is true that he stated afterwards that Goluck Chunder consented to pay the liabilities of that firm, but in cross-examination the witness admitted that Goluck Chunder consented to pay the same purely out of "good nature." Then it is said that there was a certain communication by Goluck Chunder to this witness, by which Goluck Chunder agreed to pay the liabilities of the firm as a partner. The Judge very rightly observes that as the document was not produced, he could not rely upon the memory of that man as to the real contents of that absent document. We do not find that, according to the evidence of Ram Kinkur, any such clear case has been made out for the plaintiff, which can entitle him to a decree against Goluck Chunder Sein.

In this case it is admitted that Goluck Chunder's name did not appear as a partner in the firm. It is not also shown that when the plaintiff advanced the sum of money to the *aurut*, he knew that Goluck Chunder was a partner or that he ever believed that he was so or advanced the money on his credit. The utmost that the evidence of the witnesses whom the plaintiff produced makes out is, that Goluck Chunder advanced a sum of 1,000 rupees to one Doorga Churn Banerjee, a friend of Goluck Chunder, whose name appeared as a partner according to the plaintiff's own witnesses only in 1273, after the plaintiff had advanced the money to the firm. It is said that Goluck Chunder was a dormant partner, or a *benamee* partner in the name of Doorga Churn. We have gone into the whole of the evidence adduced by the plaintiff on this point, and we are of opinion that the witness does not make out that Goluck Chunder was admitted a partner. It is not at all shewn by that evidence that the old partners ever consented to his admission as a partner in the firm and assigned a share of the profits to him,—none of those circumstances which would constitute Goluck Chunder a partner are made out by the evidence. The fact of one witness stating that *maskabar* used to be sent to Goluck Chunder would be no sufficient or conclusive evidence of the fact of his being a partner. It is admitted by Goluck Chunder that he did advance a sum of money to Doorga Churn, and if *maskabar* had been sent to him, it might have been sent to him to enable him to see how the business in which his friend Doorga Churn was concerned was going on, and whether his money advanced to the said Doorga Churn was safe or not. It does not appear to us that that circumstance of itself is sufficient to prove that Doorga Churn was a partner.

We also think that the Judge has mentioned Ram Kinkur only, because perhaps the evidence of that man was put forward to him as one of the best witnesses of plaintiff. He has given reasons in his judgment why the testimony of that witness did not satisfy him as to the fact of Goluck Chunder being a partner of the defendant's firm. His silence as to the other witnesses, I think, can be accounted for only by this fact, that he does not consider that those witnesses make out plaintiff's case, when the plaintiff's best witness, Ram Kinkur, has not satisfied him. Indeed, we have gone over the evidence ourselves, and we are of opinion that on the testimony of those witnesses, the plaintiff was not entitled to a decree against Goluck Chunder as a partner of the defendant's firm.

There has been an objection under Section 348 by the respondent, Goluck Chunder, to the effect that he was entitled to the costs incurred by him in the Courts below, as he, Goluck Chunder, has been exonerated from the claim of the plaintiff. But we think that the Judge was right in refusing costs. Although Goluck was not satisfactorily proved to be a partner, still his admission that he had advanced a sum of money to one of the partners, and the willingness manifested by him to pay the liabilities of the firm, might have induced the plaintiff to bring him into the category of defendants. We would not interfere with the order of the Judge refusing to give him costs.

We dismiss the appeal with costs.

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The 6th April 1871.

Present :

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch *Judge*.

Will—Probate—Recorder—Procedure—Jurisdiction—High Court.

In the matter of

Mee Tsee, *Petitioner*.

Mr. W. A. Montriou for Petitioner.

A person who is not the next of kin, and who has no interest in the estate of a testator, has no right to oppose the grant of the probate or dispute the validity of the Will.

The mere fact of errors of procedure having been committed in a trial before a Recorder would not warrant the High Court in saying that in pronouncing against the validity of a Will after investigation he had acted without jurisdiction, or in interfering with his decision.

Norman, C. J.—THE petitioner applied to the Recorder of Moulmein for probate of the last Will and testament of one Nga Boo, a Burmese resident of Moulmein, as executrix of that will. As far as we can make out, the application appears to have been made on the 21st December 1870. From the proceedings as brought before us, by an unverified petition presented on behalf of the petitioner bearing the signatures of Messrs. Rogers and Remfry as her attornies, it would appear that the original application describes Mee Tsee as petitioner and Mee Yoo as respondent. It is a matter of fact, which also appears from the said proceedings, that prior to the presentation of that application, Mee Yoo had presented a petition for Letters of Administration to the estate of Nga Boo, and on being sworn she had deposed that she was the widow of the late Nga Boo. That petition also, if correctly abstracted in the proceedings of the Recorder, is headed as being a petition by Mee Yoo adversely to Mee Tsee and others who are described as respondents.

These two petitions having come on before the Recorder, it appears that repeated applications were made to him for adjournments from time to time in order that the parties might come to an amicable settlement. Eventually on the 20th March 1871, after hearing the evidence adduced on the part of Mee Tsee, the petitioner now before us, in support of the Will, and she and her witnesses having been cross-examined at a considerable length by the counsel on behalf of Mee Yoo, the alleged widow of Nga Boo, the Recorder pronounced the Will to be a forgery.

We have been asked to interfere with the decision of the Recorder upon the ground that Mee Yoo gave no proof that she was the widow of Nga Boo, and that consequently she was not entitled to be heard in opposition to the Will. We have no doubt of the soundness of the proposition on which Mr. Montriou's contention is based, namely, that a person who is not the next of kin, and who has no interest in the estate of a testator, has no right to oppose the grant of the probate or dispute the validity of the Will. In England it has been held that even a creditor cannot controvert the validity of a Will, because it is a matter of indifference whether he should receive his debt from the executor or from an administrator. It is clear, however, that in this case some evidence was given, namely, the evidence of the alleged widow herself to prove that she was the widow of, or in other words had been married to, the deceased. And it also appears that upon the trial her counsel was ready to give additional proof in support of that allegation. We are not prepared to say, looking at the course which the case took, and the consent of the parties to adjournments from time to time for the purpose of amicable settlement, that the Recorder was in any way wrong in treating the alleged widow as a person having a right to contest the validity of the Will.

The next objection made is that the Recorder did not proceed regularly according to the provisions of the Succession Act, *i. e.*, Act X of 1865, by directing the party propounding the Will to file a plaint, and did not proceed as in a regular suit under Act VIII of 1859. The proceedings of the Recorder may or may not have been irregular in this respect. But the case is not before us on appeal, and we cannot deal with it as on appeal. The mere fact that there may be errors of procedure of a serious character in the trial before the Recorder, would not justify us in saying that in pronouncing against the validity of this Will upon the investigation which actually took place, the Recorder did so otherwise than in the exercise of the jurisdiction which was vested in him.

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That being so, even if we had power of superintendence over the Recorder's Court, it appears to us that the case is not one in which we should be warranted in interfering with his decision, or indeed should have any power of interference. If the petitioner is dissatisfied with the decision of the Recorder she may appeal to the proper tribunal.

We reject the application.

The 6th April 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Prosecution under Chapter XI, Criminal Procedure Code—Jurisdiction—Abetment.

In the matter of

Ishan Chunder Ghose, *Petitioner.*

Baboo Tarucknath Dutt for Petitioner.

Where an offence is committed against a Court of first instance, the Appellate Court to which it is subordinate is competent to sanction a prosecution under Chapter XI of the Code of Criminal Procedure.

Sanction to such a prosecution may be given even if the offence is abetment.

Glover, J.—The petitioner complains of the Judge's order allowing a prosecution under Chapter XI of the Code of Criminal Procedure to be instituted against him.

The only ground of law taken in his petition is, that as the enquiry regarding the alleged "interpolations" was conducted under orders of the High Court, that Court alone had power to sanction a prosecution. There is no ground for this contention. The offence, if offence it be proved to be, was committed against the Court of the Judge in which the appeal was being heard, just as much as against the Judge of the Court of first instance; but in any case the Moonsiff's Court was directly subordinate to the Judge's, and the Judge could therefore give the necessary sanction even if the offence had not been actually committed against his Court.

Another objection, which however is not to be found in the petition, is that as the only offence of which Ishan Chunder Ghose could be convicted would be abetment of an offence relating to documents, and as the abetment Section is not included amongst those in connection with which sanction to a prosecution under Sections 169 and 170 Code of Criminal Procedure can be given, the Judge had no jurisdiction to give such sanction.

The point was discussed in the case of the Queen *versus* Mohesh Chunder Chatterjee, VI Weekly Reporter, p. 20, and it was then decided that when a prisoner is sent up by a Civil Court before a Magistrate on a charge of forgery, it is perfectly competent to the Magistrate to send him for trial on a charge either of forgery, or of using the document knowing it to be forged, or of "abetting" forgery.

There seems to have been no want of jurisdiction on the part of the Judge, and this Court will not interfere with a sanction given under Sections 169 and 170, Code of Criminal Procedure, unless it is clearly shown that the sanctioning officer acted altogether without jurisdiction (Ram Pershad Hazaree, V Weekly Reporter, p. 24).

The application is rejected.

The 6th April 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Partnership—Balances—Decree.

Case No. 215 of 1870.

Regular Appeal from a decision passed by the Subordinate Judge of Dinagepore, dated the 8th September 1870.

Mun Mohinee Dossee and others (Defendants) *Appellants,*

versus

Ichamoyee Dossee (Plaintiff) *Respondent.*

Mr. Cowie and *Baboos Mohendro Lall Shome* and *Rajendro Nath Bose* for Appellants.

Baboos Sreenath Doss and *Bhugobutty Churn Ghose* for Respondent.

In a suit of the nature of one for dissolution of partnership, it is incorrect to make an absolute decree for a specific sum of outstanding balances, without anything to guide the Court in fixing that amount. No amount ought to be decreed without satisfactory proof of its having been realized and misappropriated.

Bayley, J.—We think that the decree of the lower Court as it stands must be modified

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as regards items 4, 5 and 6; *viz.*, 4, Goods and Stock-in-trade; 5, Outstanding Balances; and 6, Amount in Cash. This is in fact the only point urged in appeal, all other points being given up by Mr. Cowie. It is said that this is in fact a suit of the nature of a suit for dissolution of partnership; and therefore, the decree should have been made made either after the adjustment of the accounts, or subject to the taking of an account.

In regard to item No. 4, it is urged that there is a finding by the lower Court that rupees 22,712-8 annas was on account of goods, and that it was not in the power of the plaintiffs to obtain accounts as they had been dispossessed from the place of business; but we still think that the decree should be subject to taking an account, the finding of the lower Court, however, being otherwise undisturbed.

The finding of the lower Court as to the cash amount should also stand; but before the decree issues, it must be subject to any thing that may be shown after adjustment of accounts as far as the accounts can be made available.

As to the item 5, we think the decree is wrong. An absolute decree for a specific sum of outstanding balances without anything to guide the Court in fixing that amount is incorrect. It must be shown how far the outstanding balances are realizable, and no amount ought to be decreed against the defendants until its realization and misappropriation by them is satisfactorily proved.

We reverse the decree of the lower Court, and remand the case to the Court for the purpose of passing a new decree on the principle above stated. The appellants must pay the costs of this appeal. The costs after the remand will follow the result.

The 6th April 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Mortgagees — Right of redemption.

Case No. 1384 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 23rd March 1869, *affirming a decision of the Sudder Ameen of that District, dated the 29th February* 1868.

Shaikh Muzhur Hossein (one of the Defendants) *Appellant.*

versus

Hur Pershad Roy and others (Plaintiffs) *Respondents.*

Mr. R. E. Twidale and *Moonshee Mahomed Yusoof* for Appellant.

No one for Respondents.

A mortgagor's right to redeem what he has mortgaged is indefeasible, and cannot be interfered with by unauthorized acts of the mortgagees, *e. g.*, a butwarrah entered into by the latter.

Glover, J.—On the first hearing of this case on special appeal, a postponement was, at the request of both parties, made for the purpose of endeavouring to arrange matters by compromise. No such arrangement has been come to, and we therefore proceed to dispose of the appeal. The special respondent, we may observe, is not represented by pleader, Mr. Allan who appeared for him on the former occasion having declined to act on this.

The facts are somewhat complicated.

Kabul Mahomed on his death left behind him two sons, Kadir Buksh and Imam Buksh, and one grandson, Asudoollah.

His property consisted of three mouzahs, Bhugwanpore, Dherajpore and Bhulwarah.

By an arrangement, with which we have nothing to do in this case, the shares of the heirs were fixed at 11 annas 12¾ gundahs for Kadir Buksh and Imam Buksh, and 4 annas 7¼ gundahs for Asudoollah, in each and all of the three abovenamed mouzahs. The property was all of it mortgaged,—the 4 annas 7¼ gundahs share to the ancestor of the plaintiffs, and 11 annas 12¾ gundahs to Ram Churn Bhuggut and others, defendants in this suit.

The mortgagees of Asudoollah's share, who seem to have foreclosed, and the mortgagees of the shares of Kadir Buksh and Imam Buksh, joined together in a butwarah-suit under Regulation XIX of 1841,—the result of which was that in lieu of the 4 annas 7¼ gundahs share of all three mouzahs the mortgagees of Asudoollah got possession of two of them, *viz.*, Bhugwanpore and Dherajpore in their entirety; and the mortgagees of Kadir Buksh and Imam Buksh, in lieu of their 11 annas 12¾ gundahs share in the three mouzahs, got entire possession of

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Mouzah Bhulwarah. This took place in April 1849.

Some years after, in 1863 apparently, the representatives of Kadir Buksh and Imam Buksh sued to redeem, making the holders of what had been Asudoollah's share defendants, and got a decree declaring their right to redeem and to take possession of their share, *viz.*, 11 annas 12¾ gundahs, in each of the three mouzahs. They took possession accordingly.

The plaintiffs by this decree lost the benefit of the butwarah arrangement, which gave them the entire mouzahs of Bhugwanpore and Dherajpore, and brought a suit to have the butwarah cancelled and to have their 4 annas 7¼ share in all three mouzahs. In this they failed, on the ground that the partition made by the Collector could not be set aside. The High Court, before which the case came on appeal, appears to have declared (VI Weekly Reporter, p. 314) that the partition by the Collector could not be set aside in a suit in its then form; and that the mortgagor decree-holders ought not to have taken possession of their shares in each of the three mouzahs, but should have contented themselves with the equivalent given to their mortgagees by the butwarah, *viz.*, the entire mouzah of Bhulwarah of which they were in possession; and that the plaintiff's remedy was to bring a suit to recover possesion of those portions of Mouzahs Bhugwanpore and Dherajpore from which the representatives of Kadir Buksh and Imam Buksh had ousted them. The plaintiffs took the advice thus said to have been given to them, and the result is the present suit.

Both lower Courts have decreed the plaintiffs' claim, holding that by the terms of the butwarah the representatives of Kadir Buksh and Imam Buksh had no right to a share in all three mouzahs, but only to mouzah Bhulwarah.

The defendant who brings this special appeal is a 10 pie 13 d. sharer in the estate left by Kadir and Imam.

It appears to us that he ought to succeed. In the first place, we do not understand how a butwarah entered into between the mortgagees of the estate could bind the mortgagors, or change the nature of the security given by them. Kadir Buksh and Imam Buksh mortgaged an 11 annas 12¾ gundahs share in three mouzahs, and their heirs had, it seems to us, a perfect right to redeem that share, notwithstanding the arrangement come to by the mortgagees. It is not alleged that the mortgagors were parties to the butwarah suit. The only thing stated against them is that they took no steps to get it set aside; but clearly they were not bound to take any such steps or to move in the matter in any way. So long as they were unable to redeem the mortgage it mattered nothing to them what arrangements their mortgagees might choose to make. Their right to redeem what they had mortgaged was indefeasible, and could not be interfered with by unauthorized acts of their mortgagees. It seems to us that the heirs of Kadir Buksh and Imam Buksh were perfectly right in bringing their suit to redeem as they did, and were quite justified in taking possession of their proper shares.

We observe, moreover, that the decision of the Civil Court of the 17th August 1863, which declared the defendant's right to redeem an 11 annas 12¾ gundahs share in each of the three mouzahs, has never been reversed and is now final: so that in no case could the plaintiff, as it appears to us, succeed in his present suit.

The special appeal is allowed and the judgment of the Court below reversed in respect of the interest, *viz.*, 10 pie 11 d., held by the special appellant in the estate consisting of all three mouzahs, with all costs.

The 6th April 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Agreement to execute conveyance—Registration—Evidence.

Case No. 1768 of 1870.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 23rd May 1870, reversing a decision of the Moonsiff of that District, dated the 31st March 1870.

Asgur Ali Shikdar (Defendant) *Appellant*,

versus

Mothoora Nath Ghose (Plaintiff) *Respondent*.

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Baboos Luleet Chunder Sein and *Gopeenath Mookerjee* for Appellant.

Baboos Kalee Mohun Doss and *Kashee Kant Sein* for Respondent.

Where a party borrowing money gave the lender an ekrar agreeing to execute a conveyance of certain landed property :

HELD that the instrument was in substance an agreement the registration of which was optional, and which might be given in evidence in a suit for specific performance of the agreement to execute the conveyance for which it stipulates.

Norman, C. J.—THIS was a suit brought by the plaintiff, Mothoora Nath Ghose, against the defendant to compel him to execute a conveyance of certain landed property in accordance with the terms of an ekrar or agreement, dated the 25th of Magh 1274 or the 7th of February 1866, which was in the terms following :—

"To Mothoora Nath Ghose.

"I Asgur Shikdar, son of Asbab Ali "Shikdar, inhabitant of Ram Chunderpore, "Thannah Nulchitee, do hereby execute "this ekrar puttro (deed of agreement) to "the following effect. I, having been arrest-"ed under a writ of arrest in the execution "case of Mahomed Omer, am now in custo-"dy of the peon. As I have no means to "pay the amount of the said decree, I have "taken from you a sum of rupees 100 on "this condition that in lieu of the said sum, "I, by selling to you the 4 annas share of 5 "pieces of the property of Asad Ali Sirdir "which I purchased from the auction-pur-"chaser Zinnut Ali Khondkar on the 4th "Jyest 1271 (being the property mentioned "in the said deed of sale), will, within three "days from this date, execute a deed of sale "thereof. The original deed of sale which "I had I have now given to you. I will give "you the other document along with the "kobalah. If I fail to execute the kobalah "within the time fixed, then you will be at "liberty to have the kobalah executed by "instituting a suit in the Court, and to rea-"lize any damage that may be sustained by "you."

The defendant denied the ekrar; but the plaintiff proved that the defendant, who resides at a place called Ramchunderpore, being arrested in Burrisaul for a sum of rupees 100, obtained from the plaintiff that sum which was borrowed by the plaintiff at a Poddar's shop in the town, and executed in his favor the document above set forth. Accepting this evidence as true, the Judge made a decree directing the defendant to execute a conveyance to the plaintiff.

It has been urged before us that under Section 49 of Act XX of 1866 the document cannot be received in evidence, first, because it is an instrument which purports or operates to create a title in a tenure or land of the value of 100 rupees; and secondly, because it acknowledges the receipt of 100 rupees on account of the creation of an interest in land.

Many cases have been cited; but the nearest to the present is one decided by Mr. Justice Kemp and Mr. Justice Phear on the 30th March 1868, Lilamber Singh, defendant, appellant, *versus* Futteh Chand Sahoo, respondent.

We think, however, that in the present case the document is in substance a mere contract to convey the property, and that it does not purport to create, and was not intended to create an interest in the land. It is not immaterial to consider that it does not contain any such specification of the property to be sold as, with reference to the provisions of Section 21, would have enabled the parties to register it, had they been desirous of doing so. Had they presented it for registration, the Registrar would doubtless not have accepted it. In the hurry of such a transaction as the raising of money to prevent a man from being sent to Jail in pursuance of a warrant of arrest, one would expect that there would be no time for the preparation of a formal document, and the parties would therefore naturally stipulate that this agreement should be carried out afterwards by a document drawn up in proper legal form.

The late Chief Justice, Sir Barnes Peacock, points out that in this Registration Act the distinction between agreement and conveyance is clearly preserved, XI Weekly Reporter, p. 520,—that the registration of agreements is optional. Agreement for leases are provided for by Clause 4 of Section 17 as explained in the interpretation Clause of the Act. But there is nothing which shows that Clause 2 is intended to include agreements for the sale of property or for the creation of interests in property.

Baboo Kalee Mohun Doss contended and we think with good reason that Clause 3 of Section 17 is intended to include only receipts for money for the creation of rights, and receipts for money paid on account of contract to create interest in land.

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We think that the instrument here was in substance simply an agreement,—the registration of which was optional, and that such agreement may be given in evidence in a suit for the specific performance of the agreement to execute the conveyance for which it stipulates.

We, therefore, dismiss the appeal with costs.

The 13th April 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Execution—Bona fides.

In the matter of

Kaleedass Ghose, *Petitioner.*

Baboo Tarucknath Dult for Petitioner.

Paying tullubana and taking out process evince a sufficient *bonâ fide* intention of obtaining the fruits of a decree.

Kemp, J.—We think this application must be rejected. The petitioner is the judgment-debtor. Execution was taken out by the judgment-creditor within three years from the date of the decree. The judgment-creditor deposited tullubana and caused the service of a notice on the judgment-debtor. The case was then struck off. The first Court found that the proceedings taken by the judgment-creditors were merely colorable proceedings to keep the decree alive, and that they were not *bonâ fide* proceedings taken with the intention of enforcing the decree. The Judge came to the contrary opinion. He finds that the judgment-creditors admittedly filed the petition to execute within the time allowed by law, although at the eleventh hour; that the judgment-debtor was bound to pay when the decree was passed; and that looking to the conduct of the parties and the facts stated by them, the proceedings were *bonâ fide* and not merely colorable.

In special appeal it is contended that the Judge has not viewed the case in the light in which several decisions of this Court, which are referred to, required him to view it in. One of the decisions alluded to is to be found in Volume XIII, Weekly Reporter, page 41. In that case the Judge in the lower Court observed that the presumption was that the proceedings were *bonâ fide* until *mala fides* was proved; and the learned Judges remanded the case for the Judge to come to a more distinct finding, and to decide whether the proceedings were taken with the intention of enforcing the decree or merely colorable for the purpose of keeping it alive. Mr. Justice Markby observes that for proceedings to be *bonâ fide*, they must be taken for the purpose of obtaining the fruits of the decree. In this case the Judge has found as a fact that these proceedings were *bonâ fide*; and it seems to us that the decree-holder by paying tullubana and taking out process evinced sufficient *bonâ fide* intention of obtaining the fruits of the decree, as observed by Mr. Justice Markby.

We, therefore, reject the application.

The 13th April 1871.

Present:

The Hon'ble W. Ainslie and G. C. Paul, *Judges.*

Privy Council—Costs.

Case No. 6 of 1871.

Miscellaneous Appeal from an order passed by the Judge of Patna, dated the 21st December 1870, affirming an order of the Subordinate Judge of that District, dated the 10th September 1870.

Mussamut Oomatool Fatima and other (Judgment-debtors) *Appellants,*

versus

Azhur Ali (Decree-holder) *Respondent.*

Moonshee Mahomed Yusoof for Appellants.

Mr. R. E. Twidale and *Baboo Chunder Madhub Ghose* for Respondent.

Where the Privy Council reversed the decrees of three Courts in India with costs in each, and dismissed the suit with costs specifying a sum as the costs of the appeal to itself:

Held that such sum did not include the costs of translation, &c., incurred in the High Court.

Ainslie, J.—In this case the decree of the Privy Council reverses the decrees of the three Courts in India with costs in each Court: it also dismisses the suit with costs, and specifies the sum of £490-10-10 sterling as the costs of the appeal to the Privy Council. The question is whether this sum

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of £490-10-10 includes the costs of translation, &c., incurred in this Court. We do not entertain any doubt that the costs assessed in England were only the costs incurred before the Privy Council, and that they do not include the costs of translation, &c., incurred in this country. The terms of the decree are ample to cover all costs incurred in any stage of the suit, and the Court below rightly overruled the appellants' objection.

There has been a cross-appeal on the part of the respondent for interest on costs; but we are of opinion that as no interest has been provided for in the decree of the Privy Council, it cannot be allowed now by this Court.

The appeal is dismissed with costs, one gold mohur being allowed as pleader's fees. The cross-appeal is also dismissed.

Paul, J.—I concur.

The 13th April 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Joint Hindoo family—Female member—Joint acquisition—Presumption.

Case No. 18 of 1871.

Regular Appeal from a decision passed by the Moonsiff of Nattore, dated the 30th September 1869.

Chunder Nath Moitro (Defendant) *Appellant,*

versus

Kristo Komul Singh (Plaintiff) *Respondent.*

Baboos Romesh Chunder Mitter, Kalee Mohun Doss and *Doorga Mohun Doss* for Appellant.

Baboos Bhowanee Churn Dutt and *Bhyrub Chunder Banerjee* for Respondent.

The wives and mothers of the members of a joint undivided Hindoo family so long as they continue to live in the family and are supported out of its income are just as much members of that family as their husbands and sons; and where property is purchased in the name of one such female member during the life of her minor son, the presumption of joint acquisition arising in such cases cannot be rebutted by the mere fact that her name was used in making the purchase or entered in the Collector's books as the purchaser.

Mitter, J.—We are of opinion that the decision of the Moonsiff who tried this case in the first instance is correct, and therefore ought to be affirmed. We think it has been abundantly proved by the oral and documentary evidence on the record of this case, and indeed we may say that the point has not been seriously contested before us by the pleader for the appellant, that the property in dispute was purchased in the name of Bissessuree Dassee at a time when the said Bissessuree and her son (who was then a minor) were living together with the plaintiff Kristo Komul and his sister-in-law, Janokee Dassee, as members of a joint undivided Hindoo family, which was in possession of a considerable amount of real and personal property far exceeding in value the sum of Rs. 2,000, with which the property in question is admitted to have been purchased. These circumstances are, in our opinion, sufficient to raise the presumption that the said property was purchased with the common funds of the joint family, and for the benefit of all its members. It has been argued that the presumption of joint acquisition arising from the circumstance of a Hindoo family being joint and undivided is not applicable to this case, inasmuch as Bissessuree, the party in whose name the disputed property was purchased, was a female, and as such had no proprietary right in the family estate while her son was alive, who was the heir-at-law of her deceased husband.

We are of opinion that this contention is not sound. That Bissessuree was one of the members of the joint undivided family is beyond all question; and although her interest in the family estate was not of a proprietary character, there can be no doubt whatever that she was entitled to be, and was in point of fact, maintained at the time in question out of the proceeds of that estate. The wives and mothers of the members of a joint undivided Hindoo family, so long as they continue to live in the family and are supported out of its income, are just as much members of that family as their husbands and sons; and as unity of possession is one of the essential characteristics of a joint undivided Hindoo family, no difference in the nature of the interests possessed by the different members thereof can affect the presumption with which we have to deal in this case. So far as the ordinary and usual course of things is concerned, the practice of making *benamee* purchases in the names of female members of joint undivided

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Hindoo families is just as much rife in this country as that of making such purchases in the names of male members; and if we compare the relative positions of these two classes of members and the means and facilities respectively enjoyed by them for acquiring properties on their own account, we cannot help thinking that the presumption against such acquisition is no less strong in the former case than in the latter.

Much stress has been laid by the pleader for the appellant on the remarks made by their Lordships of Her Majesty's Judicial Committee of the Privy Council in the case reported in 10 Moore's Indian Appeal cases, page 529. But the circumstances of that case are altogether different from those of the present. That case arose in a district governed by the Mitakshara Law of inheritance, and the question which their Lordships had to determine was whether Thakooranee Dassee, one of the parties concerned in that case, was holding separate possession of a particular property, which was claimed by some of her husband's relatives as part of the joint undivided property of a joint undivided family, consisting of themselves and the husband of the said Thakooranee Dassee. Indeed, in a case of this description, the fact of the name of a childless widow like Thakooranee Dassee being recorded in the Collectorate books after the death of her husband would afford a strong presumption of exclusive ownership on her part; for, according to the Mitakshara Law of inheritance, a widow has no right to succeed to the estate of her deceased husband, in preference to the co-parceners of that husband, who were living with him as members of a joint undivided Hindoo family at the time of his death. She is only entitled to maintenance. In the present case, however, we have to deal with an undivided case of joint undivided Hindoo family and a purchase made in the name of one of the members of that family at a time when there was abundant common property to enable the joint family to make that purchase. Indeed, the very first words used by their Lordships in the passage read to us in the course of the discussion go to show that, under ordinary circumstances, no presumption whatever would be afforded by the fact that the name of a female member of the family has been used. Their Lordships observe "That Thakooranee was in her "time the sole recorded proprietor of the ta- "looks is incontestable. This in an ordinary case might be a circumstance of little "moment, because it has been ruled and "is consistent with reason that one member of a joint Hindoo family may be "so recorded on behalf of the family." These words conclusively show that in their Lordships' opinion the mere fact of the registration of Thakooranee's name in the Collector's books would not have, under ordinary circumstances, afforded any presumption whatever of her independent right and exclusive possession.

Their Lordships go on to say:—"But in "the present, case arises the question why "the name in which the property was recorded should be that of the female rather "than that of the male member of the "family, particularly when, upon the application of the ordinary Hindoo Law to "the facts as stated by the plaintiffs, that "male member (Lall Singh) would upon his "uncle's death have been entitled to the "whole estate, and the female member "(Thakooranee) would have had only a "right to maintenance." It is said that the word "*particularly*" used in this passage goes to show that the fact of registration above referred to was sufficient to raise a presumption of exclusive possession, independent of any question arising out of the Mitakshara Law of inheritance. But it is clear that there were other facts and circumstances involved in that case which would be sufficient to explain away the use of that word. In that case there was no allegation of purchase in the name of Thakooranee. The name of Thakooranee was registered in the Collector's books after the death of her husband, and as Thakooranee would not have been the heir of her husband, if the family had really been joint and undivided, as contended for by Lall Singh, the fact of Lall Singh having allowed Thakooranee's name to be so registered after the death of her husband would be of itself a strong argument against the existence of the joint undivided family relied upon by the former in the pleadings. In this case, on the contrary, there can be no doubt whatever that the family was a joint one, and the presumption of joint acquisition cannot be rebutted by the mere fact that Bissessuree's name was used in making the purchase.

The plaintiff's case, however, does not rest upon this presumption alone. He has given a large body of oral and documentary evidence, not only to prove that that pur-

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chase in question was made with the common funds of the joint undivided family, but also to establish the fact, which does not appear to have been rebutted in any manner by any reliable counter-evidence, that the said property continued to be in the possession of the plaintiff, Kristo Komul, as the manager of the joint family, down to the institution of the present suit. The Moonsiff was, therefore, quite right in starting with the presumption of Hindoo Law referred to by us; and we entirely concur with him in the following remarks made in his judgment :—"The inference I have drawn "from the High Court decree published in "page 3 of the Special Number of the "Weekly Reporter, is further confirmed by "the concurrent testimony of respectable "and trustworthy witnesses, who all depos-"ed that in 1254, B. S., the family were "joint in mess and estate and had a large "joint fund, out of which the property in dispute might have been purchased." We have gone through this evidence as carefully as we could; and after considering all the comments which were made upon it by the pleader for the appellant, we feel ourselves bound to say no sufficient reason has been shewn to us for rejecting that evidence, or for coming to any other conclusion upon it than that arrived at by the Moonsiff who had the best opportunity of testing the respectability of the witnesses, their demeanour while under examination, and their inclination to speak the truth. The evidence of one of the persons who sold the property, *viz.*, Keshub Chunder, is in our opinion entitled to particular weight. The whole context of his depositions goes to show that he was not actuated by any motive either in favour of the plaintiff or defendants; and although at this distance of time he could not speak to facts which had occurred at the time of the sale, with that degree of precision and accuracy of detail which could have been expected from him if the event had been a recent one, there is one statement made by him which has not been refuted or disproved in any manner whatever by the appellant, *viz.*, that the purchase-money was received by him and his co-vendors from the hands of the plaintiff, Kristo Komul. It has been argued that the account books filed by the plaintiff have been tampered with in the particular place where the entry relating to this particular transaction is made; but after carefully examining the book both in that place as well as in other places, we feel ourselves bound to say that there is no ground whatever to support this allegation. There were no special interpolations or erasures in that place as far as we could find, and the appearance of the book is certainly in favor of its genuineness. It appears to have been kept in the ordinary course of business, and is also proved by the testimony of Shib Chunder, who positively swears that he made the entry in question with his own hand.

So far as the appellant is concerned, we feel no hesitation in saying that he has completely failed to produce any reliable evidence to meet the large body of oral and documentary evidence produced by the plaintiff. The few witnesses examined by him are, as the Moonsiff remarks, men of no character or position in life; and looking to the means and opportunities enjoyed by those witnesses for knowing any thing about the facts of this case, we cannot but concur with the Moonsiff in rejecting their testimony as utterly valueless.

Some stress has been laid by the pleader for the appellant upon a written statement filed by the plaintiff, Kristo Komul, in the suit brought against him by Bissessuree and Janokee to obtain their shares of the joint family estate. It is true that the plaintiff did in that written statement allege that the property in question was acquired from his own exclusive funds, just in the same way as he alleged that the other properties which were claimed in that suit by Bissessuree and Janokee were acquired by him and by his wife out of their own funds. But this last allegation was rejected by the Court as not sufficiently made out in the face of the ordinary presumption of joint ownership arising from the existence of a joint Hindoo family; and we cannot help thinking that the first allegation also was of the same character. Whatever inferences might be justly drawn from this circumstance against the truth of the plaintiff's case, have been in our opinion sufficiently rebutted by the mass of oral and documentary evidence produced by him in this case in order to prove that the property now in dispute was the joint property of the family; and we should not, therefore, be justified in dismissing the suit simply on the ground that there is a contradiction between his present allegation and the allegation put forward by him in the written statement above referred to.

Upon the whole, then, we think that the conclusion arrived at by the Moonsiff is

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correct, and we therefore dismiss this appeal. We think that the plaintiff ought not to be allowed any costs in this litigation, because the defendant is a decree-holder who is an outter stranger to the family, and who has some ground for saying that if he was at all misled in opposing this suit, he was so misled, at least to a certain extent, by the conduct of the plaintiff himself in Janokee's case. Each party, therefore, must bear his own costs in this litigation.

The 13th April 1871.

Present :

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Non-transferable tenures — Zemindars' rights — Section 27 Act X. 1859—Incumbrances—Act VIII (B. C.) 1865 — Buildings — Rights of builder.

Case No. 1820 of 1870.

Special Appeal from a decision passed by the Additional Judge of Nuddea, dated the 12th August 1870, *reversing a decision of the Moonsiff of that District, dated the 29th September* 1869.

Shib Doss Banerjee (one of the Defendants) *Appellant*,

versus

Bamun Doss Mookerjee (Plaintiff) *Respondent*.

Baboos Kalee Mohun Doss, Grish Chunder Mookerjee, and *Mohinee Mohun Roy* for Appellant.

Baboo Taruck Nath Dutt for Respondent.

A zemindar is not bound to recognize the sale of a tenure which is not transferable or to accept the purchaser as a tenant; the rule that he is entitled to his rent as an entire demand upon a liability which cannot be sub-divided or distributed without his consent being clearly recognised in Section 27 Act X of 1859.

If a piece of land constituting a tenure is sold without the consent of the zemindar, the purchaser can be only treated as holding a rent-free tenure subject to that of the original tenant, such rent-free holding being an incumbrance which can be avoided by the purchaser when the tenure itself is sold under Act VIII (B. C.) of 1865.

A house built on a tenure cannot be considered "an incumbrance" within the meaning of that word in Section 16 Act VIII (B. C.) of 1865.

A landlord may object to the erection of brick-houses on land let for the purpose of cultivation, and obtain an order restraining his ryot from thus altering the character of the tenure; but if he remains passive and allows the house to be built, he cannot afterwards be heard to say that the tenant had done any wrong. Should the tenancy determine, the landlord would be the owner of the soil, the tenant of the house.

Norman, C. J.—This is a special appeal by the defendant from a decree of the Additional Judge of Nuddea, Mr. Pepper, awarding to the plaintiff possession of 7 cottahs 6 chittacks of land on which a house is built.

The land in dispute is part of a piece of ground consisting of 2 beegahs and 13 cottahs leased by Sutteah Chunder Roy, Maharajah of Nuddea, to one Ram Mohun at a rent of 20 rupees 7 annas.

Ram Mohun, with the sanction of the Maharajah, sold his tenure to Bunko Behary. Bunko Behary having allowed his rent to fall into arrears, a suit was brought against Bunko Behary by the Maharajah for rent under Act X of 1859; and in execution of a decree in that suit on the 31st of July in the year 1866, the tenure was sold to one Nund Koomar, pursuant to the provisions of Section 16 of Act VIII of 1865, B. C. The sale certificate bears date the 15th of September 1866. The plaintiff in the present suit at a subsequent time, the exact date of which does not appear, purchased the right of Nund Koomar in the tenure.

The defendant has proved that in execution of a decree obtained in the Civil Court against Bunko Behary in the month of January 1865, one Rambux bought the materials of the house, and at the same time one Bipin Behary bought the tulkur, or site of the house, as containing 4 cottahs. Bipin Behary subsequently sold the site of the house as 15 cottahs to Rambux who, on the 19th of October 1867, sold the site with the house upon it to the present defendant, Shib Doss. The Additional Judge, Mr. Pepper, finds that there is *nothing to show that Bunko Behary obtained the land otherwise than for purpose of cultivation, or at any time acquired a right or authority to erect buildings on it; and in the absence of any pottah or any separate and distinct authority*, he thought that Bunko Behary stood "in the position of a ryot who erects "his own house on culturable land, and there- "by acquires no separate and distinct rights; "who, should he fail to pay the rent, must "turn out to give place to some other tenant, "and cannot lay claim to retain any part of "land in his possession under pretence of

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"bastoo or tenement, unless at the time of his "lease he made a special provision for the "same."

The Judge adds—"This was Bunko Be-"hary's position, and the defendant does not "lay claim to any other rights than those "which he acquired from Bunko Behary." He says—"Bunko Behary had no authority "to sub-divide his jummah. * * If the "tenure was sold for any cause it should "have been sold entire, and could not be "sold in parts without the authority of the "landlord; and that sanction was not ob-"tained. When Bunko Behary's house was "sold for debt, only so much was sold as "he had a right to convey. But he had no "right to convey a separate title of tenancy "to part of the jummah. * * Bunko "Behary does not appear at any time to "have acquired the right to dispose of his "tenure in parcels or to sub-divide it into "smaller jummahs."

The appellants first attempted to argue that the tenure in question consisted of land in a town; that under Act X of 1859 the Collector had no jurisdiction to entertain a suit for the rent of such land; and that therefore the sale of the tenure under the decree of the Collector's Court against Bunko Behary for rent could not affect the rights of the appellant. But as the suit was a suit for the rent of land and nothing more, we think the argument quite untenable.

They next argued that by the sale of a portion of the tenure to Bipin Behary in January 1865 the tenure has been divided, and that the rights of the purchasers at that sale could not be affected by any sale of the tenure in a suit for rent against Bunko Behary alone.

I think it convenient to consider in the first place what is the effect of a sale by a tenant of a portion of this tenure. The relation between landlord and tenant is that of parties to a contract. The contract is entire and single. Except so far as he may be empowered by provision in the contract or by some special law or custom, one party to such a contract cannot withdraw from it and introduce a stranger as a party. There are many instances in which tenures are transferable, either by express provisions to that effect in the contract or by the custom of the district, which the Court would treat as incorporated as an implied condition in a contract for the letting of land. But a zemindar is not bound to recognize the sale of a tenure which is not transferable or to accept the purchaser as a tenant. A zemindar is not bound to allow a sub-division of a tenure. There is no provision in any of the Acts relating to this subject, which compels a zemindar to accept as his tenants the alienees of portions of the tenure. The rule that a zeminder is entitled to his rent as an entire demand upon a liability, which cannot be sub-divided or distributed without his consent, is clearly recognized in Section 27 of Act X of 1859.

If, therefore, a piece of land constituting portion of a tenure be sold either by the tenant or in execution of the decree of a Civil Court against the tenant in the absence of any consent by the zemindar, the only mode in which effect can be given to the alienation is to treat the purchaser as holding a rent-free tenure subordinate to that of the original tenant. The position of a purchaser under such circumstances was considered by Mr. Justice Phear in Sreenath Chuckerbutty *versus* Sreemunt Luskur, X Weekly Reporter, p. 466.

By Section 16 of Act VIII of 1865, B. C., the purchaser of a tenure sold for arrears of rent under that Act acquires it free from all incumbrances which have accrued thereon by any act of the holder of the under-tenure. A rent-free holding within a tenure is clearly an incumbrance upon it. I think it clear that the purchaser of a tenure under Act VIII of 1865 can, therefore, avoid the rent-free holding of the purchaser of a portion of the tenure.

But then comes the question, suppose he avoids the rent-free under-tenure, what are his rights as regards the owner of a brick-built house erected on land comprised in the holding, and what are the rights of the occupier of such house?

I think that a house cannot be considered as "an incumbrance" on the tenure within the meaning of that word in Section 16 of Act VIII of 1865, B. C. If the land had been sold for arrears of Government revenue, the owner of a house built on the land might have been entitled as against the auction-purchaser to reside in or enjoy the house paying an equitable ground-rent for the site to such purchaser, and that whether the house were built by a person holding under a lease granted by the former proprietor,—Act I of 1845, Sections 3, 26, and 27, Act XI of

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1859, Sections 3, 7,—or even by the ex-proprietor himself—*see* Ram Koomar Sen *versus* Mohesh Chunder Sen, Sudder decisions of 1860, Volume I, page 637. It is not easy to see why the purchaser of a tenure at a sale for arrears of rent should be treated as having a right greater than that of a purchaser at a sale for arrears of Government revenue.

It was decided by a Full Bench of this Court in Thakoor Chunder Paramanick *versus* Ram Dhun Bhuttacharjee, VI Weekly Reporter, page 228, after long and careful consideration, that in this country where a person in possession of land under a title, which he believes to be good, builds a house on that land, he has a right either to remove the materials, restoring the land to the state in which it was before the improvement was made, or to obtain compensation for the value of the building if it be allowed to remain for the benefit of the owner of the soil.

Therefore, apart from any particular relation between the parties, the ownership and right of possession in the soil does not necessarily carry with it a right to the possession of buildings erected thereon. Let us now see what are the respective rights of landlord and tenant where buildings are erected by a tenant during the tenancy.

I think there is no doubt but that a zemindar might object to the erection of brick-houses on land let for purposes of cultivation, and, if he resorted to a Court of justice, might obtain an order restraining his ryot from doing anything which would substantially alter the character of the tenure. In the North-West Provinces it has been held that a tenant having a right of occupancy planting trees on his holding without his landlord's permission, or even digging a kutcha well, commits such a breach of the contract of tenancy as warrants the landlord in suing to eject him.

But if the lordlord, instead of objecting to the erection of a brick-house on the holding, were to remain passive and allow a house to be built, knowing, as he necessarily would in a case such as that now before us, that the security for the rent would be enormously increased by the erection of the building, it appears to me that he could not afterwards be heard to say that the tenant had done any wrong in erecting the house on the tenure.

If in such a case the tenancy should be determined, the position of the parties would appear to be this. The landlord would be the owner of the soil—the tenant of the house. I think it would be contrary to the principles of equity and good conscience to allow the landlord to insist on the needless destruction of a valuable building, or to allow him to claim to remove it without making to the owner full compensation for its value. I may refer on this point to the Roman Civil Law, Institutes, Book 2, title 1, Section 30, and Digest, Book 41, Chapter I, Section 7, § 12. By that law, if the person who built was honestly in possession of the land, and the owner of the soil claimed the building but refused to pay the price of the materials and the wages of the workmen, the claim of the owner might be rejected. I am disposed to think that the purchaser of a tenure at a sale for arrears of rent, only takes such rights as the landlord himself could have exercised if he had re-entered and resumed possession of the property; and if that be so—if the landlord in the present case could not have insisted on the demolition of the house, so neither could the purchaser of the tenure. His only right would be either to purchase the house by re-imbursing to to the owner the full amount of its costs, or to take a fair rent from him for the land on which the house stands.

But, in the absence of any distinct finding that the landlord acquiesced in the building of the house, the defendant must be taken to be merely in the position of a person who has built a house on land of which he was in possession by a lawful title.

According to the case decided by the Full Bench to which I have already referred, the purchaser of the tenure held the option of taking over the building, or allowing the removal of the materials remaining with the owner of the land in those cases in which the building is not taken down by the builder during the continuance of any estate he may possess. I think that an option to insist on the destruction of a brick-house and the removal of the materials is one which should and must be exercised promptly, or not at all. Nundo Koomar, the original purchaser, who bought on the 31st of July 1865, never did exercise that right. He seems to have acquiesced in the continuance of the building on the ground, and to have sought to make use of his supposed legal right for the purpose of extorting an excessive price or rent for the use of the

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site of the house from defendant. This, I think, he could not do. Nundo Koomar sold to the plaintiff, who brought the present suit on the 21st of July 1869. Without expressing a final opinion whether, in the present case, Nundo Koomar immediately on acquiring the tenure could have called on Bipin Behary or Rambux to remove the materials of the house and given him actual possession, I think, if it ever existed, such right is now lost, and that the plaintiff's only right is to get a fair rent for the land. I think that the judgment of the Court below should be reversed, and the suit dismissed with costs in all the Courts.

Loch, J.—I concur.

The 13th April 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Additions to a building—Title—Compensation.

Case No. 1891 of 1870.

Special Appeal from a decision passed by the Judge of 24-Pergunnahs, dated the 14th June 1870, modifying a decision of the Subordinate Judge of that District, dated the 13th December 1869.

Gopal Mullick and others (Plaintiffs) *Appellants,*

versus

Anund Chunder Chatterjee (Defendant) *Respondent.*

Mr. J. S. Rochfort and *Baboo Sreenath Banerjee* for Appellants.

Baboo Kalee Prosunno Dutt for Respondent.

And the Cross-appeal No. 2110 of 1870.

A person is not entitled to remove additions which he may have made to a building, but is at most entitled only to compensation for present value, or for the expenses incurred in making the additions.

Norman, C. J.—THE Judge's judgment proceeds on a mistake. He says :—"It "has been found, and it has not been shown "to me that the finding is incorrect, that "the buildings on the land were erected by "Nobin Chunder ; and it appears therefore "that the defendant, who represents Nobin "Chunder, is entitled to remove the build-"ings on the determination of the te-"nancy."

Now, on referring to the bill of sale and the deed between Kalee Kishen and the plaintiffs, executed subsequently, it appears that at the time of the plaintiff's purchase there was a lower-roomed godown on the land. The Subordinate Judge finds that when Nobin entered into possession of the land, Nobin entered into possession of the land and godown which was there at the time when he entered into possession. It appears that Nobin gave no evidence that he had made even the additions to the premises himself. The Subordinate Judge comes to the conclusion—which may or may not be correct on the evidence,—that the additions were made by Nobin Chunder.

Be that as it may, the making of additions to an existing building will not entitle the person to remove the building ; he will at most only be entitled to compensation for present value of or the expenses incurred by him in making such additions; or possibly in some cases he may remove the additions, if he can do so without in any way injuring the original building.

The case must go back to the Judge for trial. Both appeals will be disposed of together, and the unsuccessful party will pay the costs of both appeals.

The 13th April 1871.

Present :

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Procedure — Defendant's case — Purchaser in execution — Judgment-debtor.

Case No. 2038 of 1870.

Special Appeal from a decision passed by the Officiating Judge of Moorshedabad, dated the 24th August 1870, reversing a decision of the Moonsiff of Gowas, dated the 14th June 1870.

Radha Binode Dutt (Plaintiff) *Appellant,*

versus

Kootabode Mundul (Defendant) *Respondent.*

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Baboo Bungshee Dhur Sein for Appellant.

Baboo Doorga Doss Dutt for Respondent.

A Judge ought not to make for a defendant a case which the latter does not make for himself.

Where a purchaser in execution claims more than the share of the person whose rights and interests he has purchased, his suit should be decreed to the extent to which those rights and interests are found to exist, and not be dismissed altogether.

Norman, C. J.—It appears to us that this case must go back to the Judge. The plaintiff claims as purchaser in execution of the rights and interests of one Akir Shaikh. The defendant is the brother of Akir Shaikh. The plaintiff's case is that Akir Shaikh during his life-time was in exclusive possession of the lands in suit. The defendant's case is that *he*, and not Akir Shaikh, was in exclusive possession of the land.

The first Court found in favor of the plaintiff. The Judge reversing the decision of the first Court observes that—"the witnesses say that he (Akir Shaikh) was in "possession of the disputed land; but they "do not depose to any fact by which the "possession can be declared to have been "an *exclusive* possession as against defendant, who has presumably an equal right to "the land with his brother Akir Shaikh." In other words, the Judge finds that the defendant and Akir Shaikh in his life-time were in possession jointly as the heirs of their father.

Now, that is not the case of either party. The defendant does not pretend that he was in *joint* possession with Akir Shaikh; and the witnesses prove that Akir Shaikh was in possession.

The Judge ought not to have made for the defendant a case which he never made for himself.

We would suggest to the Judge that in trying this case it is important to remember that the plaintiff and defendant are not on equal terms. A purchaser in execution of a decree of the rights and interests of the debtor, has not the same means of providing himself with evidence as to the title of that debtor as a member of the family of the debtor would have.

The judgment of the Judge is also erroneous on another point which is this. If he is right in supposing that Akir Shaikh and the defendant were in joint possession of the property, he ought to have given the plaintiff, as purchaser of the rights and interests of Akir Shaikh, a decree for a moiety of the property. It is not because the plaintiff claimed more than the share of the person whose rights and interests he purchased that his case must be dismissed altogether.

The case is remanded to the Judge for re-trial. Costs will follow the result.

The 13th April 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Bond—Registration—Section 17 Act XX of 1866.

Case No. 2131 of 1870.

Special Appeal from a decision passed by the Judge of Moorshedabad, dated the 23rd September 1870, *affirming a decision of the Moonsiff of Hurhurparah, dated the 7th April* 1870.

J. Perrin (one of the Defendants) *Appellant*,

versus

J. W. Ledlie and others (Plaintiffs) *Respondents*.

Baboo Rajendro Nath Bose for Appellant.

Mr. R. T. Allan and Baboo Bhowanee Churn Dutt for Respondents.

Where a bond pledges land for sums to be hereafter advanced not exceeding 100 rupees, and the sums actually advanced to exceed that amount, the bond becomes an instrument of which the registration is necessary under Section 17 Act XX of 1866.

Norman, C. J.—In this case, one Ram Churn Shaw pledged certain property by a bond to secure advances to be made by Messrs. Watson and Co. to him on account of silk which he was to supply to them. In

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execution of a decree against Ram Churn Shaw, the property pledged in that bond was sold and was purchased by the special appellant Monsieur Perrin.

The bond given by Ram Churn Shaw contains no specification of the amount for which it is to be a security. It is stamped with a stamp of 8 annas, which according to the Stamp Law Act X of 1862—which was in force when the bond was given—is a stamp for a sum above 50 rupees and under 100 rupees. Now, by the 17th Clause of Schedule A it is provided that a bond or other obligation, when the amount of the money to be secured is not specified, shall bear an optional stamp; and rules as to optional stamps are laid down in Section 27 of the Act which provides that—"No larger "sum shall be recoverable in any Court of "justice by reason of any deed, instrument, "or writing, for which an optional stamp "is indicated to be proper by the Schedule "A annexed to this Act, than the largest "sum for which, if specially stated in a "deed, instrument, or writing of the same "denomination, the stamp actually used "under the option so given would be of "sufficient value."

The bond, therefore, is a bond which pledges the land for sums to be hereafter advanced not exceeding 100 rupees. But the sums actually advanced exceeded 100 Rs. The bond, therefore, was an instrument which purported to create, and operated to create, an interest of the value of Rs. 100 in immoveable property; it was therefore an instrument of which the registration was necessary under the provisions of Section 17 Act XX of 1866, the Indian Registration Act.

The present suit is a suit for the purpose of enforcing the lien created by that bond. But under the 49th Section of the Indian Registration Act, the Court was precluded from acting on it as it was not registered.

The result is that the lower Courts were wrong in admitting the bond in evidence as creating a lien on land, and as against M. Perrin, the subsequent incumbrancer.

The decision of both Courts is reversed with costs, so far as regards the interests of the special appellant. The special appellant will get his costs of this appeal, and in both the lower Courts.

The 13th April 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Act VIII (B. C.) 1865—Sale without arrears—Fraud.

Case No. 2464 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Midnapore, dated the 23rd August 1870, reversing a decision of the Moonsiff of Gurbettah, dated the 22nd July 1869.

Damoodur Roy (Defendant) *Appellant,*

versus

Nimanund Chuckerbutty (Plaintiff) *Respondent.*

Baboo Rash Beharee Ghose for Appellant.

Baboo Mohendro Lall Shome for Respondent.

Where a tenure is sold under Act VIII (B. C.) of 1865 even though no arrears were due when the decree was obtained, before the purchase can be set aside the decree and sale must be shewn to have been fraudulent, and the purchaser to have been a party to, or to have had notice of, the fraud.

Kemp, J.—THE special appellant in this case is one of the defendants in the Court below, who is the purchaser of a tenure under the provisions of Act VIII of 1865. He contends that he is an innocent purchaser, that the Courts below have not found that there was any fraud on his part, and therefore that under the ruling laid down in Volume X, Weekly Reporter, page 154, as the decree for rent existed at the time the sale was made, and the sale was a *bonâ fide* one and he was a *bonâ fide* purchaser for value, and as the tenure passed under that sale and not the rights and interests of the defaulter, that he is entitled to receive that tenure free of incumbrances. It appears that the plaintiff purchased the rights and interests of one Gopal Paul in 23 beegahs 13 cottahs of land. It is said that these 23 beegahs 13 cottahs comprise the whole tenure; that the plaintiff purchased in execution of a Civil Court decree against Gopal Paul on two dates, namely, on the 20th December 1865 and on the 8th June 1866.

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The plaintiff then states that he got possession and let out the lands to Gopal Paul; that he, the plaintiff, paid rent to the putneedars, Watson & Co.; that the rent of 1275 was paid by him, the plaintiff; and that notwithstanding such payments, Watson and Co. sued Gopal Paul for rent, obtained an *ex-parte* decree, and sold the tenure, upon which the defendant became the purchaser. The plaintiff sues to obtain possession of this tenure and to set aside the sale to the defendant.

The first Court dismissed the plaintiff's suit and appears to have found that the dakhilahs put in by the plaintiff were spurious. The second Court found that the plaintiff was the purchaser of the rights and interests of Gopal Paul, and although he had not registered his name in the putneedar's serishtah, that he had paid rent to the putneedar and that he had obtained dakhilahs acknowledging him, the plaintiff, to be the auction-purchaser of the tenure. The Subordinate Judge further found that the proceedings of the zemindar in suing for the rent of 1275 as against the old tenant, Gopal Paul, were fraudulent, inasmuch as these arrears did not exist and had already been recovered from the plaintiff, the auction-purchaser. He, therefore, reversed the decision of the first Court as already stated.

The main ground of special appeal is comprised in the third ground taken, namely, that even if the decree obtained by the putneedar was improperly obtained inasmuch as no arrears were due, still the special appellant was not answerable for this, there being no legal evidence of fraud as against him.

We think that there can be no doubt that the decision of the Chief Justice to be found in Volume X, Weekly Reporter, page 154, does apply to the case. There was an existing decree for rent at the time of the sale, and that sale was regularly conducted by the Collector under that decree.

Before, therefore, the defendant's purchase of the tenure under Act VIII of 1865, which conveyed to him the tenure free of incumbrances, can be set aside, it must be shown that the decree and sale were fraudulent and that the purchaser defendant was a party to that fraud or had notice of that fraud.

We, therefore, remand the case to the lower Court for a finding on this point. Costs to follow the result.

The 13th April 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Enhancement of rent—Excessive demand.

Case No. 2500 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Officiating Judge of Midnapore, dated the 5th August 1870, *reversing a decision of the Deputy Collector of that District, dated the 30th November* 1869.

Shumsool Osman and others (Plaintiffs) *Appellants,*

versus

Bunsheedhur Dutt (Defendant) *Respondent.*

Baboo Kumla Kant Sein for Appellants.

Baboo Nil Madhub Sein for Respondent.

In a suit for enhancement of rent where, after measurement of the land and every opportunity of ascertaining the extent of the excess land on which rent could be claimed, plaintiff demanded rent on a much larger excess, the lower Court was held to have done rightly in refusing its assistance to plaintiff for the recovery of rent on a small excess found after all in defendant's possession.

Glover, J.—This was a suit for enhancement of rent after notice. The plaintiff alleged that the defendant was in possession of 22 beegahs 5 cottahs of land, the proper rent of which, according to the prevailing rates in the neighbourhood, was 115 rupees 1 anna 6 gundahs; that he only paid 28 rupees 3 annas 5 gundahs, as on a holding of 9 beegahs 3 cottahs 10 gundahs. He admitted that he had received payment of 31 rupees 15½ annas from the defendant and sued for the balance. The defendant

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alleged that he held four distinct and separate holdings, one of which in respect whereof this suit was brought comprised 16 beegahs 11 cottahs odd on a rent of 17 rupees 8 annas, and was a mourosee holding. It is not necessary to go into the question of the other holdings, as the case turns upon this first one alone.

The first Court gave the plaintiff a decree finding the grounds of enhancement proved, and held that the mourosee pottah of the 5th of Assin 1211 set up by the defendant was a forgery.

The Judge on the first occasion remanded the case in order to have it distinctly set forth what were the grounds of enhancement on which the lower Court considered that the plaintiff was entitled to increase the defendant's rent. On the case coming back to him after remand, the Judge dismissed the plaintiff's case altogether, holding that the notice was informal and insufficient, and that for the small excess which might be now in the defendant's possession over and above the 16 beegahs odd cottahs held by him as mourosee no enhancement could be had in this suit, inasmuch as that was not the plaintiff's case, and the Judge apparently did not think it right to allow him to make a new case in the appeal stage. He, therefore, dismissed the suit of the plaintiff altogether.

The first ground taken in special appeal is that the notice was not defective. On this point, however, there appears to be no doubt. The notice set forth that "you, "the defendants, pay less than other ryots "in the neighbourhood; and therefore you "are to pay for the future at such and such "rates." This clearly is not such a notice contemplated by Section 17 Act X of 1859. The intention of the law was that a ryot, who is suddenly called upon to pay an excess over his former rent, should know exactly the cause for which the landlord demands the excess. The Section says that where it is shown that the rate of rent paid by a ryot is less than that paid by ryots *having similar rights for the same description of land in the vicinity*, the rent can be enhanced up to the rates paid by those ryots. In this case there is no such wording to be found in the notice. We think, therefore, that the Judge was quite right in saying that this notice was insufficient and informal; and on this notice alone the plaintiff's suit for enhancement could have been dismissed.

The second objection, as it is found in the written petition of special appeal, is that the Judge is wrong is not giving the plaintiff credit for the excess lands which the defendant admits to have been in his possession, simply because in his plaint he had demanded a larger quantity of land than that found in the defendant's possession. This, we may observe, is not the objection taken orally by his pleader. That objection was that as the defendant admitted holding 16 beegahs odd cottahs at a rent of 28 rupees 3 annas 5 gundahs, and as he admitted having only paid rent on a certain proportion of that holding, the Judge was wrong in not giving the plaintiff a decree for the balance.

With regard to this, we find that the defendant did not admit any such thing. He did not admit that he paid rent for 9 beegahs 3½ cottahs; his allegation was that he paid rupees 17-8 as the rent of the mourosee holding of 16 beegahs 11 cottahs. This objection, therefore, fails in its inception.

As to the other objection, we cannot say that the Judge was wrong in dismissing the plaintiff's suit altogether. The plaintiff had every opportunity of finding exactly what it was that he asked the defendant to give him an increase of rent upon. He had measured the land, and he was bound to state distinctly what was the extent of the excess on which rent was demanded. If, then, having all these opportunities of making an exact statement, he comes into Court with one which is nine-tenths of it false, we do not think that the Judge was wrong in refusing the Court's assistance for the recovery of rent on the small excess which might after all be found in the defendant's hands. He can get that in a suit properly framed.

The last objection is that as this is a suit for arrears of rent, the Judge is wrong in not giving the plaintiff a decree for the sum of rupees 15-13-5, which arrears are admitted by the defendant. A sufficient answer to this is, that this is not a suit to recover arrears of rent but for enhancement; and supposing even, which is not at all clear, the sum to be due as arrears by the defendant upon the land which he does hold, it is the plaintiff's business to recover that in a regular way.

There are no grounds, therefore, on which this special appeal can be maintained, and it must be dismissed with costs.

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The 14th April 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge.*

Execution sale—Satisfaction of decree—Section 251 Act VIII. 1859.

Reference to the High Court by the Judge of the Small Cause Court at Jessore, dated the 27th February 1871.

Indro Narain Deb, *Decree-holder,*

versus

Gobind Chunder Dhur, *Judgment-debtor.*

All sales by Small Cause Court Judges should be conducted strictly in accordance with Section 251 Act VIII of 1859; though where property of small value is being sold in execution of a decree for a considerable amount and is purchased by the decree-holder, a Small Cause Court might on his application, and as an exceptional case, order that his receipts should be accepted as cash, but provision must in that case be made for realizing all fees of Court.

Case.—In this case, the decree-holder caused the moveable property of his judgment-debtor to be put up for sale, and bid for the same without having first obtained the leave of the Court for that purpose; and this he would be entitled to do under the ruling in Bundhoo Roy and others *versus* Hunooman Singh, quoted in Veerapa Chitty and others, petitioners, Weekly Reporter, Civil Rulings, Volume XIV, page 406; and his pleader has applied that his client be permitted to file his receipt for the property so purchased in lieu of paying the price of the same into Court, as directed by Section 251 of Act VIII of 1859, the practice in this Court during the time of my predecessors having been to allow parties to file such receipts.

I find on referring to Marshman's Civil Guide, page 742, that under Circular Order Calcutta and North West Courts, dated 18th January 1839, Civil Courts were competent to allow a decree-holder to file his receipt for the property which he purchases in lieu of payment of the purchase-money; but this was only allowed in cases of sale of houses, orchards, gardens, or small portions of rent-free land, and that the Circular had no application as regards sales of moveable property—a specific provision for which is to be found, in construction 787, 3rd May 1833, quoted at page 731 of the same work, and which amongst other things says that "personal property sold in execution of a decree should be paid for before delivery." And it appears to me more than doubtful whether the Circular Order of 1837 has not been superseded by the provisions of Act VIII of 1859 in so far as relates to sales of immoveable property.

It is stated in the application made by the decree-holder's pleader that the practice of allowing a decree-holder to file a receipt in cases of sales of moveable property is sanctioned by all the Courts in the Mofussil; and I myself believe that such is the practice; but as it appears to me to be an erroneous one and opposed to the provisions of Section 251 of Act VIII of 1859, I have consented on the pleader's application to submit the following points for the decision of the High Court, *viz.*:—

Whether under the existing law, it is competent to Small Cause Courts in the Mofussil to allow a decree-holder, purchasing properties sold at public auction in satisfaction of his decree, to file his receipt in lieu of paying the whole amount of purchase-money in Court.

The judgment of the High Court was delivered as follows by

Norman, C. J.—We think that Judges of Small Cause Courts would do well to insist that all sales should be conducted strictly in accordance with the provisions of Section 251.

If in any particular case there was a decree for a considerable amount and property of small value was being sold, we are not prepared to say that the Small Cause Court (on the application of the decree-holder to whom the money when paid into Court would belong) might not order that the receipt of the decree-holder should be accepted as cash. But the case would be an exceptional one, and he would have to see that provision should be made for realizing all fees of Court.

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The 14th April 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Registration—Sections 52 to 54 Act XX of 1866—Bonds.

Reference to the High Court by the Judge of the Small Cause Court at Jessore, dated the 6th February 1871.

Jadub Mundul

versus

Bishoo Sirdar and another.

Sections 52 to 54 Act XX of 1866 contemplate money-bonds only. A bond for the delivery of paddy without specification of its money value, or of the amount to be paid in case of non-delivery, cannot be summarily enforced under Section 53 of that law.

Case.—This is an application under Section 53 of Act XX of 1866 to enforce the agreement recorded by the registering officer under Section 53 of the said Act on the bond or obligation filed with it and dated 13th Joist 1276.

The bond is one for paddy, but states amongst other things "আমরা সাহেবের স্থানে "দেড়া বাড়ি করিয়া ২৪৲ টাকা মূল্যের ১২ বার "আড়ি ধান্য কর্জ্জ করিয়া লইলাম ইহার দেড়া বাড়ি "৬ আড়ি একুনে ১৮ আড়ি ধান্য সন মজকুরের ভাদ্র "পৌষে এক তারিখে দিয়া এই খত খালাস করিয়া "লইব খতের লিখিত ধান্য যদি এক তারিখে না দেই "তবে যখন যে ধান্য দিব এই খতের পৃষ্ঠে উশুল "দেখাইয়া লইব খতের পৃষ্ঠে উশুল ভিন্ন অন্য উশুল "লের দাবি দাওয়া করিব না" and the petitioner now asks that a summary decree be granted to him for rupees 63-0-0, the value of 18 arrees of paddy at the rate of rupees 3-8 per arree.

The application was filed on the 12th January last, corresponding with 29th Pous 1277, B. S., and the question arises whether the petitioner is entitled to a summary decree under the Section cited.

It appears to me that there are only two classes of cases in which the obligee is entitled to a summary decree, *viz.*, one where the whole amount becomes due, and the other where any instalment—when the amount is payable by instalments—becomes due; but there is no provision for a case like the present; and as it cannot be known without evidence besides the bond and the application whether or not any payment has been made in Bhadro, or what was the value of 6 arrees of paddy in that and the following month of Pous, I do not think the Act applies, and the petition must therefore be referred to a regular suit under the rulings noted in the margin.*

* Sreeram Roy Chowdhry *versus* Kuleemooddeen Mollah, IX Weekly Reporter, C. R., 477; Ram Narain Biswas *versus* Sreenath Poddar, *ib*: 498; Gour Mohun Doss *versus* Ramroop Mojoomdar, X Weekly Reporter, C. R., 84; in the matter of Luchmeeput Singh Doogar and Dhunsook Doss Bayanee and another, XI Weekly Reporter, App. from 6 J, 24.

The judgment of the High Court was delivered as follows by

Norman, C. J.—It is quite plain that this bond is not one which can be enforced summarily under the provisions of Section 53 of Act XX of 1866.

The Sections from 52 to 54 clearly contemplate bonds for the payment of money and none others. The bond before the Small Cause Court Judge is a bond which provides for the delivery to the plaintiff of 18 arrees of paddy, without any specification as to the money value of such paddy or the amount to be paid if the paddy is not delivered.

The 14th April 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Small Cause Courts—Jurisdiction—Relative of a minor—Right of action—Section 3 Act XL. 1858.

Reference to the High Court by the Judge of the Small Cause Court at Jessore, dated the 6th February 1871.

Khanto Bewah, *Plaintiff*,

versus

Nund Ram Nath, *Defendant*.

A Court of Small Causes constituted under Act XI of 1865 is competent under Section 3 Act XL of 1858 to allow any relative of a minor to institute or defend a

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suit in his behalf without a certificate of administration, where it has jurisdiction in relation to the subject-matter of the suit.

Case.—THE plaint in this case was presented unaccompanied with a certificate under Act XL of 1858, and as the plaintiff had not been specially admitted by this Court to sue as guardian of the infant, I returned the plaint to the pleader in order that he may comply with the provisions of Section 3 of the said Act. He has done this and again presents the plaint, and by his application asks leave of this Court to allow the mother to sue as guardian of her minor daughter.

It is said in Macpherson's Civil Procedure, Edition of 1860, page 8—"In order "that justice may be done, it is necessary "that suits be conducted with discretion "and intelligence, and if the suitor does not "possess these qualities he must be aided "by some person who is capable of forming "a judgment as to the necessity of applying "to the tribunals for protection or redress, "and who may be responsible to them that "the suit has not been improperly instituted ;" and at pages 11 and 12—"In the "case of a minor whose estate is not under "the Court of Wards, the executor of the "person under whose Will the minor is entitled to the property, or the legal guardian of the minor, must stand in his place "and be subject to all the rules of suit and "defence to which the minor himself would "be subject were he not a minor. The "question, who is the legal guardian, must "be determined according to the rules of "the community to which the minor belongs.

"If the minor be not a European British "subject, no person is entitled in the Presidency of Bengal to institute or defend "any suit connected with the estate of "which he claims the charge in trust for a "minor, until he shall have obtained from "the Civil Court a certificate of administration under Act XL of 1858. But when "the property is of small value, or for any "other sufficient reason, any Court having "jurisdiction may allow any relative of a "minor to institute or defend a suit on his "behalf, although a certificate of administration has not been granted to such relative.

"The legal guardian, however, is not the "only person who is entitled to sue on be"half of a minor, for it may be doubtful "who is the legal guardian, or the guardian "himself may be the person who withholds "the right or does the injury, or he may "neglect to give needful protection to the "minor. And therefore it has been laid "down that any friend of a minor, whether "his regular guardian or not, may sue on "his behalf to establish his right. This "liberty, however, does not apply to cases "in which a person who is not legal guardian "claims to receive money on behalf of a "minor."

The practice in England is that the *Prochein Amy*, or guardian *ad litem*, must be admitted before the plaintiff can proceed in the action, and this practice, I believe, prevails in the High Court in its original jurisdiction ; but of course a special admission of *Prochein Amy* or guardian to prosecute or defend for an infant, is not to be deemed an authority to prosecute or defend in any but the particular action or actions specified, so that the question arises whether the plaintiff in the present instance can sue without leave first obtained from this Court ; and, if not, whether it is competent to this Court under any law for the time being in force, or by any power inherent in itself, to allow any relative of a minor to institute or defend a suit on his behalf, although a certificate of administration has not been granted to such relative.

I am of opinion that in the absence of a certificate the plaintiff cannot sue, and that this Court has not by any law the power in those cases where the property is of small value, or for any other sufficient reason, to allow any relative of a minor to institute or defend a suit on his behalf as the provisions of Section 3 of Act XL of 1858 have not been extended to Mofussil Small Cause Courts, nor were those Courts in existence when that Act was passed, and certainly there appears to be no inherent power in such Courts to allow a *Prochein Amy* or guardian to sue without a certificate of administration.

The result is that I shall reject the plaint, as also the application for leave to sue as guardian of the minor, contingent on the opinion of the High Court.

The judgment of the High Court was delivered as follows by

Norman, C. J.—We are of opinion that a Court of Small Causes instituted under Act XI of 1865 is competent under Section 3 of Act XL of 1858 to allow any relative of a

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minor to institute or defend a suit in his behalf (though a certificate of administration has not been granted to such relative) in any case in which such Court has jurisdiction in relation to the subject-matter of the suit.

The 14th April 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge.*

Ex-parte decree — Objection by one defendant—Jurisdiction.

Reference to the High Court by the Judge of the Small Cause Court at Burrisal, dated the 6th February 1871.

Dookhee Khan, *Plaintiff*,

versus

Rajessuree Ranee and others, *Defendants.*

It may be competent to the Judge of a Small Cause Court, on hearing one of the defendants, to set aside an *ex-parte* decree as to all, if justice requires it, *e. g.*, if the objection is one which is common to the case of all; but he is not bound, because the decree is set aside as to one defendant, to interfere with the decision against others who do not object.

Case.—I BEG respectfully to state that in this case there are three defendants, against whom conjointly plaintiff obtained an *ex-parte* decree for money. Afterwards one of the defendants applied to set aside the *ex-parte* order, and the case was accordingly re-opened. On its re-trial it was found that the defendant was not liable, and the Court consequently exonerated him. It is now urged on the part of the plaintiff that, as only one of the defendants applied to set aside the *ex-parte* decree, against which the two remaining defendants have raised no objection and they are silent, the *ex-parte* order before passed against them is no way affected by the defendant present being released from the liability, and the former order should not be set aside as regards them. In support of this argument, plaintiff's pleader cites a precedent laid down in an Act X case, *viz.*, Brojonath Surma Chuckerbutty, defendant, appellant, *versus* Anund Moyee Debia Chowdhrain, plaintiff, respondent, published in Volume VII of 1867, page 237, Weekly Reporter, in which it is ruled "that the "revival of a suit under Section 58 Act "X of 1859 does not re-open the case as "regards all the defendants, but only as re- "gards the party who has applied to have "his particular case revived and heard on "the merits;" and he urges that the case under reference, which is similar in nature, ought to be disposed of in the like manner. It is, however, found also laid down in Rule VIII of the Rules of Practice for Mofussil Courts of Small Causes, as issued by the late Sudder Court in June 1861, that "when a "new trial is granted in accordance with "Section 12 Act XLII of 1860 (now Sec- "tion 21 Act XI of 1865), all former pro- "ceedings become null and void, and the "plaintiff shall be at liberty to file his plaint "*de novo*, &c." The *form* how to record the order for a new trial accompanying those rules also contains the following words, *viz.*, —"It is ordered that the judgment in this "case and all subsequent proceedings there- "on be set aside, and a new trial had be- "tween the parties, &c."

I am of opinion that the above rule and the form refer to the consequences of granting new trial of a contested case in which plaintiff and defendants were present, and not of re-opening a case for setting aside an *ex-parte* order; but as I am doubtful on the point, I have, pending the order of the Hon'ble Court, in dismissing plaintiff's claim against the defendant present, upheld the former order of decree against the defendants who are absent and do not move the Court to set aside its *ex-parte* order. No execution shall be issued until the receipt of the order of the Hon'ble Court.

The judgment of the High Court was delivered as follows by

Norman, C. J.—We think it may be competent to the Judge of the Small Cause Court, on hearing the objections by one of several defendants, to set aside the decree as to all if justice seems to require it; as for instance, if the objection is one which is common to the case of all; but that he is by no means bound, because the decree is set aside as to one of several defendants, to interfere with the decision already pronounced against others who do not object, and in fact may have no ground for objecting to the decree.

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The 14th April 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Purchase of decree by a judgment-debtor — Execution — Sale — Caveat emptor—Notice.

Case No. 121 of 1870.

Regular Appeal from a decision passed by the Subordinate Judge of Beerbhoom, dated the 25th April 1870.

Digamburee Debia (Plaintiff) *Appellant,*

versus

Eshan Chunder Sein and others (Defendants) *Respondents.*

Mr. Cowie and *Baboos Sreenath Doss* and *Chunder Madhub Ghose* for Appellant.

Mr. J. W. B. Money and *Baboos Gopal Lall Mitter, Kishen Succa Mookerjee* and *Nil Madhub Sein* for Respondents.

As between judgment-debtors and the decree-holder, the purchase of a decree by one of the debtors operates as a satisfaction of the decree, which cannot, after such satisfaction, legally be executed.

Should a sale take place in execution of such a decree so satisfied, the sale is invalid; and if the proceedings leading up to the sale included specific objections thereto on the ground of such satisfaction, the purchaser cannot pretend to rely on any legal right as a purchaser under proceedings valid upon the face of them, and of the invalidity of which he had no means of informing himself.

If a purchase is made of property in litigation while such litigation is actually going on, the purchaser is affected in the same manner as if he had notice of the dispute, though in point of fact he had no express notice or actual knowledge of the circumstances.

Norman, C. J.—A SUIT for enhancement of rent having been brought by Kalee Narain Mookerjee, Bipro Churn Chuckerbutty, and others, against the ancestors of Kalee Pershad Shadhoo, was dismissed with costs in January 1830. Kalee Pershad sold the decree to Ram Dyal Banerjee and others. In 1858, after the death of Bipro Churn Chuckerbutty, Kisto Chunder Chuckerbutty, the son and representative of Bipro Churn Chuckerbutty, purchased the decree in the name of Sharoda Pershad Roy. On the 30th of June 1864, Sharoda Pershad Roy having applied for execution of the decree obtained an order for the attachment of a putnee talook, called Nakra, Kenda belonging to the plaintiff, Digamburee Debia, the widow and heiress of Kalee Narain Chuckerbutty. In the course of these proceedings, the plaintiff, on the 11th of September 1865, presented her petition to the Judge, and therein alleged that she had recently discovered that the decree had been satisfied by having been purchased by one of the judgment-debtors, Kristo Chunder, in the name of Sharoda Pershad; that Sharoda Pershad held that decree benamee for the heir of Kristo Chunder; and therefore that the decree ought not to, and could not, be executed against her.

Mr. Craster, the Judge, overruled the objections of the plaintiff and ordered that the sale should proceed.

On the 27th of October the plaintiff presented a petition to the Judge, praying for a postponement of the sale, referred to the former petition, and reiterated the statement that one of her co-debtors had bought the decree in the name of Sharoda Pershad; and that thereby the decree had become satisfied, and saying that she was then ready with her witnesses to prove her allegation.

The Judge passed an order on the petition refusing to allow any postponement. As it was late and there were no bidders, the sale did not take place on the 27th of October. On the 30th the plaintiff put in a fresh petition praying for postponement. The sale took place on the same day, and at that sale the defendant, Eshan Chunder Sein, became the purchaser of the plaintiff's putnee talook Nakra Kenda.

The plaintiff having appealed to this Court against the order allowing the sale, on the 9th of May 1866 Mr. Justice Bayley and Mr. Justice Pundit considering that the Judge had not given sufficient opportunity to the petitioner to prove her allegation that the purchase by Sharoda Pershad was a mere benamee transaction by and for the benefit of one of the petitioner's co-debtor under the decree, remanded the case to the Judge.

On the remand the Judge, Mr. Toogood, found that the purchase by Sharoda Pershad Roy was made benamee for Kristo Chunder,

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allowed the objection, and ordered that the sale be set aside.

Mr. Justice Bayley and Mr. Justice Shumboo Nauth Pundit granted a review of their order of the 9th of May 1866 on the application of the purchaser at the sale. The case ultimately went before a Full Bench, the decision of which is reported in IX Weekly Reporter, page 230.

Sir Barnes Peacock, in whose reasoning the other Judges concur, points out that under Section 208 of Act VIII of 1859, where a decree is transferred by assigment, application for execution may be made by the person to whom it has been transferred; and if the Court shall think it "just and proper" to grant such application, the decree may be executed in the same manner as if the application had been made by the original decree-holder. He says:—"The question then arises "whether it is just and proper to allow one "of several debtors, who has purchased a "decree against himself and the others, to "issue execution against his co-debtors and "recover from them the entire amount. The "case not being provided for by any specific "rule, it becomes necessary for the Court "under Regulation III of 1793 to decide "the case according to the principles of "justice, equity, and good conscience. The "Court must, therefore, decide whether it is "according to the principles of justice, "equity, and good conscience to allow one "of several debtors under a decree to pur-"chase the decree and levy the whole amount "against his co-debtors." He comes to the conclusion that "if one debtor satisfies the "judgment-debt and takes an assigment of "it, he cannot enforce it by execution or in "any way against his co-debtors. His only "remedy is to sue them for contribution, "and to compel them to pay him their "share of the amount for which the decree "was purchased, having regard to the "proportion in which they were bound, *in-"ter se*, to satisfy the original decree;" and "that the debtor in this case having "taken an assigment of the judgment, was "not entitled to enforce it by execution "against his co-debtors."

The Court thought that whether the sale is to be reversed, so as to deprive the purchaser under execution of the benefit of that which he has derived by this purchase, was a matter which could only be decided in a regular suit.

The suit now before us was brought to try that question. The Subordinate Judge dismissed the suit.

He says, it is true that as the purchase of the decree by one of the judgment-debtors was tantamount to its satisfaction, no execution thereof could be taken out again; but it is not alleged by the plaintiff either that the auction-purchaser knew that the judgment-debtor had purchased benamee in the name of Sharoda Pershad, or that they were colluding with the said judgment-debtor. He finds that, as a matter of fact, they were not aware of the circumstances as to the satisfaction of the decree. He refers to the case of Jan Ali *versus* Jan Ali Chowdhry,* I Bengal Law Reports Appendix, Civil, page 56, and holds that as the defendant, Eshan Chunder, acquired the property at the sale as purchaser in good faith and without fraud, he ought not to be deprived of the property so acquired; and accordingly he dismissed the suit.

Fom that decision the plaintiff appealed.

I think that since the Full Bench decision, it must be taken as settled that as between the debtor and the decree-holder, the purchase of a decree by one of several debtors operates as a satisfaction of the decree; and therefore that after such satisfaction the decree cannot legally be executed.

It may be that if, in a case like the present, a debtor having satisfied the decree failed to cause satisfaction to be entered up, or if in the present case the debtor had neglected reasonable precautions, and had omitted to take proper means of giving to purchasers at the sale notice of the satisfaction of the decree, a person purchasing property in execution of a decree, appearing on the face of it to be good without notice of any infirmity in the right of the person causing the decree to be executed, would not be affected by any rights or equities of the judgment-debtors against a decree-holder causing the decree to be executed of which he had no notice.

In the present case, however, the purchaser might have known that the decree was not being executed by the original decree-holder. Any enquiry as to the title and position of the person who was executing the decree would have led at once to the discovery that the now plaintiff was contending that the decree was one which had been satisfied.

* 10 W. R., p. 154.

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Mr. Cowie admitted that it might be taken that the defendant, Eshan Chunder, bought without any actual knowledge of the facts which constituted satisfaction of the decree; but he relied on the fact that he bought property at a sale as to the legality of which active litigation was going on, and contended that he must have been informed of the proceedings upon the petitions of the 27th and 30th of October.

It is a general rule that if a purchase is made of property in litigation while such litigation is actually going on, the purchaser is affected in the same manner as if he had notice of the dispute, though in point of fact he had no express notice or actual knowledge of the circumstances.—*See* Story's Equity Jurisprudence, Section 405; Worsley *versus* The Earl of Scarborough, 3 Atkyns, page 392.

The proceedings in the Court leading up to the sale under which the defendant, Eshan Chunder, claims form a part of his title. I think it clear that he must be treated as if he had bought the property with notice of these proceedings. It must be taken that he knew that there was a contest between the plaintiff and Sharoda Pershad whether the decree had been satisfied or not, and whether the decree could be legally executed. Even if he is not bound by the decision upon the appeal as to the invalidity of the sale, his title must stand or fall with that sale; and if the sale is invalid, as in the present stage of the case we must hold it to be, he cannot pretend to rely on any legal right as a purchaser under proceedings valid upon the face of them, and of the invalidity of which he had no means of informing himself.

For this reason, I think that the judgment of the Subordinate Judge must be reversed.

It is stated that the purchase-money is in Court; and the sale having been set aside the defendant, Eshan Chunder, is no doubt entitled to get back his purchase-money. The plaintiff will have a decree for possession of the property in suit with costs in both the Courts.

Kemp, J.—In the Court below, the Subordinate Judge found on the evidence that it had been established that the decree, in satisfaction of which the sale took place, was purchased by one of the co-debtors in the name of Sharoda Pershad, and that the decree thereby became satisfied. But the Subordinate Judge did not, as he observes, "think it right that because one of "the judgment-debtors purchased the decree "and brought the disputed property to sale "in execution of that decree, that therefore the plaintiff should regain possession "of the said property. Further, that it was "true that as the purchase of the decree "by one of the judgment-debtors was "tantamount to its satisfaction, no execution thereof could be taken out again; "but it is nowhere alleged by the plaintiff "in her petition of claim, that the fact of "one of the judgment-debtors having enforced the decree after his purchase of "the same in the benamee of one of his "creatures, Sharoda Pershad, was either "known to the auction-purchaser, defendant in this case, or that he had any "fraudulent connection in the matter, or "that he colluded or leagued with the said "judgment debtor." The plaintiff's case was dismissed with costs.

It appears to me that the judgment of the Subordinate Judge is wrong. It has been held by the Full Bench* that the purchase of a decree by one of the judgment-debtors operates as a satisfaction of that decree, and that the judgment-debtor so purchasing cannot enforce that decree by execution or in any way against his co-debtors, but the only remedy is to sue them for contribution.

* Weekly Reporter, Volume IX, page 234.

It therefore being found, and not disputed before us, that the purchase of this decree was made by one of the judgment-debtors in the name of Sharoda Pershad, the decree was not one which could have supported the execution. There are no doubt rulings of this Court to the effect that the subsequent reversal of a decree, which was good at the time the sale took place, will not affect the purchase made by a third party. But the present case is quite a different one. This is a case of a decree which was satisfied when the sale took place, and which therefore ought not to have been executed at all.

There remains the question whether the defendant, Eshan Chunder, the purchaser, had actual or constructive notice that the plaintiff had prior to the sale declared that no sale could legally take place, inasmuch as the decree had been satisfied by the purchase of one of the judgment-debtors in the name of Sharoda Pershad. Now, it is clear that the plaintiff did distinctly put

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on record this objection prior to the sale in her petition dated the 7th Bhadro 1272, B. S. She asked the Court to take evidence on the point, and the Court directed her to adduce evidence. Notwithstanding this, and in the face of two or three attempts prior to sale on the part of the plaintiff to be permitted to prove her pleas, the Court proceeded to sell the disputed property.

It appears to me clear that with this specific objection to the sale, which was on record before the sale took place, the purchaser purchased at his own risk. He was put on enquiry and ought to have satisfied himself that the decree was one which could be enforced. The purchaser has been examined. He admits that he has known Sharoda Pershad, the benamee purchaser, from his childhood; and that he, the purchaser, was, if he is not now, in the service of the judgment debtor who purchased the decree. I cannot for a moment believe that under such circumstances he was, as he states, entirely ignorant of the fact that the purchase had been made benamee, or of the nature of the plaintiff's objections to the sale taking place.

As to the consent of the plaintiff to which the Subordinate Judge alludes, I observe that when the Court determined to proceed to sale and refused to enquire into the plaintiff's objections, the plaintiff's pleader asked to have one of the properties lotted sold first, as it was probable that the sale of that property would satisfy the decree and render it unnecessary to sell the other lots. This was no consent to the sale or recognition of its legality.

It has been contended that the plaint does not distinctly state that the defendant, the purchaser, had notice of the plaintiff's objection to the sale; but on turning to the plaint, I find that the plaintiff distinctly states that she "urged that the sale could not legally be proceeded with, and that the sale was effected without any adjudication of her objections."

On the whole case, it appears to me clear—

1st.—That there was no decree existing which could support the execution and sale.

2nd.—That the defendant had, if not actual, constructive notice of the plaintiff's objection, and that he purchased without making the enquiry which the recorded objection of the plaintiff put him upon making.

The purchase-money is in deposit in the Court and can be refunded to the defendant.

I would reverse the decision of the Subordinate Judge, and decree the plaintiff's suit with costs of both Courts payable by the respondents.

Glover, J.—I entirely concur in this judgment.

The 14th April 1871.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Memoranda of evidence—Recorded depositions—Raj—Inheritance—Custom (local or family)—Exclusion of females—Evidence.

Case No. 254 of 1868.

Regular Appeal from a decision passed by the Deputy Commissioner of Lohardugga, dated the 12th September 1868.

Maharanee Heeranath Kooeree (Defendant) *Appellant,*

versus

Baboo Burm Narain Singh (Plaintiff) *Respondent.*

The Advocate General (Mr. Cowie) and *Baboo Onoocool Chunder Mookerjee* for Appellant.

Mr. A. T. T. Peterson for Respondent.

Where there is conflict between a Judge's memoranda of evidence and the recorded depositions of the witnesses, the Court must be guided by the latter.

HELD *(by Jackson, J.,)* that where the right of succession to a Raj or zemindaree (dignity and estates) depends upon the custom which regulates the devolution of the Raj, the true question as between rival claimants is, which of them is favored by the custom as known to the public functionaries of the district, as recognized by the family itself of the late Rajah, and as established by precedents.

HELD *(by Jackson, J.,)* that for the purpose of ascertaining the custom of any given family on particular points, there can be no more important source of information than the declaration of successive heads of the family on solemn occasions.

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HELD *(by Markby, J.,)* that where the impartibility of the dignity and estates of a Raj had its origin, not in any custom, family or local, but in the peculiar character of the Raj itself, and which by its very nature was indivisible, the nature of the Raj would not exclude from inheritance any persons of either sex if without physical or intellectual infirmity.

HELD *(by Markby, J.,)* that in order to establish a *koolachar*, or family-custom of descent, there must be shewn either a clear, distinct, and positive tradition in the family that the custom exists, or a long series of instances of anomalous inheritance from which the *koolachar* may be inferred.

HELD *(by Markby, J.,)* that to establish a local custom to exclude females from inheritance by instances of exclusion in a certain district, the district must be stated and described geographically, in which the custom is now, and for a long time has been, prevalent, and which includes the property in question. A sufficient number of instances of exclusion within that locality must then be adduced to establish that the custom extends to the whole district, and therefore governs the succession in dispute. Until some connection, geographical or political, is shewn to exist between two districts, there is no ground for inferring the custom of one district from its existence in another.

Jackson, J.—THE subject of investigation in this suit is the right of succession to the Raj or zemindaree (the dignity and the estates) of Ramghur in Chota Nagpore, vacant by the death of Triloke Nath, the infant son of the last actual Maharajah Ram Nath Singh, Bahadoor.

The infant in question was a posthumous child, and it seems that on the death of the Maharajah without issue, the Court of Wards had assumed the charge of the estates which it still retains pending a decision by the Civil Courts as to the party really entitled.

The present suit was commenced by Baboo Burm Narain Singh, as next agnate, against the officer of the Court of Wards in possession, and against the widow of the late Maharajah Ram Nath, mother of the deceased infant, as "opposer of the plaintiff's claim."

This lady alleged herself to be entitled as heir on the death of her husband and her son (paragraph 3, written statement). But she claimed one portion of the property in suit, namely, *guddee khurkur*, as her own, alleging it to have been purchased for her with her money by her late husband.

In a separate suit, the same local Court had to decide between the claims of the present plaintiff, and a third person who asserted his right as a nearer kinsman but cognate.

Burm Narain was successful in both suits, and both his opponents appealed to this Court. The appeal of the cognate has been decided, and we are now concerned with the appeal of the widow mother.

In determining this appeal, there are two considerations which it seems to me important to keep in view.

The first is that although in point of form Burm Narain is plaintiff and the Ranee is defendant, yet in fact both stand upon the same ground as claimants of an estate which is in the custody of the Court of Wards; and therefore the burden of proof does not lie on the one side more than on the other.

The second is that the Ranee does not any more than her antagonist claim the property under the strict provisions of the Hindoo Law, but that both parties, while referring generally to the Shastras (see their plaint and written statement respectively), also appealed to the custom which regulates the devolution of this Raj,—and this, I think it abundantly clear for other reasons, must be the basis of our decision.

The plaintiff, of course, more emphatically relies on this custom or *koolachar*, but the defendant also gives her own version of it, so as to shew her own right and to exclude the plaintiff, which I think is evident on reading the 5th, 6th, 7th and 8th and a portion of the last paragraph of her written statement together.

But what seems to me decisive on this point is the judgment of the Sudder Court in 1813 between the ancestor of Burm Narain and the Maharajah of that time (II Select Reports, pp. 92-97.)

The opinion of the Court (which disposed of the suit) was in these terms:—page 97—"Adverting, however, to the extent and "situation of the estate, to the zemindar "possessing the title of Rajah, and to his "maintaining a sort of feudal establishment "of troops and dependant jageerdars, the "Court could entertain little doubt that it "was not a common estate divisible by the "laws of inheritance."

It does not precisely appear whether the Sudder Dewanny Adawlut concurred in or dissented from the view taken by the Provincial Court in that case, namely, that Regulation X of 1800 did not apply to the estate (I should have been inclined to admit that it did); but the question does not seem to be of much importance, for the custom abolished by Regulation XI of 1793 and partially restored by the later law is that of non-partition, and that alone.

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Nor I think is it material to inquire whether, as stated by Baboo Shama Churn Sircar (in his Digest, page 19 (foot, note) 2nd Edition), the effect of the bewusta and the judgment in the case of Ishan Chand *versus* Ishur Chunder Roy* is to clothe large zemindarees with the attributes of principalities.

The term Raj and the title Rajah as used in modern times do undoubtedly occasion a certain amount of confusion. A pretty clear account of the matter will be found in the answers to a series of questions on the rights and privileges of landholders, given by Gholam Hossein Khan (author of the *Siar-ool-Mootakhereea*) and the *Roy Royan*, printed in Harington's Analysis, Volume III, pages 314-356, — *see* especially the answers to question 31 ;—and the case of Rajah Tej Singh (then called Taj Singh) is expressly mentioned by Gholam Hossein Khan, who calls him (Question 30) the zemindar of Ramgurh.

The true question, therefore, in this case seems to be whether the custom of the Ramgurh zemindaree or Raj, as deposed to by persons acquainted with it, as known to the public functionaries of the district, as recognized by the family itself, and as established by precedents, favours the succession of the male heir or of the widow and mother.

The question has been a little complicated, by a shifting or widening of the issue (I am not sure which), so as to include a *local* custom; but it seems to me that as far as the plaintiff is concerned, this amounts to nothing more than his seeking to strengthen his evidence as to *koolackar* or custom in his own family, by showing that a similar custom prevailed in families of the same or nearly the same rank in the vicinity.

If we look at it in this point of view, we are, I think, relieved from certain difficulties as to the kind of proof required and as to the precise allegation of the plaintiff.

In this way, also, we are less embarrassed by abstract questions of Hindoo Law : and we also conform to the injunctions of Menu, Book VIII, verse 41, where he prescribes inquiry into the "rules of certain families" as among the "peculiar laws" which are to be "established" (if they be not repugnant to the law of God, adds Cúlluca).

* 1 S. D. A., p. 2.

Upon the issue I have stated, it seems to me that the plaintiff was entitled to judgment and that he has been properly declared entitled to succeed to the Raj and the estates.

I think that the witnesses called by the plaintiff prove that in the belief of members of the family and by general repute the *koolachar* excluded females.

From the mode in which the Judge's notes of the evidence are worded, it would seem at first sight as if the witnesses, or at any rate most of them, meant to affirm as the only custom with which they were acquainted the succession of a single heir and the non-participation of younger brothers ; but I think this was not the meaning of the witnesses, as shewn by the original depositions, and that they meant to be as explicit on the one point as on the other.

The occasional conflict between the Judge's memoranda and the recorded depositions is no doubt very embarrassing, and it is especially vexatious where the memorandum is not full and where the Judges of appeal are unacquainted or imperfectly acquainted with the vernacular. In fact the more nearly the note approaches to a complete representation of the witness's testimony, the greater is the difficulty : and I may say that in some cases the inclination of my mind has been to suspect that the note represented more exactly the witness's meaning than the actual deposition did.

But I think there can be no doubt that in case of difference, the actual recorded evidence *in extenso* is what we must be guided by ; and it is to be hoped that the Procedure Code may shortly be improved in this respect, so as to get rid altogether of the double record.

And in considering the recorded evidence in this case, as well as the written statements, allegations, and oral pleadings of the parties, large allowance must be made for the circumstances of the trial. Courts highly untechnical and simple, pleaders very imperfectly educated and trained, agents whose advice continually misleads, compel us to be extremely cautious in the inference we draw from the line taken by either party in Court, and in the construction which we put on the evidence recorded.

It is safer to collect the meaning of a witness from the whole of his testimony,

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than to give their full meaning to isolated parts of it. And if the witnesses in the present case be so dealt with, I think the plaintiff's contention will be found to be amply substantiated, so far that is as in the nature of the case the witnesses could go.

For instance, I understand the first witness, Thakoor Jeth Singh, a witness from his age and position of great importance, to affirm a family-custom whereby Maharanees, widows, do not inherit the estate, but receive an assignment of land worth rupees 4. 000 yearly for their maintenance. He also affirms the custom of succession by a single heir, younger brothers receiving maintenance, maintenance in both cases, as usual under the Mitakshara, indicating incapacity for and exclusion from an inheritance of the estate.

In like manner, Thakoor Sirvee Singh, a person of good family it would seem, though not of the Ramghur house, positively says :— "No Maharanee has ever sat in the guddee ; "it is not the custom of the family," which in the native idiom is tantamount to saying there is a custom against it.

The third witness, Nund Lall Singh, does not speak very decidedly ; but the tendency of his evidence is against female succession, and it is remarkable that such evidence was, though remotely, against his own interest, his father having married a daughter of Koonwar Bodh Singh (plaintiff's ancestor and youngst son of the first Maharajah), and he himself therefore being in the possible line of descent if daughter's sons could inherit, which according to the other witnesses they could not in this family.

The 4th and 5th witnesses merely say that they never heard of instances of a woman succeeding to the guddee, but it is to be observed that the defendant does not appear to have asked in cross-examination whether a female could succeed if the case were to arise.

The same observation applies to the 6th witness, but he refers to the fact (as did the preceding witness) of the widows of three previous Maharajahs being alive and (says the preceding witness) in the receipt of maintenance.

The 9th witness strongly affirms the custom to exclude females, and he is descended on the maternal side from this family.

A still more important witness is the Rajah of Beersote (No. 11), the head of another great family which intermarries with that of Edruk (Ramgurh), and he distinctly affirms that neither in his own family nor in that of Ramgurh are females capable of succeeding.

It is true he goes on to state—"I say this because no woman has ever sat on the guddee in that family or in mine." I do not understand the witness by these words to retract his previous affirmance of the custom but merely to support it by reference to the fact.

Some of these witnesses were afterwards re-called, and gave evidence to prove other instances in which a similar custom existed and had been maintained in spite of efforts by the widows to break through it.

I have no hesitation in saying that if we are to decide between this evidence and that which is adduced by the defendant to rebut it, I prefer the evidence for the plaintiff.

But to my mind the oral evidence is the least convincing part of the plaintiff's case, and there is much more decisive matter behind.

For the purpose of ascertaining the custom of any given family on particular points, there can be no more important source of information than the declaration of successive heads of the family on solemn occasions,—and in this case that source of information is open to us.

In the first place, we have the return made by Maharajah Shumboo Nath Singh, on the 22nd June 1846, in obedience to a requisition of the Governor General's Agent and Commissioner calling for a statement of heirship to the zemindars and ticcadars of the division.

On that occasion, the Maharajah distinctly and publicly acknowledged the plaintiff, Burm Narain, as heir next in succession to his surviving brother Ramnath who followed him as Maharajah.

It is said that the form in which the return is framed would not permit of the mention of wives, but this appears to me quite idle. The paper is called a "statement of heirship," and the ample column of "remarks" would certainly permit and would have contained the mention of the wife, if she had been capable of succeeding.

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As the Maharajah left a widow, and as among Hindoos marriage is contracted at a very early age, I think it is to be presumed that he was married at the time he made this return,—a presumption much strengthened by the words in the 4th column of the form, "at present no son is born." These words appear to me indicative of the married state and of the expectation of issue.

This public act of the Maharajah Shumboo Nath Singh appears to me to be an insuperable obstacle for the defendant, and all but conclusive in favour of the plaintiff.

But next we have the petition or memorial of the succeeding Maharajah; but before I speak of that paper I will advert to the history of succession in the family.

Testimony seems unanimous as to this, that neither in times antecedent to Tej Sing, the first Rajah of the present family, nor in later days, has there been any instance of a female succeeding to the guddee; but, as observed by the Judge below, there is no exact information as to the state of the family before Tej Sing: so that it cannot be said whether it affords examples of the supersession of a female heir or not. Nor is there any such instance in the early days of the present family, for down to the generation just passed there has been abundant male issue.

But it so happened that the three sons of Maharajah Sidhnath Singh (who was the great grandson of Tej Singh) all died without male, or indeed, it seems, any issue, but leaving widows. In each instance the succession was taken up by the next brother, the widow being passed over.

There are thus two instances which, although modern, are in exact accordance with the custom alleged by the plaintiff.

The defendant seeks to get over these facts by the averment contained in the 5th paragraph of her written statement, where she says that the three brothers (of whom the last was her husband) had lived in mutual good feeling and commensality, and "held in partnership the ancestral pro-"perty." She goes on to say:—"In this "estate of common interest, on the demise "of one brother without issue, the next "brother, upon receiving the mark of Rajah "elect on his forehead from the hands of "his elder brother, assumed the reign of "the principality one after another; and "for reasons above stated, as also under "the provisions of the Shastra, the right "of succession to the Raj at that time was "disallowed."

Now, unfortunately for her, the decision of the Sudder Court in 1813 had set at rest the question of "partnership" in the property, not to speak of the evidence on that point. And it is difficult to conceive any theory of joint ownership which should make brother succeed after brother, and then suddenly terminate the course of male descent in favor of the youngest widow.

But the defendant apparently rests her case very much on the fact of commensality between the brothers, as justifying their preference to widows; and in the 4th paragraph she asserts that plaintiff is disqualified by reason of his having lived (as well as his immediate ancestors) separate and at a distance from the senior branch; and in the 8th paragraph she puts this in a different way by objecting to him as a jageerdar.

Those objections appear to be disposed of by Maharajah Shumboo Nath's return, which of course would not have recognized Burm Narain if he had been disqualified for any such reasons.

But it is on this part of the case that the memorial of Maharajah Ram Nath, which I mentioned a little way back, appears to me to have so much significance.

This document is dated 17th November 1862, and was written by way of answer and in obedience to a purwannah, apparently of the Deputy Commissioner, transmitting to the Maharajah for explanation two copies of urzees submitted by Maharanee Thakoor Nath Sahee, widow of the late Maharajah Shumboo Nath Singh, in which she appears to have made certain allegations and complaints to the refutation of which accordingly the Rajah addresses himself.

In considering the terms of this petition, it is natural to observe that it begins with a most important recital. It sets out the contents of the official purwannah to which it is an answer, to the following effect:—"that Koonwar Ram Nath Singh, *brother* "*and heir* of the deceased Maharajah "Shumboo Nath Singh, has been appointed "Rajah, * * * * that the *Maharanee*, "*petitioner, is entitled to maintenance only*," &c. &c.

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The title of the Rajah being thus fully acknowledged by the official whom he was addressing, it was not necessary for him to insist upon the validity of that title, or else we might have expected to find a clear statement of the custom on which that title rested; but he is only concerned to answer the particular statements made by the Maharanee, to which his attention had been called.

But what has struck me very much in connection with this paper is this. If the custom or tradition of the family had been what the defendant represents, namely, that of brothers living in commensality, one took after the other in the absence of male issue, and that the last of such brothers would be succeeded by his widow (the brief existence of the posthumous son is little noticed throughout this case), we should most probably have found it asserted in the petition of this Rajah, for he was precisely in this position,—the last of three brothers who had one after another succeeded to the guddee, not young, married, but with doubtful chances of male issue.

Is it likely that in such circumstances he would not have saved the claim of his own wife (the now defendant), as against a distant relative with whom he does not appear to have been on any terms of intimacy. But he nowhere makes any reference to such rights, and speaks of the wife of the late Maharajah as being entitled to maintenance according to the custom of the family, "just as other Maharanees receive," without any sort of distinction.

Nor does he appear at any time previous to his death to have made any such statement in her favour, although he might reasonably have been expected to do so; for she was only three months advanced in pregnancy at the time of his death, and it would be of course uncertain of which sex the child would be.

Another very important point in the plaintiff's favour is the declaration of the Judge who tried the suit, that in that part of the country women do not inherit estates of the class to which the Ramgurh zemindaree belongs. I understand the Judge to refer, not merely to the district of Lohurdugga in which he happened to be sitting, or that of Hazareebagh to which the suit properly belonged, but to the division or province of Chota Nagpore; and the declaration is of the more importance because the Judge is not merely the officer presiding in the Civil Court, but also the head of his district in executive matters and necessarily versed in the political condition of the province.

The times and the present constitution of our Civil Courts are favourable to the advancement of claims which in other days would not have been brought forward. The pretention which was faintly suggested on the death of a former Maharajah has now been set up with more boldness; but I think it has been properly overruled. And I am bound to add that, according to my own knowledge and belief in such cases, to reverse the judgment of the Court below and to sanction the claims of the defendant would create a most dangerous precedent, and would introduce into a large tract of country the most serious confusion and distrust.

In my judgment, therefore, the decision of the lower Court should be affirmed, and this appeal dismissed with costs.

Markby, J.—This was a suit brought by the plaintiff to recover a large amount of real and personal property which was in the hands of the Court of Wards.

The plaintiff alleged that the property in question belonged to him as successor to the Raj of Ramgurh. The representative of the Court of Wards, who is a defendant, claims no interest in or right to retain the property, and only asks for costs. The other defendant claims also by right of succession all the property except that called Guddee Khurkur, and this she claims as her stridhun.

The general history of the Ramgurh family and the estates belonging to it during the past 100 years is well known and not disputed. About the year 1772, the then Rajah Mokund Singh having come into collision with the British Government on account of his refusal to pay revenue, an expedition was sent against him. Two members of the family, Tej Singh and Jye Sree Singh, assisted the British Government against their relative; and ultimately the estate having been declared to be forfeited, it was conferred upon Tej Singh by the British Government, together with the title of Rajah or Maharajah, which is the title generally used in this family. Successive pottahs were granted by the British Government to Maharajah Tej Singh and his eldest son Maharajah Parush Nath Singh for limited

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periods, and ultimately on the 25th March 1790 an ordinary settlement for 10 years was made with Maharajah Monee Nath Singh, the elest son of Maharajah Parush Nath Singh, which settlement was by legislative provision subsequently made perpetual.

In the life-time of Maharajah Monee Nath Singh, a claim was made by Boodh Singh, the youngest son of Maharajah Tej Singh, to have the family property divided in the usual way. The claim was contested, and the litigation was continued after the death of Maharajah Monee Nath Singh by his eldest son, Maharajah Sidh Nath Singh. Boodh Singh in that case rested his claim to the partition on two grounds, first, on an arrangement between the Maharajah Tej Singh and his sons made at the time of the grant; and secondly, on the general ground of inheritance. The Sudder Court, confirming the decision of the Courts below, considered that the alleged arrangement was not established by proof; and according to the report of the case in the Select Reports (Volume II, page 97) "with respect to the "validity of the claim of the plaintiff ac- "cording to the Hindoo law of inhe- "ritance, the Court observed that this point "turned upon the further question whe- "ther the estate in dispute was to be con- "sidered a common zemindaree divisible by "the laws of inheritance, or one of those "estates which, by the custom noticed in "and abolished by Regulation XI of 1793" "[but restored by Regulation X of 1800], "descended to one heir in exclusion of all "the other members of the family. Ad- "verting, however, to the extent and si- "tuation of the estate, to the zemindar "possessing the title of Rajah, and to his "maintaining a sort of feudal establishment "of troops and dependant jageerdars, the "Court could entertain little doubt that "it was not a common zemindaree divisible "by the laws of inheritance." The term Raj is not used in this judgment, but the Maharajah on that occasion in stating his case says:—"According to the custom of the "mountainous country and the usage of the "family, the estate was not divisible: but "that on the death of the Rajah for the "time being, he is always succeeded in the "*Raj and zemindaree* by the eldest son, to "the entire exclusion of the other branches "of the family."

Maharajah Sidh Nath Singh, who was thus confirmed in the possession of the dignity and estates, left three sons; Maharajah Luchmee Nath Singh, who died in the year 1842 without issue, but leaving a widow. The widow did not however succeed, as she would done in the usual course of succession to a husband's separate estate, but the next brother, Maharajah Shumboo Nath Singh, did so. He died about the year 1862, also without issue and leaving a widow; but again the widow was passed over and the succession was assumed by Maharajah Ram Nath Singh who died on the 9th October 1866 leaving his widow,—the present defendant. She was then pregnant, and was delivered of a son in the following April; but this son survived only a few months, and it was during this period that the Court of Wards took possession of the estate. On the death of this child, both the plaintiff and the female defendant claimed the property, and the plaintiff brought this suit.

What we have, therefore, to consider is whether the plaintiff has made out his title. If he has not, this suit must be dismissed without regard to whether the widow has made out her claim or not.

Before considering whether the plaintiff's title is established by the evidence, I will state generally what I consider to be the nature of the claim which the plaintiff seeks to establish, and which differs in important particulars from an ordinary claim to immoveable property.

I am not aware of any definition of a Raj which will enable me to say precisely whether or not the succession in dispute in this case is properly denominated the succession to a Raj. I imagine that where that term is used, it rather represents a dignity than an estate—though it may sometimes be used to include an estate where that estate is appurtenant to the dignity. And from the expressions which have been currently used in the family, such as "ascend- "ing the guddee," "affixing the teeluk," and so forth, I imagine that there was inthis family some hereditary dignity, and this dignity has been sometimes called a Raj.

It is at any rate certain that the estates now in dispute are not susceptible of division, and that the persons who under the ordinary Mitakshara Law of inheritance would have been joint owners were entitlee to maintenance only. That appears to have been disputed in the Court below, but is not in dispute now. Whether this was by

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koolachar, i. e., family custom, or by local custom, or how otherwise, has not in this case been distinctly asserted. In the case in the Select Reports already referred to, it was put by the then Maharajah on two grounds, but of course only one can exist in point of fact; and I gather that the Sudder Court considered that the custom which regulated the descent of these estates was that abolished by Regulation XI of 1793 and re-established by Regulation X of 1800. But that custom, as it exists now, is not strictly speaking either a family or a local one. It is hardly what is usually called a custom at all. It is the exceptional course of descent of particular estates, not having its legal origin in any ancient usage of a family or district but in purely financial considerations, and clearly, therefore, founded on the special permission or agreement of the ruling power. That exceptional course of descent was abolished; but Regulation X of 1800 provided that the "local custom of the country" in the jungle mehals and other similar districts should nevertheless be continued in full force.

There is no doubt that this last Regulation applies to the district where this property is situated, and the Sudder Court seems to have thought the succession to these estates was governed by it. But I think it may be considered as a matter of great doubt whether these Regulations have any application to the course of descent either of the dignity or of the estates of this family. I think it more probable that this is one of those cases in which primogeniture has been adopted, not for financial reasons regarding the estate, as in the cases referred to in Regulation XI of 1793, but for political reasons regarding the dignity which at one time was in all probability, if not regal, at least viceregal, and by its very nature therefore indivisible; and it appears to me that the estates are, as the plaintiff puts it in his plaint, appurtenant to the Raj, or as it is put by the Privy Council in the case of the Tipperah Raj* (and which comes to the same thing), the title to the dignity and to the estate are one.

If this be the right view of this case (and I think it is so), then it is clear that the impartibility of the dignity and estates has its origin not in any custom, family or local, nor in the Regulations, but in the peculiar character of the Raj itself. The question might, indeed, arise how the estates became appended to the dignity, so that they passed under one and the same title, whether by permission or agreement of the governing body, or by family or local custom. This, however, is only a matter of historical interest, because the origin of a particular course of descent is only important as assisting to clear up obscure questions of inheritance which arise under it; but in the present case the estates being appurtenant to the Raj, their course of descent is, if I may so say, absorbed in that of the dignity and may be altogether disregarded. Having ascertained the successor to the Raj, the succession to the estates follows.

This point of view appears to me important for several reasons. In the first place, we thus get rid entirely of the Regulations XI of 1793 and X of 1800, and thus of a question which appears to me of some difficulty, namely, whether all customs being swept away in 1793, any custom, except the single one of impartibility which alone was revived in 1800, could now exist. In the next place, it identifies the present case entirely with the case of the Tipperah Raj, and disposes of an argument which has been used here, as it was also used there, that the dignity and estates, though impartible, must nevertheless in ascertaining the course of descent be treated as the property of a joint family in which the family are jointly interested; that the only exceptional right is that they are held and enjoyed by the eldest among the persons, who would otherwise be entitled to hold jointly; and that on the death of a Rajah, the next successor to the Raj takes not as heir, but by virtue of his own previous but suspended right. In the case before us, both parties have asserted that the application of this rule would be favourable to their claim; but the Privy Council affirming the decision of this Court in the Tipperah case,* expressly hold that this is not the rule to be applied in such cases. They lay down that the principle which governs the descent in these cases is, that the heir will be that person who would have succeeded under the Mitackshara Law to the separate property, unless that law has been modified by custom. This mode of establishing a title may, therefore, be put out of consideration, though I shall have to refer to it again as throwing light upon a document which has been much relied on in this case.

* 1 W. R., P. C., p. 180.

* (I Sutherland's Weekly Reporter, page 180.)

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Lastly, from this point of view, it is clear that the exceptional course of descent of the Raj, so far as it is grounded on the nature of the thing inherited, will only warrant a departure from the ordinary law of inheritance so far as the nature of that thing requires. The nature of the Raj has been considered to require that it should be impartible, but it seems hardly impossible to assert that the nature of the Raj itself excludes any persons of either sex, if they are without physical or intellectual infirmity. If, then, any person is to be excluded, who would, as senior in age and nearest of kin, under the ordinary Hindoo Law be entitled to succeed, it must be by some custom modifying still further the peculiar course of descent which has already sprung from the nature of the thing inherited.

I do not understand it to be disputed that the plaintiff's title stands in need of such a custom. Unless he can establish a custom to exclude females, he cannot succeed; whether or not the defendant, widow, would then succeed is another question.

The question before us is thus reduced to this:—There being an impartible dignity to which property is attached, and the succession to which is governed generally by the rules of inheritance of separate property according to the Mitakshara, have those rules been modified by any local or family custom?

Such a custom the plaintiff has attempted to establish, and the question which remains to be decided in this case is whether or no he has succeeded in doing so. If he has not, then, as it seems to me clear, his suit must fail.

I think it is unfortunate in this case that the plaintiff, who relied upon the custom, was not called upon to state it with precision. It is in my opinion next to impossible that a custom should exist, and not be capable of being so stated. To my mind, it would be a sign that the custom is either obsolete or has never been fully established, if it did not readily assume a precise form of words familiar to the minds of those amongst whom it has to be applied. No legal skill or experience is required to state a custom. It is a mere statement of fact, and nothing is more common than to find ignorant people stating customs with precision. Indeed, we shall find that none of the witnesses in this case have any difficulty in stating a custom. Very likely from the ignorance or carelessness of those who drew this plaint it might not be therein fully stated; but I think the Deputy Commissioner ought to have required it to be stated in a definite form, or at least in one or more definite forms, when settling the issues. I do not think this would have been an unreasonable demand on the intelligence of these parties; and I think it was impossible to try this suit properly without having done so. As the issue on this point was originally drawn on the 23rd June 1868, it stood thus:—"According to the Hindoo "Shastras and the custom of the Ramgurh "family, who, among the different parties "to the suit, is entitled to succeed to the "Raj vacant by the death of Ram Nath "Singh's son, Triloke Nath Singh?"

On the 19th August 1868, this issue was substituted:—"According to the Hindoo "Mitakshara Shastras and the customs of "*the Ramgurh family and country*, who, "of the different parties to this suit, is en-"titled to succeed to the Raj vacant by the "death of Ram Nath Singh's son, Triloke "Nath Singh?" This, as appears from the record, included both the so-called custom as the impartibility and the custom to exclude females. Intermediately between this change in the issue, that is to say, on the 14th August, ten witnesses had been examined by the plaintiff. When the issue was amended on the following day, both parties on being asked said they had no wish to examine these witnesses further, and the defendant then examined four witnesses. On the 17th August, the defendant, widow, applied for and obtained a postponement on the ground that the insertion of the word "country" in the issue might make it necessary for her to procure further evidence. The case was accordingly postponed for final hearing to September 2nd, but it was intimated that "the other evidence now on the record "would be duly examined at once;" by which I understand it to be meant that the defendant might bring in any other witnesses than those already named in the list at any time until the 2nd of September, but that, according to the irregular mode in which evidence is usually taken in this country, the examination of the witnesses already summoned would in the mean time proceed. On the same day (August 17th) notwithstanding the intimation to the contrary previously made, the 1st, 4th, and 5th witnesses for the plaintiff were re-called and re-examined. On the 27th August, the plaintiff examined his 11th witness. On

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the 10th September the defendant called his 5th witness. Most of the documentary evidence was put in on the 19th August, but some further documents were put in on a date which is not given. My reasons for setting out at length these particulars will appear presently.

With regard to the evidence given by the witnesses, I must say I have felt very great difficulty in ascertaining what was really said by them. A printed copy has been furnished to us of what is called "Notes of evidence," which I suppose to be the notes taken by the Deputy Commissioner, and this is placed before us as the materials on which we are to base our decision. But it differs in many respects from the deposition taken in the vernacular by an officer of the Court below. The course taken on this argument, which I consider by no means a satisfactory one, has been to read the printed copy of the Deputy Commissioner's notes, correcting it by a reference, as the argument proceeded, to the deposition in the vernacular. I have found this course to be in this, as in other cases in which it has been followed, extremely embarrassing. It is not easy to follow an argument on evidence when there is a running conflict all through as to what the evidence is, and very difficult to decide upon evidence which we have to collect from two conflicting sources of information; and as there may still be discussion as to what the evidence really is, I desire to make it clear on what materials my judgment is based.

The first witness, Thakoor Jetta Singh, is a member of the Ramgurh family. His evidence is chiefly confined to the existing state of the family, and he says that three widows of Maharajahs besides the plaintiff are still alive. He states that "these widows re- "ceive maintenance according to family cus- "tom. The family custom is for the widow "Maharanee to receive land as maintenance "worth rupees 4,000 yearly. *The custom of* "*the family is for the actual heirs to inherit* "*the whole property. Younger sons get only* "*maintenance.*" Further on he says that, "prior to Tej Singh's time, no woman ever "obtained the guddee;" and he also says "that in this family the son of a daughter "never succeeds."

Baboo Thakoor Singh (witness No. 4), who is also of the Ramgurh family, says he has "never seen or heard of a woman inheriting "the guddee in this family. *The custom of* "*the family is that the eldest son inherits* "*the guddee, the younger sons are Koon-* "*wars and get maintenance jagheers.* I "know of the family customs by hearsay "from the time of Tej Singh, and by what "I have myself seen from the time of Luch- "mee Nath Singh. I am descended from "a branch of the family which branched off "prior to Tej Singh's time. I never heard "of any woman sitting on the guddee prior "to Tej Singh's time."

Thakoor Kishen Pershad Singh (witness No. 5) is also of the Ramgurh family of a line which branched off prior to Tej Singh's time. He states that he "never heard of a "woman succeeding to the guddee. *The* "*custom of the family is that the elder son* "*inherits the guddee, and the younger sons,* "*the Koonwars, get maintenance jagheers.*"

Witnesses 6, 7, 8 and 10 are servants of the family. Golab Singh Chowdhry, witness No. 6, says he "never heard of a wo- "man ascending the guddee in the Ramgurh "family. *The family custom is for the* "*elder son to inherit the guddee, and the* "*younger sons to get maintenance grants.*"

Mahta Toolsee Ram, witness No. 7, says— "In that family females never did attain. "*The family custom is for the elder son to* "*inherit the guddee and the younger sons* "*to get maintenance.*"

Gunnoo Singh, witness No. 8, a jemadar, says—"Since the time that I have seen, from "that time I know that *the custom of that* "*family is that females never do attain* "*the guddee.*"

Chowdhry Khem Lall, witness No. 10, a mohurrir, says—"*It is the custom in this fami-* "*ly that no woman succeeds to the guddee.* "On a Rajah dying, the elder son proceeds "to the guddee, and the younger gets main- "tenance."

Witnesses 2, 3, 9 and 11 are neighbours. Thakoor Sirvee Singh (No. 2) says—"*No* "*Maharanee has ever sat on the guddee: it* "*is not the custom of the family.*" Thakoor Nund Lall Singh, witness No. 3, a connexion by marriage, says—"I never "heard of a woman in this family receiving "the guddee. *The custom of the coun-* "*try is that the elder son ascends the* "*guddee, and the younger sons get main-* "*tenance.*" Baboo Charuna Singh, witness No. 9, also a connexion of the family, says— "*It is not the custom of the family for*

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"*women to succeed to the guddee.* When "there are more sons of a Maharajah than "one, the eldest inherits the Raj and the "younger receives maintenance."

Rajah Ram Kurun Deo says that he is the Rajah of Beersole and pays rent to the Maharajah of Ramgurh. "My family "is distinct from the Ramgurh family, but "we eat together and we intermarry. Ma- "harajah Ram Nath Singh married the "daughter of my paternal grand uncle's son, "and there have been other intermar- "riages. The customs of my family and "of the Ramgurh family are not the same "on all points. I know the customs of "the Maharajah of Echak's (*i. e.* the Ram- "gurh) family. Our customs as to inhe- "ritance are the same, and in the Maha- "rajah of Echak's family no woman up to "this time has sat on a guddee. Nei- "ther has such taken place nor have I "seen it, *and a woman cannot succeed to* "*the guddee by virtue of the family custom.* "*It has never so happened; hence I say* "*that a woman cannot succeed to the* "*guddee.* No person in my family has up "to this time died childless. My Raj is "one of 52 generations, and the sons have "continually succeeded all along."

These extracts contain all the oral evidence which I have been able to discover of a family custom by reputation. The principal document is one put in by the plaintiff. It is a petition of the husband of the defendant, the late Maharajah Ram Nath Singh, denying the claim of the widow of Shumboo Nath Singh, who seemed at that time inclined to assert her rights. The following is a brief analysis of that petition according to the translation (apparently not a very satisfactory representation of the original) which has been laid before me. It is dated the 17th November 1862. It is not signed by any one, nor does it appear to whom it is addressed; but, as both parties have relied on it as a statement made by Ram Nath Singh, I may so take it. It begins by referring to two purwannahs of the person to whom it is addressed, which had been sent to Ram Nath Singh together with a copy of a petition of the Maharanee Thakoor Nath Sahee, the widow of the Maharajah Shumboo Nath Singh. One of these purwannahs is then recited, and it seems to be an acknowledgment of the title of Ram Nath Singh to the Raj and of the Maharanee to maintenance, and to contain a request by the writer that proper provision for the Maharanee's maintenance should be made. After this recital, the claim of the Maharanee to the suit as heiress is denied by Ram Nath Singh, and his own claim is thus stated:— "As the Ramgurh zemindaree is an ancient "ancestral property of your petitioner, ac- "cording to the family and ancient usage, "(the Maharajah) in good health and in a "sound state of mind in the presence of "assembled parties marked your petitioner "with the teeluk of Raj and died." Then he sets out the history of the family from the time of Maharajah Sidh Nath Singh, and points out that Maharajah Luchmee Nath Singh, though survived by his widow and a daughter, was succeeded by his brother; and then he says:—"In view of these "circumstances, agreeably to the family "usage, law and equity, reason and tradi- "tion, the Maharanee is entitled to nothing "more than food and raiment; *because your* "*petitioner and two others are three full* "*brothers, and in default of heirs they suc-* "*ceed to the Raj one after another.*"

Then follows the answer to the second purwannah. It again refers to the Maharanee's petition, and to an assertion by her that Ram Nath Singh lived separate from his brother, Shumboo Nath Singh, and acted as his Dewan. This is strenuously denied by Ram Nath, who asserts that he and Shumboo Nath were "full brothers sharing in "each other's gain and loss," and that he only assumed the management of the property according to custom when Shumbhoo Nath became too infirm to transact business. He then gives instances of a similar arrangement to this with regard to the management in other families, and denies that his having managed the business of the zemindaree is any evidence of separation. He goes on to say that, with the exception of himself, no one had any right in the property; and "since *he was a partner and had a right* "*in the Raj* no benamee could be effected "in his name," for which reason all the business was transacted in the benamee or fictitious name of Kumaree Burgah, a domestic. Subsequently he refers to the statement he had already made that the teeluk was affixed on his forehead, and then again combats the statement that he had separated from his brother. He then denies some allegations which the Maharanee had made of ill-treatment. Next, he refers to certain instances of succession cited by the Maharanee in her petition in her own favour, and says that "the practice of the jungle mehals is differ- ent from that of other districts. Some

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instances of the practice and usage of the jungle mehals are here given." Then he cites the case (1) of Palgunge, in which the brother succeeded in presence of the widow and nephew of the late Rajah ; (2) of Koonda, in which the nephew succeeded in presence of the late Rajah's widow ; (3) of Gowan, in which a cousin in the fourth degree succeeded in presence of a female (the widow, no doubt) and a nephew of the late Rajah: "whereas," he says "your petitioner is *the* "*full brother* of the late Maharajah and lived "in commensality with him : hence he is en- "titled to the Raj, considering his right from "any point of view. The instances adduced "of the Tekaree Ranee are not sufficient. The "share of Baboo Motee Ram Singh was divi- "ded by the Court. *Moreover he left no near* "*heir, and consequently the Ranees came to* "*possession ;* but the case of your petitioner "is different, for he is full brother, lived in "the same house and ate at the same table "with the Maharajah, and received by the "Maharajah's own hands the mark of "teeluk." The rest of the petition is taken up with again denying the Maharanee's complaints of ill-treatment, and offering to allow her a suitable maintenance.

The only other document relied on is a return filled up by Maharajah Shumbhoo Nath Singh, at the request of the Agent of the Governor General, dated the 22nd June 1846. It relates to the succession to the Raj and the Ramgurh estates, and there is no mention whatever of his wife in that document as his heiress. But the plaintiff, who relies on this document, has not shewn whether or no Maharajah Sumbhoo Nath Singh had then a wife, and further the form in which the information is asked for itself to some extent precludes the mention of the wife. It therefore appears to me of little value.

After much consideration, I find myself unable to arrive at the conclusion that this evidence establishes any family custom which would exclude females. I take it that in order to establish a koolachar, or family custom of descent, you must at least show one of two things,—either a clear, distinct, and positive tradition in the family that the koolachar exists, or a long series of instances of anomalous inheritance from which the koolachar may be inferred.

It is said in a case reported in II Select Reports, p. 117, that "to legalise any deviation from the strict letter of the law, it is "necessary that the usage should have been "prevalent during a long succession of an- "cestors, when it becomes known by the name "of koolachar." But I imagine that a distinct tradition in the family would supply the place of ancient examples of the application of the usage.

The evidence above stated, however, fails to convince me that in this family there is any clear tradition that by special family custom females are excluded from inheritance.

Of the eleven witnesses called all state what the custom is. Six witnesses, of whom three are members of the family, one is a neighbour, and two are servants of the family, state the custom without any reference to the exclusion of females. Four of whom, one is a neighbour, one is a distant connexion, and two are servants of the family, state that by custom females are excluded. The witnesses who state the custom to exclude females are, therefore, not only fewer in number, but considerably inferior in means of knowledge to the witnesses who omit that statement. Indeed, the omission of *all* the members of the family to state the custom to exclude females is to my mind almost conclusive against there being any clear and distinct reputation in the family that such a custom exists.

Next to the members of the family, by far the most important witnesses is the 11th, Rajah Ram Narain Deo. Indeed, I am not sure from the evident care and detail with which his statements are made, and his knowledge of the subject, that he is not the most important witness of all. Yet to my mind, he as much as admits that there is no family tradition on the subject. Having said "a woman cannot succeed by virtue of family custom," he immediately adds "*it has never so happened, hence I say that a woman cannot succeed to the guddee.*" I can only look on this as an inference of a custom by the witness from a certain series of events, but that is an inference for the Court and not for the witness. How far that inference is justified I will consider presently.

This evidence would, in my opinion, scarcely afford ground for inferring a family custom if it stood alone. But it appears to me to be much weakened by the petition of Ram Nath, which seems to me to make very strongly against any tradition in this family that females are excluded.

For whatever reason he may have been desirous of doing so, it is, I think, obvious

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that Ram Nath was at that moment strongly contesting the rights of his brother's widow, and desirous of placing his own title on the strongest grounds. He would, therefore, assuredly have inserted so complete an answer to the Maharanee's claim as a family custom to exclude females would afford if he had been aware of its existence. But from beginning to end I find not the least trace of it. The ground on which he bases his claim to the Raj and the estates are perfectly clear; first, because he has been marked with the teeluck by the late Maharajah; secondly and principally, because he and the two last Maharajahs were *full brothers joint and undivided.* It seems to me that he refers to family usage only as establishing the impartibility of the Raj, and that he takes up exactly the position which was assumed by the plaintiff in the Tipperah case, and which though declared by the Privy Council to be erroneous is not an uncommon notion, namely, that a full brother succeeds in preference to the widow to ancestral impartible property. I take this petition to fall as evidence little short of a categorical statement by Ramnath that, as far as he knew, no trace of any custom to exclude females generally existed in the family, and being made by a person strongly interested in asserting such a custom it is entitled to full credit. It seems to me scarcely possible that any tradition of such a custom could exist in the family without Ramnath having been aware of it, and I do not find in the petition any sign whatever of carelessness or inability such as would lead me to suppose that he would omit so important a statement.

It seems to me, therefore, that the attempt to establish the family custom by evidence of reputation has failed. I very much regret that there should be a difference of opinion on this point, and I regret that we have not here the assistance of the Deputy Commissioner who heard the evidence. He finds very clearly on the evidence that by family custom the Raj is impartible, but he expresses no opinion whatever on the oral evidence of family custom to exclude females. He seems to me to base his opinion on that point on entirely different grounds.

I will now take the evidence of cases of anomalous descent from which the custom to exclude females is sought to be inferred. This consists of two parts, first, the uniform statement of all the witnesses that they never knew or heard of a woman succeeding to the guddee in this family; and secondly, the fact that in 1842 and again in 1862, the widow of a Maharajah was passed over in favour of a younger brother.

With regard to the first part of this evidence, if we take the view that the Deputy Commissioner seems to have taken (*see* his judgment, page 20 ad fin.) that there is no evidence of the succession prior to Tej Singh's time, and that we must judge of the custom entirely from what has happened since that time, there is, of course, nothing in it whatever. From Tej Singh to Luchmee Nath son succeeded father in regular course, and the occasion for exclusion of a widow never arose. And upon the whole, though some of the witnesses seem to assert as a matter of family history that no woman has ever been known to succeed, yet I think the Deputy Commissioner has rightly considered that this is not to be relied on as establishing a general exclusion of females. Succession in the direct line of father and son 10 or 12 generations would not be at all extraordinary; and even if a person out of the direct line were known to have succeeded, this would be nothing unless it were also known that the deceased Maharajah in that case left a widow or daughter. Moreover, looking to the condition in which this district was for many years prior to our occupation of it (*see* some extracts from a letter of the Collector, VI Select Reports, p. 134), I think it would be difficult to draw any inference of legal rights from the events of that period. It seems to me, therefore, easy to account for what the witnesses say on this point without referring it to the exclusion of females by family custom. I think, therefore, that the only reliable evidence of actual exclusion of females, who would otherwise have been entitled to inherit, is in the two modern instances. We are, however, very imperfectly informed of the circumstances under which these two ladies were excluded. In the first instance, the point does not appear to have been much contested. The second instance is so recent that it is still quite open to the widow in that case to assert her rights. Moreover, if we may judge from the petition of Ram Nath which has been already referred to, the widow of Shumboo Nath Singh yielded, not to any assertion of a custom to exclude females, but to the erroneous view which, as we have seen, Ram Nath took of the nature of the right of succession to an impartible Raj, namely, that a joint brother did succeed under the ordinary law in preference to the

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widow to property of this description. On the whole, therefore, I cannot infer any family custom to exclude females from the actual course of descent.

Then comes the question whether there is a local custom that women are excluded. I conclude from the evidence that this is the local custom relied on, though, as I said before, by a very serious error the plaintiff was not called upon to state before the evidence was gone into the exact custom on which he relied. Even stated as I now state it, the custom is extremely vague; yet nothing more definite than this has been stated either in evidence or in argument, or even in the judgment of the Court below. I do not know now in what district the custom is said to prevail, or in regard to what kind of succession or what sort of estates. According to English law, I imagine that such a proceeding as this would not be allowed, but the plaintiff would be obliged to state the district in which the custom was alleged to exist and to confine his evidence to that district. Take, for instance, a case where a plaintiff alleged the custom of a manor. He would not in general be allowed to show what the custom was in other adjoining manors—(Duke of Somerset *versus* Francis, I Strange, p. 654; Marquis of Anglesey *versus* Lord Hatherton, 10 Meeson and Welsby, p. 219). But, as pointed out by Lord Mansfield in Furneaux and Hutchins, Cowper, p. 808, he may do so if he states the custom as a *general custom of the whole county* (not "a general custom of the *country*" as this passage is sometimes quoted, a *county* being a well defined and ancient division of the kingdom). So in the case reported by Lord Hale (Hargrave's Tracts, page 84) the custom is laid as "the custom of *that country*," "that is the country on the borders of the river Severn—(*See* also the observations of Lord Ellenborough in R. *versus* Ellis, I Maule and Selwyn, p. 662). So in India, the custom might be laid as the custom of a zillah or other similar district. This rule appears to me to be not an artificial rule of evidence, but as pointed out by Lord Abinger in the case in 10 Meeson and Welsby, p. 235, to be founded in good sense; because if there is not some limitation of this kind, it is plain that the custom of one district might be gradually extended indefinitely in all directions. Had the objection been taken, I think that in this case the defendant would have had a right to require that before any evidence of local custom was gone into, the plaintiff should state the locality to which the custom was alleged to apply.

The evidence produced by the plaintiff in support of the local custom is most singular. The witnesses are none of them asked as to the general course of inheritance in any district, but as to what has happened in eleven specified estates selected, as I imagine, by the plaintiff himself. In three of these only were the witnesses able to give any particulars of the descent, and it is rather remarkable that those are the very same three to which Ram Nath referred in the petition I have already discussed, namely, Palgunge, Koonda and Gewan. The witnesses altogether refrain from stating that any local custom exists; and it is left to be inferred from those three instances of exclusion. The omission to state the locality over which the alleged custom prevails makes it difficult to deal with this evidence. All these three places are said to be now in Zillah Hazareebagh; but that I imagine to be quite a modern political division. This property and a large tract of the surrounding country was originally comprised in Zillah Ramgurh (Regulation III of 1793, Section 2). Subsequently, a district was formed under the name of jungle mehals, but which included no part of the Zillah of Ramgurh. It was formed entirely of portions of the Zillahs of Beerbhoom, Burdwan, and Midnapore (Regulation XVIII of 1805). Subsequently, the Zillah of Ramgurh was abolished, and a portion of Ramgurh, including these estates, a great part of the jungle mehals, and what was then Midnapore, were made Non-Regulation districts and put under the superintendence of an Agent of the Governor General (Regulation XIII of 1833), for whom a Commissioner has been since substituted (Act XX of 1854). This Commissionership is now divided into four Deputy Commissionerships,—Hazareebagh, Manbhoom, Lohardugga, and Singbhoom. But these divisions have, I imagine, been made solely with reference to the convenient transaction of business, and do not correspond with any ancient divisions of the country. For the present purpose, therefore, the fact which was so much relied on that these there estates and Ramgurh are all in the same district of Hazareebagh seems to me to be immaterial. It seems to me that it would be absurd to find that this was a local custom of a modern division like Hazareebagh; but if not of Hazareebagh, to what other locality is it suggested to

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belong? I should say that to establish a *local* custom to exclude females from inheritance by instances of exclusion, a district must be stated in which the custom is now and for a long time has been prevalent, and which includes the property in dispute. The district might be defined geographically as it might correspond with some ancient political division. A sufficient number of instances of exclusion within that locality must then be adduced to establish that the custom extends to the whole district and therefore governs the succession in dispute. It appears to me, however, that the plaintiff in this case has entirely failed to bring the evidence up to this point. Moreover, I think the effect of the instances given is greatly weakened by the uncertainty in which it is left, whether or no these three estates are held as ghatwalee tenures. If that be so, and it is a point on which the plaintiff's witnesses are not agreed, the exclusion of females might possibly be accounted for without resorting to any such inference as the general exclusion of females in the district.

Moreover, I think the petition of Ramnath of 1846 shows clearly that he was as little aware of any *local* custom, which would exclude females, as of *family* custom to the same effect. If there had been such a local custom within his knowledge, he would certainly have mentioned it; and I think that it would be most strange if he had not then ascertained all the special rules of inheritance applicable to the question, whether peculiar to his own family or to the district in which he resided.

The Deputy Commissioner says, however, in his judgment (page 23 ad fin.) that the Ramgurh estate is "a large feudal tenure which is not divisible, and that it is a matter of notoriety that in this part of the country women do not inherit such estates, they being disqualified by sex from performing all that it is incumbent on a Rajah to perform." With regard to the last part of this statement, there is no evidence beyond that of two of the defendant's witnesses as to the duties of the Rajah. They say that it was customary for the Maharajah at times of poojahs to sit under the umbrella and to hold cutcherry outside; and that this the Ranee could not do. But there is no evidence that this is an indispensable ceremony; and like many other ceremonies usually performed by men, but not usually performed by women, it might, as far as I am aware, be omitted without any serious consequences arising. I am not sure I understand in what sense the Deputy Commissioner calls the Ramgurh estate a "feudal tenure;" but as I shall show presently the terms on which the Rajah holds his estate are those of an ordinary zemindar. As to the notoriety of the custom, I have some doubts whether this is a matter on which a Judge is entitled to give the results of his own experience. If I am at liberty to consider this statement, I should have no hesitation in saying that it is the strongest part of the plaintiff's case. My chief objection to this statement is the very vague terms in which it is made. I am quite at a loss to know what district the Deputy Commissioner refers to when he speaks of "this part of the country." He may mean his own district of Lohurdugga; but if so, that is nothing to the purpose, for this property is not in Lohurdugga, but in Hazareebagh; and this suit only came to be tried by the Deputy Commissioner of Lohurdugga by an accident. Again, he seems to consider that the custom applies only where the owner of the estates has to perform duties which a woman is by her sex disqualified from performing; but if so, it does not apply to the Ramgurh estates, for the Maharajah has not, and never had as far as I can discover, any such duties.

It is certainly remarkable that if there does exist a local custom to exclude females, so notorious as stated by the Deputy Commissioner and covering any extensive district, that it is not noticed in any work upon the Hindoo Law of Inheritance, either general or special, as far as I am able to discover. The custom of primogeniture, as it is sometimes called, but as it is more correctly called of impartibility, as observed in this part of India, has been the subject of legislation and has frequently been noticed by text writers, and the succession in this very family has upon that point been more than once referred to. Strange, Jaganatha, Shama Churn Sircar, Harington, and Macnaghten all refer to the custom of primogeniture or impartibility in this locality, but not one of them speaks of the exclusion of females. Had such a custom been notorious as a local custom, I should think it must have been known to Mr. John Harington; and had it been known to him, I think it is hardly possible that he would have omitted to mention it in that part of his Analysis where he discusses the departure from the ordinary law of inheritance which has taken place in these

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very districts (Volume I, part I, pages 194 and 199).

I do not, of course, mean it to be inferred that the exclusion of females from succession is unknown in India. Since this case was argued, I have seen a list of 25 questions addressed to certain Rajahs and Chiefs in the Regulation and Tributary Mehals, and the answers thereto illustrating the succession to those guddees. It is clear that in those cases, if those statements are reliable (and I believe them to be so,) females are excluded, if not altogether, at least to a very great extent. This district is immediately south, and almost adjoins the district of the Assistant Commissioner of Lohurdugga, and his statement as to the notoriety of the custom may perhaps be thus accounted for. But it is hardly necessary to repeat that until some connection, either geographical or political, is shewn to exist between the districts, there is no ground for inferring the custom of one district from its existence in another; and as far as I am aware, the country above designated as "Regulation and Tributary Mehals" is entirely distinct from that in which the Raj of Ramnuggur is situate and which has been generally known as the Jungle Mehals.

The course of inheritance in the case of impartible property is indeed almost always spoken of as if it went entirely in the male line, but it is clear to me that this is only an adoption of the Hindoo form of expression "*puttro poutradi*," which is the ordinary expression which is used to indicate heritability, and which is, I believe, always understood to include females. That by the general Hindoo Law females are not excluded from succession to a Raj is, I believe, unquestioned.

In the much contested case of the Shiva Gunga Raj, a woman eventually succeeded without its ever being suggested that any such general rule of exclusion was known to exist—(*see* 9 Moore, pp.589 and 605).* Jaganatha says (Book 2, Chapter 4, Section 15, page 118):—"If the King give the whole "of his dominions to his eldest son qualified "for the empire, although his other sons be "void of offence, the gift is valid." He says nothing about the exclusion of females; and even in this respect, in a curious passage at page 127, he hints a doubt whether some modern princes, who are not independent in the government of their subjects, but merely employed in levying the revenue of the paramount, should be considered as princes. Of course, as against clear and ample evidence that the local custom existed, or that females had been over and over again excluded, these speculations would be nothing; but I think one is justified in referring to them in the present case.

The direct evidence in support of the local custom is at the very best meagre and weak, and the most valuable testimony is that of the Judge himself speaking from his own experience.

The materials at my command for testing the value of the Deputy Commissioner's opinion on this point are not very ample, but the result of such investigations as I have been able to make leads me to doubt the existence of such a local custom as is asserted. It leads me *undoubtedly* to the conclusion that there is none so notorious and so general as to be judicially noticed without proof.

There was indeed one argument used to which I was at first inclined to give considerable weight. It was asked by the counsel for the plaintiff, if women succeed in this district to estates of this nature, why did not the widow prove instances of it? And it was pointed out that the case was adjourned expressly in order to give her time to enquire into the custom of the country, and yet she produced no one to speak to it, whereas prior to the adjournment, *namely*, on August 18th, one of her own witnesses, Banee Jyenundun Doss, had stated that in the district of Hazareebagh no woman had to his knowledge ever succeeded to the Raj. What exactly occurred with reference to this adjournment I have stated above; and it certainly does at first sight appear remarkable that, if it were possible, the defendant should not have taken this simple course of disproving the custom; and under some circumstances I should have presumed that search had been made, and that not a single instance of a female succeeding to a Raj in the immediate neighbourhood of this property at any rate could be produced. I should still have wished to know how many persons are possessed of that dignity in that neighbourhood and something of their history, but from the evidence I presume that there are other Rajs besides Ramgurh at no great distance, and it would have been necessary therefore to consider the effect of this inference from absence of proof on the

* 2 W. R., P. C., p. 35.

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part of the defendant. But, on consideration, I do not think it safe to presume either that such a search as I have indicated has been made, or what would be the result of it if it had taken place. We have a very careful and accurate report from the Deputy Commissioner of all the proceedings that took place in the Court below, and we see how vague the inquiry was to which the attention of the parties was directed. As I have already remarked, I do not find either in the issues or in any part of these proceedings any statement on the part of the plaintiff of what local custom he intended to prove. As already pointed out, the witnesses re-called by the plaintiff on the 17th August, and that called on the 27th, made no assertion of any general custom,—they only particularized certain estates in which women had been excluded. To this the defendant may have rested content to answer that these instances proved nothing in regard to the property in dispute, and that one of the plaintiff's own witnesses admitted them to be ghatwal estates.

Some attempt was made to show that the terms of the tenure of these estates imposed duties upon the zemindar which a woman was unable to perform. I do not think so. This appears to me to be an odinary zemindaree tenure. The pottah under which the estates are held contain a clause which imposes duties on the zemindar in the nature of police duties, but it only extends to the protection of travellers and to the arrest of criminals. These I imagine are the ordinary duties of zemindar. The zemindaree sunnud granted by the Mogul Government to Ram Jeewun, the zemindar of Rajshahye in 1735, contains a precisely similar clause to that in the Rajah of Ramgurh's pottah (Harington's Analysis, Volume III, page 279), and Ram Jeewun was succeeded on his death by his widow, the Ranee Bhowanee (Id., page 311). There appears to me to be no analogy between these duties and those of a ghatwal, which are of a much more general character and which are usually expected to be personally discharged.

On the whole, although I feel much diffidence in coming to a different conclusion from that of the Deputy Commissioner upon a point of this kind, yet I cannot think that any local custom has been established with that clearness and definitiveness which would justify a departure from the ordinary rule of inheritance. Between impartibility and the exclusion of females there is no connexion whatever, and it lies on the plaintiff, therefore, to establish the exclusion upon which he relies; and this I think he has not done. I am not prepared to say that the investigation has been a satisfactory one, and had the law allowed it I should for my own part have been most anxious to have had a further enquiry. But that course has not been even suggested to us, and I do not think that on our own motion we have power to direct it. The case is very much in the same condition as that of Rae Manick Chand *versus* Madho Ram,* which was recently before the Privy Council (III Bengal Law Reports, P. C.)

If the plaintiff has failed to lay before us the best evidence which might have been got he alone will suffer. No other title ought in any way to be affected by this decision.

On the evidence before us, I think no custom either family or local to exclude females has been established. I think, therefore, that the plaintiff has failed to make out his title; that the decision of the lower Court ought to be reversed, and his suit dismissed with costs in this Court and in the Court below.

Of course, I express no sort of opinion whatever whether or no the defendant has proved her title to any part of the property.

The 14th April 1871.

Present:

The Hon'ble W. Ainslie and G. C. Paul, *Judges.*

Notice of enhancement — Clause 1 Section 17 Act X. 1859.

Case No. 1650 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Nuddea, dated the 20th April 1870, *reversing a decision of the Deputy Collector of Koosteah, dated the 15th December* 1868.

Koomar Puresh Narain Roy (Plaintiff) *Appellant,*

versus

Gour Soondur Bhoomick (Defendant) *Respondent.*

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* 11 W. R., P. C., p. 42.

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Baboo Mohinee Mohun Roy for Appellant.

Baboo Bhowanee Churn Dutt for Respondent.

A notice to the effect that the ryot's rent was liable to be enhanced on the ground that he was paying at a rate lower than that paid by equal ryots("toollo projah"), is sufficient to show that the enhancement was sought under Clause 1 Section 17 Act X of 1859.

Ainslie, J.—THE case now before us appears to be exactly similar to the case reported in the XII Weekly Reporter, page 537.

The notice which was issued to the ryot in this case was to the effect that his rent is liable to be enhanced on the ground that he was paying at a rate lower than that paid by "equal ryots", the Bengalee words used being *toollo projah;* and this seems to be sufficient to show that the enhancement was under the 1st Clause of Section 17 Act X of 1859. When the case came before the first Court, the defendant does not appear to have taken any objection that the notice was insufficient, and that he did not understand its terms; and from the second issue laid down by that Court, it is perfectly clear that the parties went to trial upon the merits, and not on any technical question.

We think we ought to follow the judgment of this Court in the case above referred to. We, therefore, decree this appeal, and remand the case to the Judge to try it upon the merits. Each party will pay his own costs of this appeal.

The 14th April 1871.

Present:

The Hon'ble W. Ainslie and G. C. Paul, *Judges.*

Breach of contract—Agent's right of action—Damages.

Case No. 1685 of 1870.

Special Appeal from a decision passed by the Judge of Nuddea, dated the 27th May 1870, *affirming a decision of the Subordinate Judge of that District, dated the 7th September* 1869.

Soorendronath Roy (Defendant) *Appellant,*

versus

Rughoobur Dyal Awustee and another (Plaintiffs) *Respondents.*

Baboo Rash Beharee Ghose for Appellant.

Mr. Sanderson for Respondents.

The question of competency of an agent to sue, if not raised in the initial stage of a suit, cannot be permitted to be raised in special appeal.

Ordinarily on a breach of a contract of sale the vendor can only recover as against the purchaser the difference between the price contracted for and the price at which the vendor might or could have sold the goods at the time of the breach.

Paul, J.—IN this case we are of opinion that the special appeal must fail. There are three points made in special appeal, first, that the parties who instituted this suit as plaintiffs are simply agents in the matter of the contract, and therefore the suit would not lie. Now, it is not a general proposition of law that an agent who effects the contract cannot sue. If he is a bare agent without having any interest whatever, he may not be able to sue; but where he has an interest, it is quite clear that he can sue. It is sufficient, however, to say for the purpose of meeting this objection, that it was not taken at the initial state of the case; and therefore it would be very unjust to allow it to be taken now in special appeal. Besides, the non-taking of the objection in the lower Court satisfies us that the parties did not in reality intend to take it, because they were fully satisfied that these plaintiffs were really entitled to sue.

The next point made is that the plaintiffs did not prove that they were ready and willing to deliver the indigo seed contracted for. On this point, it is only necessary to say that it was never raised in either of the Courts beyond its being involved in the general allegation made by the defendant that the plaintiffs had first broken the contract; and that both the lower Courts have found that the plaintiffs have not committed any breach of the contract, and that it is the defendant who has broken it. This finding of the lower Courts also disposes of the objection of the defendant that the plaintiffs were not in a position to fulfil the terms of the contract.

The sole question, then, that remains is whether the damages have been assessed by

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the lower Courts on a correct principle. Now, there can be no doubt of the general principle contended for by Baboo Rash Beharee Ghose on behalf of the special appellant, that ordinarily speaking on a breach of contract the vendor can only recover as against the purchaser the difference between the price contracted for and the price at which the vendor might or could have sold the goods at the time of the breach of the contract. At the time when the breach of this contract must be supposed to have taken place, the indigo seeds could not be sold at any price at all, as found by both the lower Courts. This was a contract in which no time was fixed for the delivery of the indigo seeds. It would therefore be implied that the parties should have a reasonable time to fulfil the conditions thereof. There can be no doubt that the indigo seeds would not be purchased after the month of April, and I think the plaintiffs were bound to wait until the sowing season was ended before they could claim any compensation from the defendant. The plaintiffs have very properly waited until the end of of that season as found by both the Courts. Therefore, the damages to which the plaintiffs are entitled would be the price contracted for minus the value of the indigo seed after the sowing season, namely, the price contracted for minus nothing at all. I consider, therefore, that the decisions of both the lower Courts, having reference to the special facts of the case, have proceeded on a correct principle in assessing the damages.

Such being the case, I think that the decrees of the lower Courts must be affirmed and this appeal dismissed with costs.

Ainslie, J.—I concur.

The 14th April 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Enhancement of rent—Alternative pleas.

Case No. 1771 of 1870.

Special Appeal from a decision passed by the Officiating Judicial Commissioner of Chota Nagpore, dated the 3rd June 1870, reversing a decision of the Assistant Commissioner of Maunbhoom, dated the 30th September 1869.

Nil Monee Singh Deo, Bahadoor, (Plaintiff) *Appellant,*

versus

Anunt Ram Putnaik and others (Defendants) *Respondents.*

Baboos Gopeenath Mookerjee and *Bhowanee Churn Dutt* for Appellants.

Baboo Kalee Kishen Sein for Respondents.

In a suit for arrears of rent at an enhanced rate, where defendants pleaded protection under a mokurruree pottah of old date which had been lost long ago, and also pleaded the presumption arising from uniform payment for more than 20 years:

HELD that the defendants' inability to adduce sufficient proof of that pottah was no reason why they should not be allowed an opportunity to prove the uniform payment pleaded.

Glover, J.—THIS is a suit for arrears of rent at an enhanced rate after notice for the year 1274, amounting to rupees 840-12 on 510 beegahs of land. The defendants pleaded that they were protected by a mokurruree pottah dated in the year 1192, and that they had paid a uniform rate of rent of 72 rupees 6 annas for more than 20 years, and were entitled to the presumption of having paid at that rate from the date of the permanent settlement. This latter plea apparently was taken because the pottah is stated to have been destroyed some years before the suit was instituted. At all events it was not produced.

The first Court decreed for the plaintiff, holding that the defendants had not been able to prove that they held under the mokurruree pottah. On appeal, the Judicial Commissioner remanded the case to try whether or not the defendant had been able to show that he had held the tenure at an unvaried rate of rent for a period of 20 years, and was therefore entitled to the presumption of law arising under Act X of 1859. The first Court, after remand, again decreed the case in favor of the plaintiff, and this decision the Judicial Commissioner has now reversed.

In special appeal, it is contended that as there was no proof on the part of the defendants that they held under a mokurruree pottah, they are not entitled to any presumption of having held the land from the time of the decennial settlement. This objection appears to us untenable. If there had been any finding by the Courts below

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that the defendants had come into Court upon a pottah which was found to be spurious, it then would have been a different thing and the defendants would not have been allowed to shift their case and endeavour to protect their holding by proving payment of rent at uniform rates for 20 years, after they had failed under circumstances of fraud in setting up their substantial plea of a mokurrureé pottah ; but in this case the only thing that has been found against the defendants is that they had not been able to adduce sufficient proof of that pottah, which, considering that the pottah was dated so far back as the year 1192 and was apparently lost many years ago, was not very wonderful ; and we think there is no reason why the defendants should not have been allowed an opportunity to prove, if they could do so, the uniform payment of rent by them for a period of 20 years prior to suit, which would entitle them to the benefit of the presumption of law that they had paid at the same rate from the time of the permanent settlement.

Then as to the uniform payment of rent,

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The special appeal is, therefore, dismissed with costs.

The 14th April 1871.

Present :

The Hon'ble W. Ainslie and G. C. Paul, *Judges.*

Mokurrureé pottah—Lessors—Boundaries—Area.

Case No. 1986 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Jessore, dated the 15th July 1870, *reversing a decision of the Deputy Collector of Khoolnea, dated the 6th Demember* 1869.

Kazee Abdool Maunah and others (Plaintiffs) *Appellants,*

versus

Buroda Kant Banerjee (Defendant) *Respondent.*

Baboo Debendro Ghunder Ghose for Appellants.

Baboos Mohendro Lall Shome and *Motee Lall Mookerjee* for Respondent.

Parties holding a permanent settlement from Government cannot question the validity of a mokurruree pottah previously granted by themselves when they held the property under a temporary settlement.

In order to ascertain what land is actually leased, it is necessary to look to the boundaries mentioned in the lease and not to the estimated area.

Ainslie, J.—THERE is no ground for interfering with the judgment of the Lower Appellate Court in this case.

The first objection taken in special appeal is that the lease set up by the defendant is not valid, inasmuch as the parties by whom it is said to have been granted had no authority to grant a lease in perpetuity. It is true that the lessors of the defendant's vendor had no power to grant a mokurruree pottah at the time when they held the property under a temporary settlement ; but as they themselves subsequently obtained a permanent settlement of the property from Government, they cannot now question the validity of the pottah previously granted by them to the defendant's vendor. The pottah would no doubt have been void as against Government or any person other than the plaintiffs to whom Government might have assigned its rights, but certainly it must be binding upon the parties who granted it.

The next objection is that even if the pottah filed by the defendant be accepted as valid, he cannot derive any benefit from it ; because there is a clause in it which prohibits the defendant's vendor, Nil Monee, from alienating the tenure. In the first place, it does not appear that there is any provision in the lease that in case of alienation the tenure created by it would be forfeited ; and secondly, it is shown that the plaintiff has acknowledged the defendant as his tenant under this lease since 1270. Besides this, the plaintiff does not sue for ejectment, but he sues for enhancement of rent of a certain tenure in the occupation of the defendant ; and there is no other tenure except the one which was created by the lease propounded by the defendant.

Thirdly, it is contended that the lease was granted for a certain specified area of land ; and that as it turns out on measurement that defendant holds more land than the quantity specified in the lease, the plaintiff is entitle

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to enhance the rent of that excess land. It appears to us that in order to ascertain what was actually leased to the defendant's vendor, we must look to the boundaries mentioned in the lease and not to the estimated area. There was no provision for a subsequent survey and adjustment of rents in accordance therewith. The mere error in the estimated area cannot operate to take from the lessee any of the land that lies within the specified boundaries of the leased property.

The appeal is dismissed with costs.

Paul, J.—I concur. I think that the Judge of the Lower Appellate Court has very carefully decided the case, and no ground whatever has been shewn to shake the reasons he has assigned.

The 14th April 1871.

Present :

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Consolidation of suits—Appeal.

Case No. 1993 of 1870.

Special Appeal from a decision passed by the Judge of Nuddea, dated the 26th August 1870, affirming a decision of the Collector of that District, dated the 29th June 1870.

Enayetoollah and another (Defendants) *Appellants,*

versus

Radha Churn Roy and others (Plaintiffs) *Respondents.*

Baboo Mohinee Mohun Roy for Appellants.
No one for the Respondents.

Two suits having been instituted by a purchaser of two different portions of the same tenure for enhancement of the rent of the respective portions, the first Court treated them as if they constituted one suit and gave one decision in both.

HELD that in doing so the Court acted sensibly and reasonably, and that there could be no objection to one appeal being filed from what was substantially one decree.

Norman, C. J.—THE facts of this case are very simple.

It is stated that the plaintiff instituted two suits for enhancement of rent of the same tenure. The circumstances under which that took place are these. He purchased at several times at the first sale 7 annas, and at the 9 other annas of the same property. The cases having been set down for hearing, the first Court treated them as if they constituted *one* suit and gave, very sensibly and reasonably as it appears to us, one decision in both cases. From that decree, which was substantially one decree in two consolidated suits, the defendant appealed.

If the lower Court thought fit to treat the two cases as consolidated and passed one decree in both suits, it seems to us that there can be no possible objection to the defendant's preferring one appeal.

The case must go back to the Lower Appellate Court for re-trial.

Costs will follow the result.

The 14th April 1871.

Present :

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Splitting of liability—Sharers.

Case No. 1998 of 1870.

Special Appeal from a decision passed by the Additional Judge of Nuddea, dated the 7th June 1870, affirming a decision of the Deputy Collector of that District, dated the 14th September 1869.

Indromonee Burmonee (one of the Defendants) *Appellant,*

versus

Suroop Chunder Paul (Plaintiff) *Respondent.*

Baboo Grish Chunder Mookerjee for Appellant.

Baboo Sreenath Dass for Respondent.

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A tenant's liability to pay his jumma to the party entitled cannot be split up without his consent, so as to make him liable to pay fractional portions of rent to different sharers in the zemindary.

Norman, C. J.—THE plaintiff sues for arrears of rent for the years from 1273 to 1275, to which he alleges himself to be entitled as being a shareholder in certain land held by the defendants comprised in two jummas, one of rupees 106 and the other of rupees 34. The plaintiff says that some time since he acquired by purchase first 1 anna 4 gundas of the lands comprised in those jummas, and subsequently additional fractional shares of this land; and that by these purchases and by taking in farm 2 annas and 8 gundas, he became possessed in all of 6 annas 16 gundas of the property. Being thus purchaser and ijaradar, he sues the defendants, and amongst others the special appellant before us, Indromonee Burmonee, for the rents of 6 annas, after deducting 16 gundas which he says has been taken possession of by another party.

The lower Courts made a decree in favour of the plaintiff, from which decree the defendant, Indromonee Burmonee, appeals; and she points out through her vakeel that there is no evidence that she ever assented to any division of her liability, or agreed to pay the rents of the 6 annas 16 gundas, or of any other fractional share, to the plaintiff.

We think that the objection of Indromonee Burmonee is well-founded; that the liability of herself and co-sharers was to pay the entire jumma of rupees 106 and rupees 34 to the persons to whom they were liable to pay the same; and that the plaintiff by purchasing fractional shares of the property comprised within the jummas could not split up without her consent her entire liability, and make her liable to pay fractional shares of that rent to the several persons alleging themselves to hold shares in the zemindary, whose interests and rights she would have no means of ascertaining with accuracy.

The suit, therefore, as regards the special appellant, Indromonee Burmonee, must be dismissed with costs in all the Courts. The other defendants not having appealed, the decree will stand as against them.

The 14th April 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Bond—Interest.

Case No. 2066 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Purneah, dated the 20th June 1870, modifying a decision of the Officiating Sudder Moonsiff of that District, dated the 14th April 1870.

Shaikh Reasut Hossein (one of the Defendants) *Appellant,*

versus

Jusmunt Roy (Plaintiff) *Respondent.*

Baboos Bama Churn Banerjee and *Taruck Nath Dutt* for Appellant.

Baboos Anund Chunder Ghossal and *Obinash Chunder Banerjee* for Respondent.

Where a party borrowing money entered into a bond stipulating to pay 24 rupees per cent. per annum as interest until the whole debt, principal and interest, was paid off; and if the whole was not paid within the time mentioned that the bond should be enforced as a registered deed:

HELD that the rate of interest was not a question of discretion, but must be paid at the rate stipulated.

Bayley, J.—THIS special appeal is on the point of interest only. The question is whether between the due date of payment and that of suit, the Lower Appellate Court has erred in awarding interest at rupees 24 per cent. as was stipulated in the bond.

We have heard the bond read and it is somewhat peculiar in its terms, that is to say, there can be no doubt that what the parties contracted for was that rupees 24 per cent. per annum should be paid as interest until the whole debt, principal and interest, might be paid off; and if the whole was not paid within the time mentioned, the bond should be enforced as a registered deed.

We have been referred to a decision reported at page 16, Volume VIII, Weekly Reporter; but there is nothing whatever in that case showing the stipulations, while here they are shewn in the most clear and distinct terms. On the contrary, in that case a great deal turned upon the circumstance that the

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deed itself was silent on the point, and it was upon that assumption that the question determined by the Judges in that case arose. It is quite clear that the Lower Appellate Court is right in holding that the party is bound to pay interest at the rate stipulated in the bond. It is not a question of discretion. It is only giving effect to the terms of the bond under Act XXVIII of 1858.

The special appeal is dismissed with costs.

The 14th December 1870.

Present :

The Hon'ble E. Jackson and Dwarkanath Mitter, *Judges.*

Suit to recover money—Small Cause Court—Section 27 Act XXIII of 1861 — Section 15, Charter Act—Jurisdiction—Non-resident defendants.

Case No. 249 of 1870.

Special Appeal from a decision passed by the Additional Judge of Hooghly, dated the 6th December 1869, *reversing a decision of the Moonsiff of Serampore, dated the 24th June* 1869.

Tarinee Churn Mookerjee and others (Plaintiffs) *Appellants,*

versus

Poorno Chunder Roy and others (Defendants) *Respondents.*

Baboos Kishen Succa Mookerjee and *Taruck Nath Sein* for Appellants.

Baboos Issur Chunder Chuckerbutty and *Kedarnath Chatterjee* for Respondents.

A suit for the recovery of a sum of money below 500 rupees alleged to have been improperly taken away from the Collector, who held it in deposit on account of certain lands taken for public purposes, was held to be a case cognizable by the Small Cause Court, in which special appeal was barred by Section 27 Act XXIII of 1861.

Such a case having been tried by the Moonsiff of a station where there was a Small Cause Court, and heard in appeal by the District Judge, the High Court, under the powers described in Section 15 of the Charter Act, set aside the decisions of both the lower Courts as void for want of jurisdiction.

Where some of the defendants in such a suit are living within the jurisdiction of a Court of Small Causes, that fact is sufficient to bring the case within the category of suits cognizable by such Court.

Mitter, J.—This suit was instituted in the Court of the Moonsiff of Serampore, for the recovery of a certain sum of money alleged to have been improperly taken away by the defendants from the Collector of Hooghly, who held that money in deposit on account of certain lands taken by Government for public purposes. The Moonsiff gave a decree to the plaintiff, but this decree has been reversed by the Judge on appeal for the reasons set forth in his decision.

The defendants, who are now special respondents before us, object that there is no special appeal in this case, inasmuch as it is a case for a sum of money below 500 rupees.

I am of opinion that this objection is sound. The suit was clearly a suit cognizable by the Small Cause Court, and, as the amount involved is below 500 rupees, no special appeal can lie to this Court under the express provisions of Section 27 Act XXIII of 1861.

But I am further of opinion that there has been a failure in the investigation of this case by the Lower Appellate Court. That Court seems to have paid no attention to the chittahs prepared by the resumption authorities on the former occasion. Neither the taedad nor the resumption decree gives the boundaries it is true ; but this defect is not to be found in the chittahs. The boundaries given in this last document bear a very close resemblance to the boundaries of the disputed lands as they are described in the plaint ; and it seems that the question of identity might have been placed beyond all dispute by an actual testing of the chittahs in the *locus in quo*. Besides, the Judge seems to have misunderstood the purport of the evidence given by the plaintiff's witnesses.

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Those witnesses have not said that the plaintiff was in possession for 6 or 7 years only.

What then is the proper order which we ought to pass in this case? I am of opinion that the decision of both the lower Courts ought to be set aside for want of jurisdiction, under the powers vested in this Court by the 15th Section of the Charter Act. If this suit was really cognizable by the Court of Small Causes, neither the Moonsiff of Serampore nor the Judge had any jurisdiction over it, inasmuch as there is a Small Cause Court at Serampore. It has been urged that one of the parties to this suit, namely, Mr. Quentin, was living in Chinsurah at the time of its institution, and that the Small Cause Court of Serampore had, therefore, no jurisdiction over it. I am of opinion that this objection is not valid. Mr. Quentin has been made a defendant as the manager of an estate belonging to a minor; and it is, therefore, doubtful whether Mr. Quentin or the minor is to be considered as the real defendant. But be this as it may, the suit would still be cognizable by the Small Cause Court of Serampore, even if we treat Mr. Quentin as the real defendant. The other defendants were living within the local limits of the jurisdiction assigned to that Court, and this fact would be sufficient to bring the suit within the category of "suits cognizable by the Small Cause Court," as described in Section 6 of Act XI of 1865. Act XI shows that the Courts of Small Causes are competent "to try all such suits as those described in 6." and Section 12 gives exclusive jurisdiction to those Courts to try those suits. This point has been already decided by a Division Bench of this Court in the case of Khoda Buksh Mistree, reported in the 9th Number of the 14th Volume of the Weekly Reporter, page 156.

For the above reasons, I would set aside the decisions of both the lower Courts as void for want of jurisdiction. The plaintiff ought to pay the costs of the defendant.

Jackson, J.—I concur. I think that the plaintiff should bear the costs of this litigation so far as he has brought his suit in the wrong Court, and he asks us to quash all the proceedings to enable him to bring his claim in the right Court, and because the whole litigation has been caused by his own neglect to look after his own interests before the Collector.

The 1st March 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover *Judges.*

Minor's estate—Manager—Section 7 Act XL of 1858.

Case No. 461 of 1870.

Miscellaneous Appeal from an order passed by the Judge of Midnapore, dated the 2nd December 1870.

Kalee Pershad Singh, *Appellant,*

versus

Poorno Debia (Petitioner) *Respondent.*

Baboos Ashootosh Dhur and *Taruck Nath Sein* for Appellant.

Mr. R. T. Allan and *Baboo Romesh Chunder Mitter* for Respondent.

Under Section 7 Act XL of 1858, a manager appointed to the estate of a minor cannot in any way get rid of or resign that trust without the permission of the Court, and without duly accounting to his successor for all monies received and disbursed by him.

Kemp, J.—THE appellant before us is the uncle of the respondent, who has been found on the evidence by the Judge to be a minor. The Judge also found on the evidence that the respondent will not be of age until September 1871. The Judge's decision on this part of the case is a very careful one. He has thoroughly sifted the evidence, and we may say that no attempt has been made by the pleader for the appellant to show that the Judge has come to a wrong conclusion on this part of the case. The Judge finds that the appellant has been guilty of a gross breach of trust in the management of this estate, inasmuch as admitting that his statement is correct, namely, that the minor was of age when he alleges that he made over the accounts of the estate to him, he could only have just arrived at majority; and under such circumstances he was bound to exercise every precaution and to act in strict good faith towards his ward. The Judge, therefore, finding that the conduct of the appellant had been such as to render it necessary to remove him from his position as manager of the estate of the minor, has directed his removal and has also called upon him to account for all sums received and disbursed by him during the time he was in charge of the estate, within two

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weeks from the date of the order; the account to be rendered to be supported by vouchers. The ryots were directed by proclamation not to pay their rents to the appellant, and the minor was directed to bring in and deliver into Court all the accounts and papers in his hands which he may have received from his late guardian. We are of opinion in this case that the evidence which has been adduced by the appellant to prove the delivery of accounts to the minor is not evidence upon which the Court can rely. Taking the appellant's case, it is clear from his own admission that the respondent could only have been some two or three months more than 18 years old when the alleged delivery of accounts was made. Now, as he was the uncle of the minor, and was placed in a fiduciary position towards the minor, the Court is entitled to expect *uberrima fides* from a person in such a position.

In this case, we find on the examination of the appellant himself that at the time when he alleges that he made over the accounts of the estate to his late ward, he took no precaution whatever to have that ward well advised as to what he was doing; no attempt was made to explain the accounts to him; nobody was present on his behalf to advise him. The alleged transaction took place in the presence of two ryots and of some connection of the minor who admittedly could neither read nor write.

Now, although the appellant is not bound under Section 16 to deliver accounts into Court periodically, he not having been appointed under Section 10 of the Act, there can be no doubt that he was bound to retain in his possession, if he delivered over as he states all the accounts to the minor on his arrival at majority, copies of those accounts to enable him to satisfy any demand which his late ward or any other party might make against him. Under Section 7 of the Act, if a manager be appointed and he seeks to denude himself of the trust imposed upon him, he cannot in any way get rid of or resign that trust without the permission of the Court, and without duly accounting to his successor for all monies received and disbursed by him. In this case, we find that the appellant himself admits that he was in charge of the minor's estate from the year 1268 to the year 1276, and that a sum of 80,000 rupees appeared on either side of the account; and yet he would ask the Court to believe that dealing with a boy who, on his own admission, had only just arrived at majority, and who is, as found by the Judge, of very weak intellect, he made over to that boy accounts covering transactions amounting to over 80,000 rupees and extending over a period of 8 years, without retaining in his hands a single copy or voucher which would enable him to meet any demands that might afterwards be made upon him by the respondent. We think, considering the whole case and looking to the evidence adduced, that the appellant has been very properly dismissed from his office, and that the Judge has passed a very proper order in directing that he should be compelled to render an account of his stewardship. Of course, it is not for us to say at this stage of the case what course ought to be pursued in carrying out that order. Section 22 provides for that. The Judge in the exercise of the discretion may impose upon the appellant a fine not exceeding 500 rupees, and may also commit the recusant guardian to close custody until he shall consent to deliver his accounts.

We dismiss the appeal with costs.

The 14th April 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Possessory suit—Evidence.

Case No. 2278 of 1870.

Special Appeal from a decision passed by the Officiating Additional Judge of Chittagong, dated the 8th July 1870, *reversing a decision of the Moonsiff of that District, dated the 10th September* 1870.

Lukhee Chunder Chuckerbutty (Plaintiff) *Appellant,*

versus

Ramdhun Shaha and others (Defendants) *Respondents.*

Baboo Grish Chunder Ghose for Appellant.

Baboo Aukhil Chunder Sein for Respondents.

In a suit to recover possession of certain land on the allegation that it was part of plaintiff's jote jumma, which had been previously held by his father and mother, plaintiff's inability to substantiate an alleged

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pottah was held to be no reason why he should not be permitted to fall back upon other evidence, *e. g.*, possession by his father under a talookee jote title.

Jackson, J.—We think that this case must be remanded to the Judge for re-consideration. The plaintiff brought this suit to recover possession of certain land alleging that it was a portion of his talookee jote; that his father had been in possession of it for a long time back; that after the death of his father his mother took possession of it on behalf of the plaintiff, but that she left the neighbourhood in the year 1267, B. S., corresponding with 1222, M. S.; that he on arriving at full age in the year 1230 returned to the spot and endeavoured to obtain possession, when he found that the defendants were in possession of the land and they would not give it up: he therefore brought this suit.

The defendants denied that the plaintiff's father or his mother had ever been in possession of the land, and they alleged that the land was settled with them by the zemindar in the year 1266, B. S.

The first Court found in favor of the plaintiff on all the points and gave him a decree.

The Additional Judge, on appeal, has given a distinct decision solely upon one portion of the documentary evidence put forward by the plaintiff. The plaintiff had alleged that two years before his mother left the disputed land, she had obtained a pottah from the zemindar confirmatory of her husband's original title, by which also some additional land was given to her. This pottah was denied by the defendant, and the Judge has come to the conclusion that this pottah is not to be trusted and that he does not believe the genuineness of it. But he goes on to say that as the plaintiff has failed to substantiate this pottah, he considers that the plaintiff has no right to fall back upon any other evidence; and he therefore declines to go into any other evidence whatever, and he has accordingly dismissed the plaintiff's suit.

It is manifest that such a decision is wrong. It does not follow that if the plaintiff is entitled to recover the land, he must lose it because one portion of the evidence in support of his title is rejected. If the plaintiff can prove that his father was all along in possession of this land under a talookee jote title, and that he is still entitled to recover it, there seems to be no reason why he should not recover because he is unable to substantiate the pottah of 1220.

We find also that the Additional Judge has not distinctly decided the question of limitation. He says:—"If the oral evidence "given by the plaintiff's witnesses that he "was in possession after his father's death "can be taken to mean that he was in possession through his mother or guardian, "then there is evidence adduced on the "plaintiff's side that he was in possession "within 12 years." He then goes on to say:—"I am not prepared, without further consideration, to determine that the "plaintiff was certainly within the preceding 12 years in possession of the land in "suit."

As limitation has been pleaded in this case it is for the Judge first to decide the question of limitation, and he should decide it after considering the whole of the evidence both for the plaintiff and for the defendant. If he is not satisfied that the plaintiff has been in possession within 12 years, the plaintiff's title has ceased. If, on the other hand, plaintiff has been in possession within 12 years, it is then for the Judge to consider whether he has given sufficient evidence of his title under which he is now entitled to recover the land, or whether the defendant's title is superior to that of the plaintiff.

Costs of this appeal will follow the result.

The 14th April 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Co-sharers — Limitation — Clause 13 Section 1 Act XIV of 1859.

Case No. 2546 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of East-Burdwan, dated the 4th August 1870, *affirming a decision of the Moonsiff of Mahomedpore, dated the 14th February* 1870.

Rajoo Singh (Defendant) *Appellant,*

versus

Gunesh Monee Burmonee (Plaintiff) *Respondent.*

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Baboos Anund Chunder Ghossal and *Mohendro Lall Seal* for Appellant.

Baboos Kalee Mohun Doss and *Luckhee Churn Bose* for Respondent.

In a suit under Clause 13 Section 1 Act XIV of 1859 to enforce a right to a share in immoveable property on the ground that it was joint family property, where plaintiff claimed as the heir of her husband, and defendant (who pleaded a title derived by purchase from one of the co-sharers) had been in adverse possession for 9 years:

HELD that under the Clause 13 plaintiff would have to prove that she had been within 12 years prior to date of suit in the enjoyment of a share of the profits or rents.

Kemp, J.—THIS is a suit under Clause 13 Section 1 of Act XIV of 1859 to enforce a right to a share in immoveable property on the ground that it is joint family property. The plaintiff claims the share in suit as the heir of her husband. It appears that the husband has been absent some 35 years. The statement of the defendant, special appellant before us, was that his title was derived by purchase from one of the co-sharers dated in 1266. It is clear that the defendant's admitted possession for nine years has been adverse to the plaintiff. Under the Section already quoted, the plaintiff had to show that she had received a portion of this estate within 12 years prior to the institution of the suit.

Both the Courts below, instead of trying the question of limitation raised by the defendant's statement under the Section already quoted, have held that because "the land "under claim formed a portion of a joint "estate, therefore the possession of one of "the co-sharers could not deprive the other "co-sharers of their rights and interest for "want of their possession." These, we may mention, are the words used by the Subordinate Judge. We think that this decision is clearly wrong in law, and that the case must be sent back to the Subordinate Judge to try the question of limitation raised in the defendant's answer. According to the provisions of Clause 13 Section 1 of Act XIV, the plaintiff will have to prove that she had been within 12 years from date of suit in the enjoyment of a share of the profits or rents of the joint estate. Failing to do so, her suit should be dismissed. Costs to follow the result.

The 14th April 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Right of easement—User—Interruption—Acquiescence.

Case No. 2560 of 1870.

Special Appeal from a decision passed by the Officiating Judge of East-Burdwan, dated the 11th August 1870, *affirming a decision of the Moonsiff of Pothna, dated the 25th February* 1870.

Heera Lall Kooer (Plaintiff) *Appellant,*

versus

Purmessur Kooer and others (Defendants) *Respondents.*

Baboo Luleet Chunder Sein for Appellant.

Baboo Nil Madhub Sein for Respondents.

A person claiming a right of easement over another's property, is bound to prove continuous enjoyment without interruption not merely by presumption but as of right.

Wrongful interruption does not destroy a right of user where steps are immediately taken to assert the right, but if this is not done for a length of time acquiescence may safely be presumed.

Glover, J.—THE plaintiff sues to have opened up a "doura" or watercourse, through which he alleges that the surface water of his fields flows over the defendants' lands into a tank, likewise the property of the defendants. His cause of action he states to be the planting by the defendants of certain bamboos on the intervening lands, which bamboos are now grown up and oppose an obstacle to the free flow of the water into the tank.

The defendants pleaded limitation. They admitted that there had been a passage through which the surface water of the plaintiff's land once flowed, but averred that it had been closed for more than 40 years, and that the plaintiff's water now escaped through another channel in a southerly direction.

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The first Court dismissed the plaintiff's suit, because there was no proof of user.

On appeal the Judge remanded the case for a local enquiry, and to ascertain whether the right sued for had been exercised at any time within 12 years before suit. The first Court held a local enquiry by an Ameen, and again dismissed the suit for very much the same reasons as it had been dismissed before, and the Judge upheld that decision.

The only point pressed upon us in special appeal is that the real issue in the case has not been determined; that on the remand the issue fixed was whether there had been any user of the easement on the part of the plaintiff for 12 years preceding the suit, and that the case has been decided against him on the plaintiff failing to prove that he had had a *continuous* user of the water-course. If this issue, as stated by the special appellant, was the one which was really fixed on remand, all I can say is that it was not the proper issue to have been tried. A person claiming a right of easement over another person's property is bound to prove that he has had the continuous enjoyment of that easement without interruption, and not merely by the permission of the opposite party but as of right. In this case, it has been found as a fact on the evidence that the plaintiff has not been able to prove any such continuous user. In fact, from his own statement of the case, it is very clear that for six years at all events he has had no enjoyment whatever of the alleged right. The lower Courts were, therefore, right in dismissing the suit, and the special appeal must be dismissed with costs.

Kemp, J.—I concur in this judgment. It appears that the plaintiff admittedly for six years had no right of user in the channel in question. If the interruption had been a wrongful one, the plaintiff's right of user would not have been destroyed, if he had taken steps at the time of that wrongful interruption to assert his right; but when we have him for six years taking no steps whatever, we may safely presume that if he had any right of easement at any time over the defendant's land, he aquiesced in that long interruption and in the consequent loss of any right that he may have possessed.

The special appeal is dismissed with costs.

The 15th April 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Small Cause Courts — Application under Section 21 Act XI. 1865— Default.

Reference to the High Court by the Judge of the Small Cause Court at Jessore, dated the 27th January 1871.

Gopal Chunder Roy, *Plaintiff*,

versus

Arman Shaikh, *Defendant*.

Case — An application having been made to a Small Cause Court Judge to set aside an *ex-parte* decree, the Judge found from the record that the defendant had been personally served with summons. He accordingly requested the pleader to tell his client to be present 3 days after to be examined. As neither applicant nor his pleader was present on that date, the Judge rejected the application without issuing notice on the opposite party. A second application was then made under Section 21 Act XI of 1865.

HELD that the communication to the pleader was an informal proceeding, and as applicant had not been summoned in due form his application should not have been rejected in his absence, and the Judge was bound to hear the second application.

Case—THIS is a second application under Section 21 of Act XI of 1865 to set aside the decree passed *ex-parte* against the defendant, and the question arises whether it ought to be admitted.

The first application to set aside the decree was made on the 16th instant and it was verified; but as I found on looking at the record of the case that the defendant had been personally served with sommons, I requested the pleader to tell his client to be present in Court on the 19th instant to be examined touching the matters referred to therein; but as neither he nor his pleader was present on that date, I did not cause notice to be issued calling on the opposite party to show cause and rejected the application.

It is now urged that the second application ought to be admitted under the ruling of the Full Bench in Nussuroodeen Khan *versus* Indur Narain Chowdhry, Weekly Reporter, Civil Rulings page 93, Volume V; but it appears to me that that ruling will not apply,

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as the present is not an application for a *new trial* but an application to *set aside an ex parte judgment*, and it has been held in a recent case, Dhunnoo Chowdhry *versus* Bukshun and another, Weekly Reporter, Civil Rulings, page 266, Volume XII, that the case of a review is very different from that of an application for new trial under Section 21 of Act XI of 1865.

It may be urged that as the first application was verified, I ought to have issued a notice to the opposite party to show cause why the *ex-parte* judgment should not be set aside without calling on the application to appear and satisfy the Court that summons was not served on him; but I do not think this can be urged with any show of reason, as by Section 38 of Act XXIII of 1861 the procedure prescribed by Act VIII of 1859 shall be followed, as far as it can be, in all miscellaneous cases and proceedings instituted after the passing of the Act; and I apprehend that every Court is bound to satisfy itself in the mode it thinks proper of the truth of the statement set forth in an application or petition. Besides, it appears to me that an application to set aside an *ex-parte* decree is not an application that requires to be verified either by the Code of Civil Procedure, Act XI of 1865, or any other law. The only applications besides plaints, written statements, and petitions to sue in *formâ pauperis*, are applications for discharge from arrest or confinement made either under Section 273 or 280 of the Code.

For the above reasons, I think the second application should not be admitted; but as my mind is not wholly free from doubt, I shall not dispose of the application till receipt of the opinion of the High Court on the question whether the application ought to be admitted or rejected.

The judgment of the High Court was delivered as follows by

Norman, C. J.—I do not understand the proceeding to which the Judge of the Small Cause Court adverts. By Section 21, in cases of decrees passed *ex-parte* within 30 days after the execution of process, the party may give notice of his intention *to apply to the Court* at its next sitting for an order to set aside the decree.

On the application being made at that sitting—which the Act contemplates as an application to be made in the presence of the decree-holder—if it be proved that the summons was not duly served, or that the defendant was prevented from appearing, the Court may set aside the decree.

I do not see how the case was before the Judge on the 19th, or under what authority he could reject an application which was not made to him.

The communication to the pleader may have resulted in the debtor's making his appearance, but it was an informal proceeding. The Judge ought not to have proceeded in the absence of the party and his vakeel. The application, which the party against whom the decree passed had a right to make under Section 21, appears to me not to have been disposed of by the order on the 19th. I think, therefore, that the Judge was bound to hear the second application if it was within time.

Loch, J.—It appears to me that the verified petition presented on the 16th was the application for a new trial which the applicant was required to make under the provisions of Section 21 Act XI of 1865 for a new trial. The Judge of the Small Cause Court after examining the record, which for some cause he was not able to take up on the day when the petition was presented, thought it necessary before serving notice on the opposite party to show cause to examine the applicant; and as he was not in attendance, he told his vakeel to produce him on the 19th; but as neither did attend on that date, he rejected the application. I agree with the Chief Justice in thinking that this proceeding was informal. If the Judge required the attendance of the applicant, he should have summoned him in due form; but having failed to do so, he should not have rejected the application in his absence. The present application should be heard.

The 17th April 1871.

Present:

The Hon'ble W. Ainslie and G. C. Paul, *Judges.*

Mahomedan Law—Legitimacy—Presumption—Dowry.

Case No 185 of 1870.

Regular Appeal from a decision passed by the Subordinate Judge of Tirhoot, dated the 31st May 1870.

Bibee Wuheedun (Defendant) *Appellant,*

versus

Syud Wusee Hossein and others (Plaintiffs) *Respondents.*

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Baboos Unnoda Pershad Banerjee and *Chunder Madhub Ghose* for Appellant.

Mr. R. E. Twidale for Respondents.

According to Mahomedan Law, the acknowledgment of a father renders a son or daughter a legitimate child and an heir, unless it is impossible for the son or daughter to be so; and the acknowledgment need not be of such a character as to be evidence of marriage.

In a suit against a Mahomedan widow for property in which she sets up a claim to have a lien on account of her unsatisfied dower, she is bound to prove the existence and amount of her dower in a clear and satisfactory manner.

Paul, J.—In this case two of the plaintiffs, Syud Wusee Hossein and Syud Nubbee Hossein, alleging themselves to be the sons of one Tusuddook Hossein, together with other persons who are the heirs of the person who purchased a portion of their claim, sued the defendant, Bibee Wuheedun, who is admittedly the widow of the deceased Tusudook Hossein, and an infant son, for possession of a 9 annas and 4 pies share out of the entire 16 annas of the estate of Tusudook Hossein, otherwise called Meer Suleem.

It appears that Tusudook Hossein died on the 27th February 1863. Upon the application for a certificate after his death by Bibee Wuheedun, some opposition was entered on behalf of the grand-mother of the present plaintiffs. That opposition seems to have failed, and no proceedings appear to have been taken from that time until the time of the institution of this suit, namely, the 1st September 1869.

This lapse of time, had the case of the plaintiffs been at all doubtful, would have tended to confirm any suspicions which might have arisen as to its truth, and would thus have rendered the plaintiffs' suit extremely hazardous; but it appears to us that this lapse of time has no material bearing on this case, and may be sufficiently accounted for on the ground that these two plaintiffs, being penniless, were unable to sue for their share of the estate until they were taken by the hand by some such person as Booniyad Ali, by whose assistance they were enabled to bring this suit.

The defendant, Bibee Wuheedun, denies that those two plaintiffs were the sons of Syud Tusuddook Hossein, or that they were acknowledged by him as his sons. She alleges in the 3rd paragraph of her written statement, that a woman by the name of Shobratun came to Mozufferpore and was employed by the mother of Tusuddook Hossein, and afterwards by Tusuddook Hossein himself, as a cook; that Shobratun was a common prostitute, and that she was in the habit of going out of the house (meaning the house of Tusuddook Hossein) and coming back when she liked; that two children were born to her from illicit intercourse, and that the woman having died shortly after leaving behind her two children, the master of the house maintained them out of charitable motives, but that notwithstanding this they were not his sons. It appears to us that the 3rd paragraph of the written statement contains a statement of circumstances from which it may be reasonably inferred that the two abovenamed plaintiffs were in reality the children of Tusuddook Hossein by Shobratun. If this inference cannot be fairly drawn from the facts stated in the 3rd paragraph of the written statement, we consider we are entitled at all events to deduce from those facts the following inferences; that Tusuddook Hossein, if he were so minded, had many opportunities of sexual intercourse with Shobratun who lived in his house, and that the two children who were born in that house might have been the children of Tusuddook Hossein. These inferences clearly lend an air of probability to the case made out by the plaintiff's witnesses.

Now, the first point in issue in this case is whether the two first named plaintiffs were the legitimate sons of Tusuddook Hossein, and entitled to inherit the share of the estate of Tusuddook Hossein claimed in the plaint. On this point, considerable evidence has been offered by the plaintiffs; and Baboo Bhooputtee Roy, who is a Judge of great experience and intelligence, considers the evidence which has been adduced to establish the parentage of the first two plaintiffs has been given by highly respectable zemindars and relatives of Tusuddook Hossein whom he thoroughly believes, and he holds the first point in issue, that the two first plaintiffs were the legitimate sons of Tusuddook Hossein, fully and satisfactorily proved. Without desiring to say that an Appellate Court must in every case place implicit confidence in the estimate which a Judge of a subordinate Court may form of the evidence on which he bases his judgment, we are of opinion in this case we are entitled to say that this Court is fully justified in placing the greatest possible reliance upon the careful consideration which has been accorded to the evidence and the proper finding which has been come to by the lower Court. It has been well observed by the Subordinate Judge that "the evidence of these respectable wit-

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"nesses men of independence and old friends "and near relatives of the deceased, appears "to me to be fully reliable, and their evi- "dence is clear enough to prove the legiti- "macy of plaintiff's birth."

Now, the evidence adduced by the plaintiff has been read and commented upon before us at some considerable length. Beyond some verbal criticisms and the exposition of certain minor improbabilities and certain petty inaccuracies in the evidence of the witnesses called by the plaintiffs we have heard nothing whatever calculated to impress us with the accuracy of the position taken up by the appellants that we ought to discredit the testimony of the plaintiffs' witnesses.

We have already in the course of the argument discussed at length the reasons which induce us to believe the evidence adduced by the plaintiffs. It is, therefore, unnecessary to state them again at any great length, but we may say broadly what the evidence of the plaintiffs' witnesses establishes. The evidence of the plaintiffs' witnesses establishes in the first place that Tusuddook Hossein, whilst he had a family dwelling-house at Rajasan, used to carry on the business of a karpurdaz at Burhampoora, where he ordinarily resided when he was engaged in his business; and that, within half a mile of Burhampoora Islampore, he had another house where Shobratun used to live and where in all probability these two boys were born; and that this state of things continued to exist for a number of years, until in fact the death of Tusuddook Hossein.

It seems to us reasonable to conclude from the facts thus satisfactorily established, that these two boys were born of Shobratun from Tusuddook Hossein, and that the wretched and unhappy attempt to make out that Shobratun was a common prostitute has wholly failed. We should be sorry to say that in this country where a false case has been attempted to be set up by a defendant, it necessarily tends to throw discredit on the rest of the defendant's case: still when we find that such an utterly false allegation has been made the basis of the defence and is found to pervade the whole of the case set up by the defendant, it seems to us that the falsity of such an important statement throws a considerable amount of suspicion on the truth and integrity of the case sought to be established.

Having arrived at the conclusion that Shobratun was not a prostitute, that she lived in the house of a respectable person, and that she gave birth to these children there, it may be fairly presumed that they were the legitimate offspring of Tusuddook Hossein. The conclusion last stated as a matter of a fair presumption, assumes the form of certainty when we consider what is further established by the evidence of the plaintiffs' witnesses, namely, that Tusuddook Hossein acknowledged to his friends and relatives that these children were his and treated them in all respects as his own sons.

The plaintiffs' case, therefore, as launched by them in substance shows that Shobratun lived in a house belonging to Tusuddook; that Tusuddook had intercourse with Shobratun; that the two children were born to her by Tusuddook; and that Tusuddook took them about with him to the house of his friends and relatives, and before them acknowledged these children to be his sons. Are not these facts sufficient, according to Mahomedan Law, to make out the claim of the plaintiffs'? It seems to us that there is no resisting the conclusion that they are amply sufficient for that purpose.

But the claim of the plaintiffs is attempted to be resisted first by Baboo Unnoda Pershad Banerjee in the arguments addressed to us, on the main ground that the evidence of the plaintiffs' witnesses is untrue, or at all events unsatisfactory; and we have already observed that the lengthened arguments so put forward have not produced the slightest impression on our minds as to the untrustworthiness of the evidence of the plaintiffs' witnesses. As this case is one of importance, it is necessary shortly to consider the evidence the truth of which has been so hotly contested.

The first witness is a respectable zemindar, and not connected with either party. He speaks to the fact of constantly visiting Tusuddook Hossein and Tusuddook Hossein visiting him: of seeing these children often with the father, and learning from his lips that they were his children.

Some other witnesses, who are relatives of the parties, speak to the same effect. In particular, one Meer Yusoof Ali, who is a cousin of Mussamut Wuheedun, speaking from his own knowledge, says that these two boys were the sons of Tusuddook Hossein *alias* Meer Suleem; that seeing that the children of his first wife did not survive, he advised Tusuddook to marry a second time; that although he was not present at the marriage, he speaks to the fact of this second wife giving birth to the plaintiffs. Being a relation of the

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defendant his interest would be all the other way; but no reason has been suggested to lead us to suppose that this man is stating anything but the truth.

Then there are other witnesses who are not relatives of either party. One is Meer Koorban Ali, who is a vakeel. We must take it that he is an honest witness, as his evidence has not in any way been impugned by cross-examination. He swears to the fact of these two boys having accompanied Meer Suleem on the occasion of visits made to him by Meer Suleem when invited; and he also speaks to their being the children of Tusuddook Hossein. We cannot have better evidence of Tusuddook Hossein treating these children as his sons, than his taking them about with him to his friends and relatives and calling them his sons.

Turning to the evidence for the defence, we find that one of their witnesses, Munraj, swears that Meer Suleem used to treat the plaintiffs as his sons. All that the other witnesses whom the defendants have called say is that they do not know whether they are the sons of Meer Suleem or not.

There seems, therefore, to be no doubt that the plaintiffs were the children of Tusuddook Hossein, and this conclusion is borne out by the circumstances to which we have already adverted. But in point of fact, it appears to us that the mere acknowledgment by the plaintiffs is quite enough. It is contended, however, by Baboo Chunder Madhub Ghose (who followed Baboo Unnoda Pershad Banerjee) contrary to the current of authorities on the subject, that mere acknowledgment is not enough.

Although we do to a great extent respect the arguments of pleaders, we are not bound even to tolerate them when urged in direct contravention of the spirit of the Mahomedan Law, and in the teeth of the current of authorities on the subject of the sufficiency of an acknowledgment by the father to be found in Moore's Indian Appeals and in the Weekly Reporter. We will turn first to a decision of the late Chief Justice, Sir Barnes Peacock, and Mr. Justice L. S. Jackson, reported in V Weekly Reporter, page 135, in which it was held that the acknowledgment of a father renders a son or daughter a legitimate child and an heir, unless it is impossible for the son or daughter to be so, and this is also borne out from certain passages cited in Baillie's Digest of Mahomedan Law.

Here, there was a clear acknowledgment by Tusuddook Hossein that these children were his. Is there any thing in the circumstances to show that it was impossible for the plaintiffs to be his children. The general circumstances of this case altogether remove the bar of impossibility. The very statement which the defendant makes lends an air of probability to the assertion that they were his children, and coupling that with the following facts,—that the first wife had children who died, that Tusuddook Hossein had been advised by his relatives to marry another wife, and that Shobratun lived with Tusuddook Hossein and had children whilst living in his house,—it is certain that the two first plaintiffs must have been his children.

But it is argued contrary to the authorities as before observed that an acknowledgment by a father is not enough unless it is of such a character that it is evidence of marriage. We are not aware that the doctrines of the Mahomedan Law compel us to go so far as that. There is an authority in the XI Weekly Reporter, page 426, which expressly rules as follows.—"According to Mahomedan Law, a child born out of wedlock, if acknowledged, acquires the status of legitimacy." The decision of Mr. Justice Kemp, which contains the above passage was confirmed on appeal before three Judges, XII Weekly Reporter, p. 497. The idea of legitimation according to Mahomedan Law is fully supported by the observations of the Privy Council in 8 Moore's Appeals, page 159.*

Assuming, however, that the circumstances proved should be of such a character as to lead to a fair conclusion that a marriage did take place between the parties for the purpose of making the admitted off spring legitimate, we find that in this case there exists a fair and reasonable presumption of a marriage having taken place although there is no direct evidence. We proceed now to consider how the presumption of a marriage having taken place is made out. A very good reason existed why Tusuddook Hossein should contract a second marriage. The witnesses say, and Meer Yusoof Ali in particular says, that Tusuddook Hossein had lost all the children of his first wife. It was, therefore, necessary that he should, in order to have progeny, get married a second time. But the question is, did his choice fall upon Shobratun? It is said that Shobratun was a woman of a very low stamp, and that it was not at all likely that the choice would fall upon her. But it is in evidence that she lived in the house of this man at Islampore, and it is not

* 3 W. R., P. C., p. 37.

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likely, that having a wife of respectability at Rajasan and having had to settle or pay a large sum of money as her dower, he would contract a second marriage of a similar character, and so have to settle or pay another large sum as dower, and treat his second wife with the same consideration and provide her with the same comforts as his first wife. Under the circumstances it may well be that when the deceased made up his mind to take a second wife, he resolved that he should marry one from an inferior class.

But it is further said that if she had been the wife of Tusuddook Hossein, she would not have been treated as a menial servant in the house at Islampore where she resided. Whatever may have been the original character in which she entered that house, we do not think it likely after the woman had borne two children she would any longer be treated as a menial servant. Even if we assume that she was at one time a menial servant, considering the probabilities we have adverted to in conjunction with the following facts, *i. e.*, that Shobratun continued to reside in the house after she had given birth to these children, and that the co-habitation of the parties lasted till the death of Shobratun, we think we shall be within the principle of the decision of the Privy Council to be found in VIII Moore's Indian Appeals, if we hold that a fair and necessary presumption arises that the parties went through the form of marriage in order to avoid the sin of fornication. Under all systems of law the presumption is in favor of morality, and particularly in the Mahomedan Law is the presumption strong in favor of morality and against immorality; and when, as in this case, all the circumstances make in favor of the presumption that a marriage was celebrated we have no hesitation whatever in believing that some kind of ceremony was gone through.

We will now advert to the arguments which have been urged against the supposition that a marriage had taken place. In the first place, it is said that Shobratun did not live in the family dwelling-house of Tusuddook Hossein at Rajasan, and it is argued that that circumstance tends to show that the marriage did not take place. But it appears to us that that proves nothing of the sort, because it is not likely that Tusuddook Hossein while following the ordinary dictates of prudence would venture to bring into the family dwelling-house such a woman as his second wife, and so introduce an element of discord.

Then it is said that the relatives of Tusuddook Hossein did not visit his second wife. But we do not see that the relatives were called upon to come a long way from the family dwelling-house at Rajasan in order to visit this woman. If the reason which would account for the senior wife not living with the junior wife is of any force, the same reason would operate in keeping the relatives apart.

Then it is said that at the time of various ceremonials, visitors were not invited to attend. But relatives are not invited on the occasion of every ceremony. It is only an important occasions, that relatives are invited. Now we do not see what important occasions could have well transpired during the infancy of these two boys comparatively humbly born.

There is no doubt that Tusuddook Hossein acknowledged these boys as his sons, and we cannot understand why the frequent and public acknowledgment of the two first plaintiffs as his sons should have been made by Tusuddook Hossein, unless the fact was that he was their father and he recognized them as his legitimate progeny. If these boys were not his sons, it must be taken that Tusuddook desired to deceive his friends and relatives by declaring them to be his sons without any sufficient reason for so doing. Such a conclusion would be manifestly absurd.

It appears to us, therefore, that no valid ground whatever has been shewn for impugning the reasons which the Subordinate Judge has assigned for holding that the plaintiffs have proved themselves to be the sons of Tusuddook Hossein.

Then as to the 2 annas of mouzah Mawel, it is clear that the title to this property stands in the name of the defendant Mussamut Wuheedun, and the plaintiffs have failed to prove that these 2 annas belonged to their father. Consequently, the decision of the lower Court to the effect that Tusuddook Hossein had the beneficial interest in this property does not appear to be borne out by the evidence, and must therefore be reversed.

It is also clear that as to items Nos. 25, 26, and 27, that they are decrees against certain debtors which have not been yet realized. The plaintiffs, therefore, can only obtain a declaration that they are entitled to their shares in those decrees.

As to the dower, the matters stand thus. An issue was raised as to whether mouzah Mawel and the money in deposit in Chummun Lall's kotee were given to Mussamut

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Wuheedun in lieu of her *den mohur*. We take it that by that issue it was intended to put the defendant to proof of her dower, its amount, and of the fact alleged that certain property was given in lieu of dower. It is argued, however, that the form of the issue assumes the dower to have existed. We do not agree with that contention, because if that were so there would have existed something on the record to show that the dower had been admitted. The Judge did not so understand the issue he had raised, for he holds that the defendant had adduced no evidence to prove her claim to dower or what the estate of Meer Suleem had to pay. It is contrary to all experience to believe that the plaintiffs would have admitted the dower simply on the allegations made by the defendant, there having been nothing set up to indicate that the dower which was alleged to have been made many years ago had remained unsatisfied. For these reasons, we think the dower was not admitted. It was the duty of the defendant, as she relied upon her dower, to have proved its existence and amount in a clear and satisfactory manner. This she has not chosen to do. She has merely alleged her lien for dower in respect of two items of property, namely, the 9,871 rupees deposited in Chummun Lall's kotee and a 6 annas share of mouzah Mawel. On this point the Subordinate Judge disbelieves the witnesses, and we think he is right in doing so, because beyond the evidence of one or two common witnesses there is no proper reliable evidence to prove that these two items of property had been given in lieu of the dower. If the money in Chummun's kotee had been assigned over to Mussamut Wuheedun, why was not some person in Chummun Lall's kotee called to establish this fact? We think the evidence on this point is of the most meagre and unsatisfactory character; and it appears to us there is no reason for concluding that there had not been a *bond fide* sale of the 6 annas of the property. That being so, we do not think it advisable to allow the parties at this stage of the proceedings to produce fresh evidence in order to show that the dower existed and has not been satisfied otherwise than by the assignment of the property mentioned, which has not been proved. If the defendant had chosen, she might and ought to have proved these matters at an earlier stage of this suit. We pass no opinion as to whether the dower has been satisfied or not. We have only to remark that supposing the dower not to have been satisfied by the deceased, it must be remembered that the widow claiming the dower has been many years in possession of the estates left by the deceased, and that she has either paid herself the whole or a substantial portion of the claim. At all events, she will probably be entitled to set off as against the wasilat which the plaintiffs will endeavour under this decree to obtain from her any portion thereof which may have been appropriated towards her dower.

On the whole, then, the decision of the lower Court will be affirmed with all costs, the decree being modified only with regard to the 2 annas of mouzah mawel. The defendant Mussamut Wuheedun will be allowed to remain in possession of that share of the property. The order relating to the three decrees numbered 25, 26 and 27 in the plaint will also be amended, it being declared that the plaintiffs are only entitled to share in those decrees.

The 17th April 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Res adjudicata—Sections 7 and 10 Act VIII. 1859—Mesne profits—Interest.

Case No. 2504 of 1870.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 5th August 1870, *reversing a decision of the Subordinate Judge of that District, dated the 14th May* 1870.

Shib Kristo Dah (Plaintiff) *Appellant,*

versus

Abdool Sobhan Chowdhry (Defendant) *Respondent.*

Baboos Chunder Madhub Ghose and *Luckhee Churn Bose* for Appellant.

Baboo Oopendro Chunder Bose for Respondent.

Defendant, who received earnest-money, executed a deed of bynamah contracting to convey to plaintiff certain mourosee tenures and to complete the conveyance on a specified date; the value of the property was to be ascertained by local inquiry, pending which the consideration-money would be represented by a percentage on the profits per annum, subject to future adjustment. Defendant failed to perform his part of the contract and sold the property. Plaintiff then sued for specific performance, and eventually obtained a decree and under it possession. The present suit was brought by plaintiff to recover a sum of money as part of the

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consideration-money, which he would have been in a position to recover from the profits but for defendant's breach of contract, which deprived him of interest, as well as of a sum paid on account of rent due by defendant with interest,—all which he claims.

Held that as the breach of contract which is the basis of the present suit was the cause of action in the former suit, plaintiff ought under Section 7 of the Code of Civil Procedure to have included his whole claim in that suit. Having failed to do so, his present suit is barred.

Held that the present claim was not one for mesne profits coming within the purview of Section 10, but one for interest on sums advanced at different times.

Kemp, J.—THE plaintiff is the special appellant in this case. It is necessary to allude briefly to the previous litigation between the parties, for without doing so the position of the parties and the nature of the plaintiff's claim cannot be easily understood.

The defendant, on the 17th Pous 1269, executed a deed of bynanamah whereby he contracted to convey to the plaintiff certain mourosee tenures situated in Zillah Hooghly, and a certain sum was paid as earnest-money. It was also contracted that the deed of conveyance was to be completed on the 29th Magh 1269, and that the value of the property was to be ascertained on a local enquiry. It was assumed pending that local enquiry that a certain percentage on the profits per annum would represent the consideration-money; and it was stipulated that if the enquiry showed that the value was less, the consideration would be reduced in proportion; if more, it would be raised accordingly. The defendant failed to perform his part of the contract and sold the property to one Pearee Mohun Soor. The plaintiff then sued for specific performance of the contract, and after a protracted litigation obtained a decree and under that decree obtained possession.

The present suit is brought by the plaintiff to recover the sum of 2,998 rupees. The plaintiff states that he advanced 5,101 rupees on several dates, as part of the consideration-money, to the defendant Abdool Sobhan Chowdhry. He further states that he paid 229 rupees on account of rent due to the zemindar, which Abdool Sobhan failed to pay. He goes on to state that if Abdool Sobhan had carried out his contract, the plaintiff would have been in a position to recover from the profits of the property 8 per cent. upon the sum of 5,101 rupees, the consideration-money advanced by the plaintiff to the said Abdool Sobhan on various dates; that on the breach of the contract he has been deprived of interest on his money for 6 years 6 months and 17 days, amounting, with the sum paid on account of rent due by Abdool Sobhan with interest, to 2,998 rupees, for which the plaintiff brings this suit. In the plaint it is distinctly stated that the cause of action is the breach of the contract on the part of Abdool Sobhan, which occurred on the 29th Magh 1269. A plea was taken in bar to the hearing of the suit under Section 7 Act VIII of 1859. The first Court was of opinion that the suit was not barred and gave the plaintiff a decree. On appeal the Judge has held that Section 7 applies, and he has dismissed the plaintiff's suit.

In special appeal, we have to consider whether Section 7 applies or not; and also whether the claim in the present suit is for mesne profits so as to bring it under Section 10 or not.

Baboo Chunder Madhub Ghose, who has been heard for the appellant, has called our attention to two decisions to be found, one in the 5th Weekly Reporter, page 182, and the other in 8th Weekly Reporter, page 15. We take the decision in Volume 8 first. This is a Full Bench decision, and it contains an expression of the opinion of the late Chief Justice, Sir Barnes Peacock, to the effect that it is very inconvenient—and no doubt it is—that suits by reversioners should be brought against a number of defendants whose interests are altogether distinct from each other. In that case, the learned Chief Justice remarks that the validity of the different deeds under which the defendants held depended each upon its own merits. However, the decision did not turn upon that point,—it turned solely upon a question under the Mitakshara Law. Consequently, that decision in no way applies to the present case.

Looking to the decision in Volume 5, we think that that decision if any thing supports the finding of the Judge in this case; for the learned Judges who decided that case say that "Section 7 requires that all rights "arising out of the same cause of action "must be sued for together, but that Sec- "tion does not enact similar penalty for all "rights which may arise under different "dates and different causes of action."

The test, therefore, which we must apply to this case is the one which has been laid down in a case reported in 8th Weekly

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Reporter, page 11, Privy Council Decisions, as a test applying to all cases. Their Lordships observe that the correct test in all cases in which the question is whether Section 7 applies or not is this, namely, whether the claim in the new suit is in fact founded on a cause of action distinct from that which was the foundation of the former suit.

Now, looking to the plaint in this suit, it is clear that the cause of action was the breach of the contract. This is distinctly stated in the plaint, and the date of the breach of the contract is also given therein on which the cause of action accrued. In the former suit the same cause of action was the basis of the suit, namely, the breach of this very contract.

Section 7 says that every suit shall include the whole of the claim arising out of the cause of action. It is, therefore, clear that the cause of action being the same, the plaintiff ought to have included his whole claim in the former suit. But it is said that because Pearee Mohun was made a defendant in the former suit, and issues might have arisen between Pearee Mohun and the plaintiff in that suit, who is also the plaintiff in the present suit, therefore Section 7 does not apply.

We think that there is no force in this contention. The former suit was for specific performance as against the Mahomedan defendant. Pearee Mohun was of course made a party, because subsequent to the breach of the contract the Mahomedan defendant, who was the substantial defendant, had sold the property to Pearee Mohun. The main issue between the parties as tried by the Courts was whether the Mahomedan defendant had contracted to sell to the plaintiff or not, and whether or not he had broken that contract; and upon the finding of that issue depended whether the sale to Pearee Mohun was to stand or fall. It would not have been necessary to have gone further into that case as between the plaintiff and the Mahomedan defendant; because the plaintiff did not include, as he ought to have done, damages arising out of the breach of the contract. Of course, Pearee Mohun would not have had to pay the damages even if the issue had been raised. The sale to him was set aside and he had to pay his own costs, because he purchased the property with notice of the contract between the plaintiff and the Mahomedan defendant; but as between the Mahomedan defendant and the plaintiff, there was nothing to prevent the plaintiff from including in his claim any damages accruing from the breach of the contract entered into between the plaintiff and the said Mahomedan defendant. The plaintiff not having, under the terms of Section 7, included the whole of the claim arising out of the cause of action, and the present cause of action being the same as the cause of action in the former suit, we think that Section 7 clearly applies.

It is attempted to bring the claim within the terms of Section 10, namely, to make out that it is a claim for mesne profits, and that therefore it may be deemed a distinct cause of action. We think that this is wholly untenable. The terms of the plaint are these :—"Certain sums of money were "advanced by me on certain dates to you, "the defendant. If I had got possession of "the property, I might have recovered 8 "per cent. as interest from the profits. I "therefore claim 8 per cent. interest for a "certain term of years." This is certainly not a claim for mesne profits. Mesne profits are what a party has either collected or could have collected. This is a claim for interest at the rate of 8 per cent. on certain sums advanced on different dates to the defendant as part of the consideration-money. This claim does not come within the purview of Section 10.

We, therefore, uphold the decision of the Judge and dismiss the special appeal with costs.

The 17th April 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Rent-suit — Measurement — Excess land—Pottah.

Case No. 2544 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Officiating Judge of Midnapore, dated the 25th August 1870, *affirming a decision of the Deputy Collector of that District, dated the 13th December* 1869.

Radhika Prosunno Chunder and others (Plaintiffs) *Appellants,*

versus

Nehalee Churn Dey and others (Defendants) *Respondents.*

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Baboos Mohinee Mohun Roy and *Bhowanee Churn Dutt* for Appellants.

Baboo Grish Chunder Mookerjee for Respondents.

B having covenanted to take from *A* without inquiry about 18 beegahs of land at a rent of one rupee a beegah with a stipulation that if, on inquiry, any excess land should be found he would pay the same rate of rent for such excess; or if the area should be found less than 18 beegahs, that he would receive a proportionate deduction from his rent;—a measurement took place and an excess was discovered. *A* then sued *B* for rent on the entire quantity of land.

HELD that *B* was liable to pay rent for the excess at the rate of one rupee a beegah and that the tender of a pottah by *A* to *B* was not necessary.

Where the issue whether a pottah is tendered or not is not raised in the Court of first instance, it ought not to be raised in the Lower Appellate Court.

Kemp, J.—THIS is a suit on the part of the plaintiffs for rent for 1274, 1275, and 1276. The allegation of the plaintiff was that the defendant held 18 beegahs of land at an annual rent of rupees 18. Subsequently the land was measured and jumma-bundee was made. By this measurement and jumma-bundee the land was ascertained to be 97 beegahs; therefore they are entitled to the rent of 97 rupees, or one rupee per beegah, and not 18 rupees, according to the amulnamah. The defendant admitted that he holds 18 beegahs of land, and that he is liable to the plaintiff only for 9 rupees being the amount in arrear.

The Deputy Collector gave the plaintiff a decree for the amount admitted by the defendant. The Judge has confirmed this decree. He holds that according to the terms of the amulnamah, on which the question of liablity entirely turns, the defendant is not liable for the year 1274 to pay a higher rent then 18 rupees, or one rupee per beegah for 18 beegahs of land. The Judge then proceeds to enter into a question which was not raised in the first Court, and holds that inasmuch as the plaintiff sued for specific performance, he must before he can obtain a decree show that he has performed two material covenants, that is to say, that he has prepared a jumma-bundee and tendered a pottah and that the defendant has refused to accept the pottah so tendered.

It is already said that the case turns upon the construction to be put on the amulnamah. It is very clear from the terms of that amulnamah that the defendant on the 3rd Pous 1273 covenanted to take, without enquiry, about 18 beegahs of land at the rate of one rupee a beegah from the year 1274. Then follows a stipulation to the effect "if on enquiry any excess land "is found within the boundaries, you "will pay for as many beegahs as are "found to be in excess of 18 beegahs "at the rate of one rupee per beegah, and "if on enquiry the area is to be found to "be less than 18 beegahs you will receive "a proportionate deduction."

It appears, therefore, to us that it being admitted in the Judge's decision that the measurement has taken place, if there is an excess over 18 beegahs as stated by the plaintiff, that excess having been found on measurement, then, according to the terms of the amulnamah, the defendant would be liable to pay rent for that excess at the rate of one rupee per beegah.

With reference to the point which the Judge has raised, namely, whether the plaintiff has performed the material covenants stated by the Judge, we may observe that this point was not raised below. Moreover, the tender of the pottah is referred to in a subsequent clause of the amulnamah and is entirely contingent upon the plaintiff's obtaining a further settlement from Government. We may also quote in support of our view, a decision to be found at page 233, Weekly Reporter, Volume XIV. In that case, the issue whether a pottah was tendered or not not having been raised in the first Court, the learned Judges who decided that case held that it ought not to have been raised in the Lower Appellate Court. Moreover, that issue does not appear to us to be at all essential to the proper determination of the point at issue between the parties, which is this, namely, whether, according to the terms of the amulnamah, the defendant is liable to pay the old rent 18 rupees until the jumma-bundee and measurement have been completed in his presence, or whether according to the terms of the amulnamah as construed by us, the defendant is liable to pay one rupee per beegah for any excess land found over and above the 18 beegahs for which he originally covenanted.

We have already explained the terms of the amulnamah as construed by us. It, therefore, only remains for the Judge to find, the measurement being admitted, whether the quantity of the excess land as stated by the plaintiff has been proved or not? If so,

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we see no reason why the plaintiff should not obtain a decree for the rent of the excess land at the rate of one rupee per beegah as stated in the amulnamah.

The case will, therefore, be remanded to the Judge for a re-trial with reference to the above remarks.

Costs to follow the result.

The 18th April 1871.

Present :

The Hon'ble J. P. Norman, *Officiating Chief Justice.*

Declaratory decree — Appeal—Court Fee's Act—Stamps.

Regular Appeal from a decision passed by the Subordinate Judge of Shahabad, dated the 30th December 1870.

A. B. Miller (Defendant) *Appellant,*

versus

Akhooree Ram and others (Plaintiffs) *Respondents.*

Mr. R. E. Twidale and *Baboo Mohesh Chunder Chowdhry* for Appellant.

No one for Respondent.

In a suit for possession and wasilat, plaintiff obtained a decree declaring his right to possession upon the death of his father. Defendant appealed.

HELD that as the decree had given consequential relief, *i. e.*, relief from the operation of conveyances and mortgages, which on the face of them affected plaintiff's interest, an appeal from the decree should bear an *ad valorem* stamp duty.

Note by the Deputy Registrar.—THE original suit was for possession with wasilat for a share in certain mouzahs named, and was first valued at 3,738 rupees 15 annas and 3 pie, being ten times the annual revenue.

The Court of first instance, without going into the merits, dismissed the suit on the grounds (1) that it was under-valued, and (2) that the plaintiff should have sued for a declaration of his future right.

On appeal, the Zillah Judge, without noticing the first point, confirmed the portion of the decision of the Court below which dismissed the suit, on the ground that the suit could not be entertained during the lifetime of the father, and that it should have been for partition and for a declaratory order that after the death of the father the alienation made by him would not affect the plaintiff's right.

Against that decision, the plaintiff presented the Special Appeal No. 2158 of 1869; and in remanding the case to the first Court for trial on the merits, this Court directed that the question of valuation be taken up and dealt with an accordance with the provisions of Section 31 Act VIII of 1859.

The value was then altered from 3,738 rupees 15 annas and 3 pie to 37,000 rupees; and the first Court on remand decided the case by an order declaring the right of the plaintiff to possession of the property upon the death of his father, and dismissing his suit for immediate possession.

The defendant now appeals to set aside that order, and has engrossed his petition of appeal, as stated on his behalf, under Article 17, Clause 3, on a stamp of the value of 10 rupees.

Clause 3 provides a Court fee of 10 rupees for "Plaint or memorandum of appeal *to obtain* a declaratory order, where no consequential relief is prayed".

This appeal is *to set aside* a declaratory order made in a suit for possession and wasilat, and therefore it is presumed consequential relief *is* sought; and the Court fee paid, *viz.*, 10 rupees, instead of 1055 rupees, appears altogether insufficient.

I beg to refer the point for the orders of the Hon'ble the Chief Justice.

Norman, C. J.—I think that an *ad valorem* stamp duty is payable. This is not an appeal in a suit where no consequential relief is prayed. Nor can it be said that no consequential relief is given by the decree.

The plaintiff by the decree has obtained relief from the operation of conveyances and mortgages which on the face of them affected his interest. The ordinary instances given of bills not praying for relief, are bills to perpetuate testimony and bills of discovery.

It does not follow that the appellant is bound to pay the value as on an appeal against a decree for present possession.

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The 18th April 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble A. G. Macpherson and Dwarkanath Mitter, *Judges.*

Bond—Suretyship—Cause of action.

Case No. 6 of 1870.

Appeal preferred under Section 15 of the Letters Patent of the High Court of the 28th December 1865, against a judgment of the Hon'ble G. Loch and the Hon'ble E. Jackson, two of the Judges of this Court, in Special Appeal No. 817 of 1870, the said Judges having been equally divided in opinion.*

Bhugeeruth Adhikaree (Plaintiff) *Appellant,*

versus

Tarinee Chunder Pakrassee (Defendant) *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.

Baboo Umbika Churn Banerjee for Respondent.

Case.—Defendant required his agent (*B*) to procure for him certain articles. *B* not having ready money borrowed a sum from *M*, for which he gave a bond to which plaintiff (a pleader employed by defendant) put his name, and purchased and forwarded the articles in question. Subsequently *M* obtained a decree against *B* for the amount of the loan with interest, and the plaintiff, after futile applications to the defendant for the same, had to pay the whole amount of the decree. Plaintiff then sued to recover.

HELD that the plaintiff's cause of action was as a surety who had paid a debt for which as between him and defendant the latter alone was liable, and that his cause of action arose when he paid the money.

Norman, C. J.—THE facts of the case, as set out in the judgment of Mr. Justice Loch, are as follow:—

The defendant, who is a zemindar in the Rajshahye district and also the employer of the plaintiff, who is a pleader of the Civil Court of Rajshahye, required certain articles for his daughter's marriage, and requested his agent Kalee Chunder Bhuttacharjee to procure them. Kalee Chunder not having any ready money borrowed the sum of rupees 200 from one Tara Chand Moitro, for which Kalee Chunder gave a bond to which the plaintiff, at the request of Kalee Chunder, and being a pleader employed by the defendant, put his name. The bond is dated the 27th Assar 1268, or in other words, the 10th July 1861.

Now, the position of the parties on that statement of Mr. Justice Loch, which is borne out by the statement of Mr. Justice Elphinstone Jackson and of the two Lower Courts, does not show either that the plaintiff lent any money to the zemindar, or that he sold the articles procured and forwarded by Kalee Chunder to the zemindar. Therefore upon that bond, and on the transaction as it took place in 1861, the plaintiff had no cause of action against the defendant either for money lent or goods sold. I may add, as confirming this view of the facts, that there is not a suggestion that the plaintiff was to get any profit by the sale of the goods or any interest for the money, which he would have stipulated for had he advanced the money.

On the 30th August 1864, the creditor Tara Chand Moitro obtained a decree for the amount of the loan with interest against Kalee Chunder and the now plaintiff, and the plaintiff appears to have made repeated applications to the defendant, "for whose benefit", as Mr. Justice Loch says, "the money had been borrowed," for the amount; but the defendant having failed to pay it, the plaintiff had to pay the whole amount of the decree which he did in two instalments, namely, rupees 281 on the 4th July 1866, and rupees 390 on the 30th June 1868; and he brings this suit against the defendant for recovery of the money so paid on his (defendant's) account.

The cause of action which the plaintiff appears to have had on this statement of facts, and on such evidence as there is on the record, was a cause of action as a surety who had paid a debt for which, as between the plaintiff and the defendant, the defendant alone was liable.

It is wholly immaterial that, upon the form of the contract as between the plaintiff and the lender of the money, the plaintiff appeared to be the principal. Until the plaintiff paid the money due upon the bond, he had no right of action against the defendant. The first instalment was paid by the plaintiff on the 4th July 1866. This action is brought within three years from that time, namely, on the 22nd June 1869. It appears to me quite plain that the action is not barred by any provisions in the Limitation Act XIV of 1859.

* 14 W. R., p. 173.

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That being so, I am of opinion that the decision of Mr. Justice Loch and also the decision of the Lower Appellate Court must be reversed, and the decree of the first Court must be restored and affirmed. The defendant to pay the plaintiff's costs in all Courts.

Macpherson, J.—Considering that the transaction was such as it is held to be by Mr. Justice Elphinstone Jackson, namely, that the defendant's agent Kalee Chunder borrowed the money, and the plaintiff merely stood security for the repayment of that money, I agree with the learned Chief Justice and concur in the decree which he proposes to make.

Mitter, J.—I concur.

The 18th April 1871.

Present:

The Hon'ble G. Loch and H. V. Bayley, *Judges.*

Costs—Review.

Case No. 27 of 1871.

Miscellaneous Appeal from an order passed by the Judge of Bhaugulpore, dated the 15th December 1870.

Ram Sahoy Singh and another (Opposite Party) *Appellant,*

versus

Rookhoo Singh (Petitioner) *Respondent.*

Baboo Doorga Doss Dutt for Appellant.

Baboo Aubinash Chunder Banerjee for Respondent.

An omission to award costs cannot be considered merely as a clerical error, but must be rectified by way of review within the prescribed time.

Loch, J.—In this case a suit was brought to recover rupees 900.

The first Court gave the plaintiff a full decree.

The Judge on appeal modified the first Court's decree and gave the plaintiff a decree for rupees 200, with proportional costs, but made no order for costs in favor of the defendant as regards that portion of the suit which was dismissed.

A special appeal was preferred to this Court and dismissed.

Two years after the Judge had passed his decision in the case, an application was made on the part of the respondent to correct what he calls a clerical error in the decree, *viz.*, the omission to award costs to him on account of that part of the claim which was dismissed.

The Judge appears to have treated the matter simply as a clerical error, and without calling upon the opposite party to show cause why the decree should not be amended, he passed an order awarding costs to the defendant.

Subsequently, when the opposite party objected to that order by a petition, the Judge after hearing what each party had to say, still held the omission to be merely a clerical error and ordered it to be amended.

We do not think that the question of costs can be considered in this case merely as a clerical error. A Judge when passing a decree gives costs or refrains from giving costs for some reason or other; and if he refrain giving costs and any party considers that he is entitled to obtain costs, he should apply within the prescribed time to the Judge for a review of that part of the decree which he considers injurious to himself. Now, it is clear that in the present case the petitioner could not file a petition for review, because there had been a special appeal to the High Court, and further he was out of time and apparently had no cause to show why he did not make the petition in due time.

Under these circumstances, we think that the Judge was wrong in re-opening the question of costs after so long a time had elapsed, and we reverse the order with costs.

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The 18th April 1871.

Present:

The Hon'ble G. Loch and H. V. Bayley, *Judges.*

Costs—Interest—Execution—Full Bench Ruling.

Case No. 51 of 1871.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Bhaugulpore, dated the 28th January 1871.

Rajah Leelanund Singh (Judgment-debtor) *Appellant,*

versus

Rajah Ram Narain Singh (Decree-holder) *Respondent.*

Mr. R. E. Twidale for Appellant.

Moonshee Mahomed Yusoof and *Baboo Boodh Sein Singh* for Respondent.

HELD that the principle of the Full Bench Ruling reported at page 109 of VI Weekly Reporter (Miscellaneous Rulings), is as much applicable to interest upon costs as it is to interest upon mesne profits not awarded by the decree, and must be applied to all decrees passed either before or after the date of that judgment.

Loch, J.—THE petitioner in this case seeks to execute a decree for costs, and applies to have them *with interest.* The decree says nothing about interest upon costs, but it is urged that under the practice of the late Sudder Court every decree for costs necessarily carried interest with it upon those costs; and it is further urged that the Full Bench judgment, reported in Volume VI, Weekly Reporter, page 109, Miscellaneous Rulings, is not applicable to cases of this kind, as the decree now sought to be executed is a decree of the Sudder Court and not of the High Court; and that the principle laid down in that judgment relates only to mesne profits and interest on mesne profits not awarded by the decree of the Court, and is not applicable to cases of interest upon costs.

Two decisions by a Division Bench of this Court have been referred to; the one reported in Volume II, page 21, Miscellaneous Rulings; and the other in Volume III, page 21, Miscellaneous Rulings, in which it was held that under the practice of the Sudder Court, interest on costs followed even when not specially mentioned in the order. It appears to me that the judgment of the Full Bench referred to above *does* apply to a case of this kind, and that the principle laid down in that judgment is as much applicable to interest upon costs as it is to interest upon mesne profits not awarded by the decree, and that that judgment must be considered as overruling the judgments reported in Volumes II and III of the Weekly Reporter, for we find these words in that judgment which seem to embrace all questions of the kind:—"We have no doubt that "in executing a decree, the Court which "executes it has no power to alter or add "to it." But it is said that the judgment which is now sought to be executed is one of the late Sudder Court; and the practice of that Court was to allow interest upon the costs, although the decree made no provision as to interest. I believe that such was the practice, and I have stated it more than once in judgments; but nevertheless we must, I think, now apply the principle of the ruling of the Full Bench to all decrees passed either before or after the date of that judgment; and under this view of the case, I think that the petitioner cannot now recover more than what the decree gives him, and that is simple costs of the suit. The order of the Lower Court is set aside. Each party must bear his own costs of this appeal.

Bayley, J.—I need only add that I entirely concur with Mr. Justice Loch, and that this appeal is exactly analogous to the case of Rajah Leelanund Singh *versus* Maharajah Joy Mungul Singh, decided by myself and Mr. Justice Mitter on the 1st April last.*

The 18th April 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Incidental findings—Jurisdiction.

Case No. 2486 of 1870.

Special Appeal from a decision passed by the Judge of Cuttack, dated the 19th September 1870, *reversing a decision of the Moonsiff of Balasore, dated the 25th March* 1870.

Shib Pershad Panah (one of the Defendants) *Appellant,*

versus

Muddun Mohun Doss (Plaintiff) *Respondent.*

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* *Ante*, p. 335.

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Baboos Unnoda Pershad Banerjee and *Tarucknath Sein* for Appellant.

Baboos Romesh Chunder Mitter and *Obhoy Churn Bose* for Respondent.

An incidental finding by a Revenue Court as to the genuineness of a pottah, is no bar to the jurisdiction of a Civil Court to try the same question on a distinct issue in a regular suit.

Glover, J.—THIS was a suit to cancel a pottah on the ground that it was a forgery. The Court of first instance considered that inasmuch as in a former suit under Act X of 1859 between the parties to this suit it had been decided by the Deputy Collector that the pottah was a genuine instrument, the present action was barred by Section 2 of Act VIII of 1859 on the principle of *res adjudicata*. The Judge on the contrary held that although there had been a decision by the Deputy Collector, and afterwards by the Collector, as to the genuineness of this document, still as that finding had not been come to upon any distinct issue regularly laid down as to the genuineness or otherwise of the pottah, it was a mere incidental finding and could not bar the jurisdiction of the Civil Court.

The defendant appeals specially. We think that the Judge's decision remanding the case for a trial on the merits was a correct one. The Deputy Collector, in the case decided on the 27th of October 1868, tried only one issue, which we think was the proper issue under the circumstances of that case, namely, whether the intervenors or the plaintiff were in *bonâ fide* receipt and enjoyment of the rent claimed; and in order to decide this issue he took into consideration the pottah now in question, and he undoubtedly did find on the evidence that that pottah was a genuine one. The Collector also, before whom the case came in appeal, came to the same opinion; but although both these Courts did incidentally determine that this pottah was genuine, it is quite clear on reading their decisions that no issue was fixed on that particular point, nor indeed could there have been any such issue, as the only question then before the Courts was the *bonâ fide* receipt and enjoyment of rent by one party or the other; and whatever else was decided in order to enable the Courts to arrive at a satisfactory finding on the substantial issue before them, was determined incidentally for the purposes of that suit only; and according to many decisions of this Court such an incidental finding or expression of opinion by a Revenue Court would not be a bar to the jurisdiction of the Civil Court to try, on a distinct issue in a regular suit, the question of the genuineness or otherwise of the pottah.

The case of Pitumber Shaha and others *versus* Ram Joy Ghose and others, reported in Volume VII, Weekly Reporter, is exactly in point with this case. It is there laid down that a proceeding in a suit under Act X of 1859, in which the Collector did not finally adjudicate upon the genuineness of a pottah although he accepted it as genuine, is no bar to a subsequent suit in the Civil Court for a declaration that the pottah is a forgery. Another case, that of Showdamonee Dossee *versus* Ram Chand Bydo and others, in Volume X, Weekly Reporter, page 38, lays it down that in a suit for arrears of rent in which an intervenor opposed the plaintiff's claim (which is precisely the case here), and where the Deputy Collector collaterally and incidentally to guiding his mind to a conclusion on an issue which arose under Section 77 of Act X of 1859 thought proper to enquire into and state his opinion as on matters of title between the plaintiff and the intervenor, he could not be said in the sense of Section 153 to determine a question of title between the parties by his judgment.

The other case referred to by the special appellant's pleader was brought under Clause 5 Section 23 of Act X of 1859, and was to eject the defendant and has really no reference to the present dispute: there was no question in that case as to the genuineness of the pottah. It was assumed that the pottah was genuine.

We think that the decision of the Deputy Collector in the former case as to the genuineness of this pottah was an incidental decision only, and that the question of right and title was not determined by him in such a way as to prevent the Civil Court from going into the question of the genuineness or otherwise of that pottah in the present suit.

The Judge's order, therefore, remanding the case for trial on the merits is confirmed, and the special appeal dismised with costs.

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The 18th April 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Change of proprietory title—Putneedar—Ryot—Rights of occupancy.

Case No. 2551 of 1870.

Special Appeal from a decision passed by the Judge of West-Burdwan, dated the 6th September 1870, *affirming a decision of the Moonsiff of Sonamookhee, dated the* 18*th May* 1870.

Ram Ghose (Defendant) *Appellant,*

versus

Radha Churn Gangooly (Plaintiff) *Respondent.*

Baboo Rash Beharee Ghose for Appellant.

Baboo Bama Churn Banerjee for Respondent.

A mere change in the proprietory title of an estate does not entitle a putneedar, who holds from the new proprietor, to eject a tenant who can prove a right of occupancy.

Kemp, J.—THIS is a suit brought by the plaintiff, who obtained a putnee lease from the Maharajah of Burdwan on the 14th of Srabun 1274, to eject the defendant from certain lands. The plaint states that the Maharajah having obtained a decree for these lands in a suit No. 16, as appertaining to Lot Hooda Rooppal in Pergunnah Bishtopore, granted a putnee of the mehal to the plaintiff; that the defendant was in wrongful possession of these lands; that on the plaintiff going to take possession he was forcibly ousted by the defendant on the 7th of Bysack 1275; that upon this the plaintiff let out the lands to one Kitab Sheikh and Bhyrub Bagdee, and that they not paying the rent the plaintiff attached their crops; that upon this the defendant objected and claimed the crops as having been raised by him; that the Deputy Collector in 1868 in the case No. 50 released these crops; and that the plaintiff's cause of action therefore arose on the 2nd of Kartick 1274 when these crops were released. He sues for khas possession and for demolition of the defendant's houses.

The defendant's answer is to this effect:—That he has been in possession of these lands for a very long time, or from the time of the Rajah of Bishtopore, as appertaining to the mouzah of Hurreekistopore; that on the mouzah Hurreekistopore being resumed by Government, the lands in dispute were found to be in his possession and were assessed as such by the Government; that on a settlement being made by Government with Buldeb Singh for the parent mouzah of Hurreekistopore, the defendant paid his rent to the aforesaid Buldeb Singh; that he is not a trespasser as stated by the plaintiff; that the allegation that Kitab Sheikh had obtained a bundobust from the plaintiff was false; that on the plaintiff attaching the defendant's crops as belonging to Kitab Sheikh and Boyrub, the defendant immediately put forward a claim which was found to be good and the crops were released; that the defendant was no party to this suit No. 16, and therefore that suit is no evidence as against him; that the defendant has been in occupation of these lands for much more than 12 years, and that therefore if the plaintiff's or his predecessor's title in the lands has been found to exist by any decision of the Civil Court, still the plaintiff would not be entitled under the law to eject the defendant.

Both Courts have found for the plaintiff. The first Court appears to have found that the defendant had been in occupation of these lands for more than 12 years; "but that "as the defendant had not acknowledged "the plaintiff's proprietory right, but on the "contrary calls Buldeb Singh his landlord "though the latter has no ownership in the "property in question, therefore the Moon-"siff comes to the conclusion that the de-"fendant is willing to be the ryot of Buldeb "Singh and not of the plaintiff; but as a "Court of Justice had declared the plaintiff "to be the owner and the defendant would "like to be the plaintiff's tenant, therefore "the defendant could not be awarded what "he never prayed for." These are the words of the first Court.

The Judge on appeal admits that the decree No. 16 does not affect the jummaie rights of tenants, but that as the defendant denies his relation of tenant to the plaintiff, he must therefore be considered to be a trespasser and to have forfeited any right of occupation which he may have had. Then the Judge goes on to say that the defendant's witnesses are worthless,—

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that there is no reliable proof of the defendant's possession of the tenure for 12 years, The reasons given for this opinion are that the resumption proceedings are of the 17th December 1861, and the Moonsiff says the Judge has made a miscalculation, and that the plaintiff's witnesses do not say that the defendant had houses before 1268, though his brother may have had houses upon the land before that time. The Judge then concludes by saying that, even if the defendant has been in possession for more than 12 years, he cannot proceed on two opposite pleas, namely, that he is the ryot of Buldeb Singh and not of the plaintiff; and 2udly, that he is a ryot having a right of occupancy and willing to pay rent to the plaintiff.

We are of opinion that the decision of the Judge is wrong. It appears to us that the Judge has proceeded on a misconception of the defence set up by the defendant in this case. What the defendant says is this, that the lands in dispute had been held by him for a very long time, much more than 12 years, as belonging to mouzah Hurreekistopore, a resumed mehal; that in 1861 he was found in possession of the lands by the Goverment authorities when they resumed the Mouzah Hurreekistopore, and on a settlement being made with Buldeb Singh he, the defendant, has paid rent to Buldeb Sing; that not being a party to the suit No. 16 he, the defendant, was not aware of the change in the proprietory title; that he is a ryot having a right of occupancy and one who cannot be ejected by the plaintiff, even if the title of the plaintiff has been declared to be that of malik of the disputed lands. There is no distinct denial of the plaintiff's title, and what the defendant says is simply that if the plaintiff's title to the particular piece of land in suit has been declared by a Civil Court, he is entitled to receive rent from me but he is not entitled to eject me. It appears that the suit of the Maharajah was against Buldeb Singh to set aside the settlement made with Buldeb, and to establish that these lands belonged not to Hurreekishtopore, but to the Maharajah's mouzah in Pergunnah Bishtopore. The Rajah obtained a decree in 1273. It appears that he also obtained wasilat, and the Moonsiff in his decision recites that the Rajah obtained wasilat from the occupant ryots, and amongst them from the defendant. However, be that as it may, it is clear that the mere change in the proprietary title would not entitle the plaintiff, who holds from the Maharajah whose title commenced in 1274, to eject the defendant if he can prove a right of occupancy in the land. Now, the Judge has found that the plaintiff's witnesses, although they do not say that the defendant had houses before 1268, state that his brother had houses there before that time. We think we may infer from the Judge's decision that the plaintiff's witnesses did admit the defendant's possession for more than 12 years; for he says if even the defendant's possession was for more than 12 years, he cannot proceed on two opposite pleas as set forth above.

The first Court, too, found that the defendant had established his right of occupancy; for he says that the witnesses for the plaintiff state that the defendant's brother had houses on these lands many years ago, and that although the defendant was not then living with his brother, the houses were built upon these very lands now in dispute.

We, therefore, think that the plaintiff is not entitled to eject the defendant, or to obtain khas possession or to destroy the houses erected by the defendant many years ago. We, therefore, reverse the decision of the Judge and decree this appeal with costs.

The 19th April 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerje, *Judges.*

Intervention under Section 77 Act X. 1859—Collector's recusancy—High Court's interference — Section 15, Charter Act.

Sreemutty Nassir Jan and another, *Petitioners,*

versus

Akbur Mozoomdar, *Opposite Party.*

Baboo Luleet Chunder Sein for Petitioners.

Baboo Romesh Chunder Mitter for Opposite Party.

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Where a Collector refused to notice an intervenor's claim because the intervenor had not filed a document on which her title rested, he was held to have refused to try the case and thus to warrant the High Court's interference under Section 15 of the Charter Act.

Jackson, J.—THE applicant in this case obtained a rule calling upon the other side to show cause why the decision of the Collector of Tipperah, dated the 18th May 1870, in the case of Jamiruddin Bhooeah, gomastah of Akbur Mozoomdar, plaintiff, appellant, *versus* Haniff Bhooeah, defendant, and Nassir Jan, intervenor, respondents, should not be set aside on the ground that it had been passed upon irrelevant grounds. Cause has this day been shown, and it is alleged that this Court has no jurisdiction to interfere; partly because this is not a case in which the Court has refused jurisdiction which it should have exercised, and partly because the parties have an opportunity to set aside this decision by a regular suit.

On the first point, we are of opinion, looking to the decision of the Collector, that he has refused to exercise the jurisdiction which he should have exercised. He has in no way tried the question at issue between the plaintiff and the intervenor, upon which also must depend the question as between the plaintiff and ryot defendant. Looking to the terms of Section 77 of Act X of 1859, the question at issue was whether the intervenor, third party, or the plaintiff, was in receipt of rent from the ryot defendant before the institution of this suit. This issue was distinctly laid down as one of the points to be tried by the Collector. But instead of deciding it, he refused to consider or take any notice whatever of the claim of the third party, because that third party had not filed a deed of gift on which her title rested. It is evident that this is no decision whatever upon the case. It was not for the Collector to ascertain whether the intervenor's title was good or bad. The deed of gift could only be of any use in order to ascertain the validity of her title, and the mere filing of the document could not possibly be any evidence whatever in the suit. It is in fact, therefore, a direct refusal to try the case altogether. To lay down that because such and such a document was not filed therefore her claim must be utterly bad, is no decision on the point at issue. The Collector might have as well decided the case upon any other equally irrelevant ground than that which was before him for decision. It is possible that the intervenor might have brought a separate suit in the Civil Court to rectify this decision. But it is a question what effect that would have on the claim as between the plaintiff and the ryot defendant.

We think we ought not to allow this decision to stand as it is, but that the case should be sent back to the Collector with directions to him that he will consider the evidence upon the record and try the question as between the intervenor and the plaintiff, looking especially to the provisions of Section 77 Act X of 1859; and upon his decision as between the intervenor and the plaintiff, and upon the consideration of any other fact or any other point which may arise as between the plaintiff and the defendant, he will decide the case as between the plaintiff and the ryot.

Costs of this proceeding will be paid by the plaintiff, assessed at two gold mohurs.

Mookerjee, J.—I concur. It is evident that in this case the Collector has refused to try the appeal, or any of the issues which legitimately arise in a case under Section 77 Act X of 1859. He declines to try the case simply on the ground that the intervenor has not filed the deed of gift under which he claims possession. The question he had to decide was whether the intervenor was "in the actual receipt and enjoyment of the rent." He fixes the issues correctly, but declined to try them merely because the deed of gift has not been filed. If he had tried the question of possession and actual receipt of rent, his decision on that point, however wrong or improper, would perhaps have been final according to law. But as the Judge has refused to try the real issue before him, and disposed of the case on a matter wholly irrelevant to the point before him, it must be held that he has refused to exercise a jurisdiction vested in him by law. Under the powers of superintendence given to this Court by the Charter Act, I hold that we can direct Courts subordinate to this Court to do their duty, and to see that they do not avoid to try and determine cases simply because a party to the suit has not done that which he was not imperatively required to do, and which is irrelevant to the real question which the Court had to decide. This I should consider a refusal to exercise a jurisdiction where he had one under the law.

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The 19th April 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Suit for pottah—Amulnamah—Onus probandi.

Case No. 2541 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 12th August 1870, *affirming a decision of the Deputy Collector of that District, dated the 30th July* 1869.

Kishen Pershad Singh and others (Defendants) *Appellants,*

versus

Mohun Singh (Plaintiff) *Respondent.*

Baboos Mohinee Mohun Roy and *Bhowanee Churn Dutt* for Appellants.

Mr. R. T. Allan and *Baboos Doorga Mohun Doss* and *Huree Mohun Chuckerbutty* for Respondent.

The proprietors of a certain holding having refused the terms of Government, a farming settlement was made with the present defendant who undertook to confirm and ratify all amulnamahs granted by the zemindars while the settlement proceedings had been pending. Plaintiff, being a ryot without a right of occupancy but one who had got an amulnamah, sued for a pottah at the rate fixed by the amulnamah.

HELD that the amulnamah formed the basis of a special contract between the parties, and took their case out of the purview of Sections 5 and 8 of the Rent Law; and that by the terms of the amulnamah the defendant was bound to give plaintiff a pottah on fair and equitable rates ("*upajukta*"), which were to depend on the rates which he himself obtained from Government.

HELD that the *onus* of proving that the rate which he claimed was fair and equitable was upon the plaintiff.

Glover, J.—THE plaintiff in this case sued his zemindar (a farmer holding under Government) for a pottah for a period of 14 years, at a rate of 1 rupee per beegah on a holding of 222 beegahs.

It appears that whilst negotiations for settlement were going on with the original proprietors, these were allowed to make arrangements with the ryots and to give them amulnamahs. For some reason or other, however, the proprietors refused the Government terms, and a farming settlement was made with the present defendant, he undertaking to confirm and ratify all amulnamahs that had been granted by zemindars during the time the settlement proceedings had been pending. The plaintiff was one of those ryots who had got an amulnamah from the zemindars and on the strength of it he sued for a pottah at the rate said to be fixed by it.

The farmer denied in the first place that he was bound by the amulnamah at all, and alleged that in any case the plaintiff could only get a pottah on terms which he, defendant, should agree upon, plaintiff not being an "occupant ryot;" that as a matter of fact the plaintiff was called upon to take a settlement of the lands at rupee 1-4 a beegah, which was considerably less than the proper rate, but that as he refused to attend and take the settlement the land was leased to another tenant.

The Court of first instance gave a decree to the plaintiff for a pottah at rupee 1-4 a beegah for 14 years.

But on appeal the Judge modified the decision. He thought the plaintiff entitled to a pottah at fair and equitable rates, and for a reasonable time only. He ordered the defendant to give plaintiff a pottah for five years at one rupee per beegah.

Both parties have appealed against this decision. The cross-appeal of the plaintiff, however, was not pressed and need not be considered.

The farmer appeals urging in the first place that supposing him to be bound by the amulnamah, the plaintiff is not entitled to a pottah at the rent claimed, inasmuch as he is not an occupant ryot and does not come under Section 5 Act X of 1859, as supposed by the Judge, but under Section 8 of that Act, by which he could only be entitled to a pottah on terms agreed to by the zemindar.

We have had this amulnamah read to us. It recites that so much land had been given to the plaintiff at one rupee a beegah for one year (1274) without any enquiry made, and that a settlement would afterwards be made with him for such term as Government might give to the zemindar, after measurement and arrangement of the proper rent, at *fair and proper rates.* The word used is "*upajukta,*" and the meaning of it is, we have no doubt, what is called in Act X a "a fair and equitable" rate.

We think that this amulnamah formed the basis of a special contract between the parties, and took their case out of the pur-

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view of Sections 5 and 8 of the Rent Law. Had there been no such special agreement, the appellant would no doubt be right, for it is clear that the plaintiff has no right of occupancy, and if he wanted a pottah would have had to arrange for it as best he could with his landlord,—Section 8 would apply to his case and not Section 5.

But by the terms of the amulnamah, we think that the defendant bound himself to give the plaintiff a pottah at fair and reasonable rates, which were to depend on the terms which he himself obtained from Government. It is not denied that the farmer has got his lease from Government at the rate of about 12 annas a beegah, and the question would be what is a fair rent for the land which the plaintiff holds.

Now, the Judge in deciding this point has given the plaintiff the "status" of an occupant ryot, and has held that under Section 5 of Act X of 1859 the rent previously paid is to be considered a fair and equitable rent, unless the contrary be shewn. The rent for the year 1274 was admittedly 1 rupee per beegah; *ergo*, it was on the defendant to show that this was not the proper rent for the future. There can be no doubt, we think, that the Judge is wrong here. The plaintiff is not an occupant ryot and is not therefore entitled to the privilege accorded to him. The *onus* of showing that the rate of 1 rupee per beegah is the fair and equitable rate was upon him, and it was not for the farmer to show that 1 rupee was not the proper rate, until the plaintiff had given some evidence that it was the proper rate. The Judge however has decided the issue solely on the inability of the defendant to satisfy him that the proper rate was more than 1 rupee.

There is, we are told, evidence on the record on the part of the plaintiff which shows that the rate was 1 rupee 2 annas; but neither of the Courts below has come to any finding on the plaintiff's evidence. The Moonsiff has decided for a rate of 1 rupee 4 annas, because a third party (the ryot now in possession) pays that rate. The Judge has fixed 1 rupee because that was the rate in 1274, and the defendant has not been able to prove that it ought to be more now. Both of these findings appear to us wrong.

We think that the case must go back for a finding on the whole evidence as to what are fair and equitable rates for the plaintiff's lands, due regard being had to the circumstances under which they were taken and to the nature of the improvements (if any) made by the plaintiff on the holding.

When the fair rate is ascertained, the point will arise as to whether it is that at which a pottah is claimed by the plaintiff. If it be so, we think that under the terms of the amulnamah the plaintiff would be entitled to such pottah. If, on the other hand, the plaintiff has sued for a pottah at a less rate than that found to be fair and equitable, he will not be entitled to a decree but will have his suit entirely dismissed. The rule in such a case has been laid down in Gholam Mahomed *versus* Asmut Ali Khan (X Weekly Reporter, 14 F. B.)

The case is remanded to the first Court with reference to the above remarks. Costs to follow the result.

The 20th April 1871.

Present:

The Hon'ble A. G. Macpherson and Onoocool Chunder Mookerjee, *Judges.*

Forged mortgage — Bond — Declaratory suit—Substantial relief.

Case No. 2218 of 1870.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 17th August 1870, *affirming a decision of the First Subordinate Judge of that District, dated the 14th May* 1870.

Fukeer Chand (Defendant) *Appellant,*

versus

Thakoor Singh (Plaintiff) *Respondent.*

Mr. Mun Mohun Ghose for Appellant.

Messrs. R. T. Allan and *R. E. Twidale* for Respondent.

In a suit to obtain a declaration that a certain mortgage-bond which had been registered, was falsely alleged to have been registered by the plaintiff, and was invalid as being a forgery, the registration having been obtained by false personation:

HELD that the existence of the mortgage was a distinct cloud on plaintiff's title and, without any proof of special damage, diminished the value to him of the property which it apparently covered; and that such suit was not merely a declaratory suit, but one seeking substantial relief.

Macpherson, J.—THE only ground of special appeal which it is necessary for me

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to notice,—because I think that it is the only one in which there is any substance,—is the first, namely, that the plaint merely asks for a declaratory decree, and therefore discloses no legal cause of action.

The suit is brought to obtain a declaration that a certain mortgage-bond, dated 24th March 1869, which has in fact been registered, and is falsely alleged to have been registered by the plaintiff, is invalid as being a forgery, the registration of which was obtained by a false personation of the plaintiff.

The defendant, while contending that the suit would not lie as being merely for a declaratory decree, pleaded that the bond was genuine and was really executed by the plaintiff, and that the plaintiff himself got it registered.

The Lower Appellate Court has found the facts for the plaintiff; that is to say, has found that the bond is a forgery and that the plaintiff never executed it and never got it registered.

Mr. Mun Mohun Ghose for the defendant contends that, inasmuch as no special injury to the plaintiff by reason of the existence of this bond is alleged in the plaint or found by the Lower Appellate Court, and inasmuch as it is neither alleged nor proved that the defendant has ever taken any action against the plaintiff upon this bond, the suit is bad as being simply for a declaratory decree: and he has cited a variety of cases in support of that contention.

I admit that most of the cases do support his view to a certain extent. Nevertheless, in my opinion, the general result to be drawn from them is no more than this,—that a declaratory suit will not lie if the document which the suit seeks to set aside does not necessarily affect the plaintiff's enjoyment of his property, or does not raise any substantial cloud upon his title which he is obliged to dispel by suit. In the present case, however, it is clear that the facts found by the Lower Appellate Court necessarily show that a very serious cloud is cast upon the plaintiff's title by the deed which he now seeks to set aside. The existence of a mortgage-deed, purporting to have been registered by the plaintiff himself, is a distinct cloud upon his title to the land affected by that deed; and, without any special evidence to prove the damage, it cannot be doubted that the existence of such a document necessarily diminishes the value, to the plaintiff, of the property which is apparently covered by the mortgage-deed, I think, therefore, that in this particular instance, the suit is not one of those inofficious needless suit which will not lie, but that it is a suit in which the plaintiff is found to have sustained, and to be sustaining, very substantial injury from the act of the defendant which is complained of. I think, therefore, that the suit will lie.

It is very difficult in these questions arising under Section 15 Act VIII of 1859, to lay down any general rule applicable to all cases. It appears to me that each case must be judged of by its own particular circumstances and on its own merits.

The decision which I now give, however, does not conflict in any degree with the general principles of most of the cases which have been quoted by Mr. Mun Mohun Ghose. And certainly they do not conflict with the judgment—upon which he relied much—of Mr. Justice Bayley and Mr. Justice Paul, reported in XIV Weekly Reporter, page 450. I find there that Mr. Justice Paul distinctly expresses his opinion that such a suit, as the present suit is, will lie if the deed which is sought to be set aside manifestly and unquestionably does throw a cloud over the title of the plaintiff.

Under all the circumstances of this case, I think the suit is a substantial suit seeking substantial relief, and not merely a declaratory suit, because the effect of the declaration will be to relieve the property of that which is a great injury to it and diminishes its value.

I think, therefore, that the appeal ought to be dismissed, and the judgment of the Lower Appellate Court ought to be affirmed with costs.

Mookerjee, J.—I entirely concur. I think the plaintiff in this case had a good cause of action, and that it was necessary for him to bring this suit. A very serious cloud was cast on his title, and he had every right to sue to dispel that cloud. Suppose the plaintiff wanted to raise a large sum of money on this property, say equal to ¾ of its market-value, and for that purpose had applied to a mahajun or any other man of business. It is most probable that the lender would

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institute enquiries in the Registry Office. On that enquiry, it would be found that a large sum of money had already been advanced to the borrower by the defendant on the security of this property, and finding that the lender would probably decline to advance the amount asked for. Would it be said that the plaintiff even then had suffered no injury because the defendant has not taken any action on the bond. The defendant had published his mortgage by causing it to be registered. It is a notice to the world that the value of the property has diminished by the amount advanced by him, and intending purchasers and lenders will not advance such sums of money in respect of this property as they would have otherwise done. The plaintiff, therefore, had good reasons to come into Court and ask for a declaration that the deed of mortgage purporting to have been registered by him in favor of the defendant be declared a false and invalid document. The mere fact of the defendant not having yet taken any action on the bond is of no consequence, for as long as the deed remains unchallenged, the value of plaintiff's property is deteriorated, and there is a heavy cloud upon the plaintiff's title to it. It cannot be well argued that the plaintiff must wait till he is actually injured, namely, till he has occasion to deal with this property and till parties actually decline to advance money to him on the ground of this mortgage. But why should the plaintiff wait till that time? He sees that a deed, which he has not executed, had been registered in a public office as a deed executed by him. It is certainly a cloud on his title and tends to depreciate the value of his property. He is in my opinion quite right in bringing this action to remove that cloud, and thereby to restore the property to its full value.

The 20th April 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Appellate Courts—Local inquiry.

Case No. 2439 of 1870.

Special Appeal from a decision passed by the Officiating Judicial Commissioner of Chota Nagpore, dated the 23rd August 1870, affirming a decision of the Moonsiff of Kishenpore, dated the 29th December 1869.

Monkee Dumber Sahee and another (Plaintiffs) *Appellants,*

versus

Monkee Bhullundur Sahee and another (Defendants) *Respondents.*

Baboo Lukhee Churn Bose for Appellants,

Baboos Chunder Madhub Ghose and *Taruck Nath Sein* for Respondents.

Appellate Courts ought not to interfere with the result of a local inquiry, except upon very clearly defined and sufficient grounds.

Kemp, J.—We do not think it necessary to call upon the pleader for the respondent in this case. This is a boundary dispute between the two villages of Beetee and Bora Koocha. Both Courts have come to a finding that the lands in dispute do not belong to the village of the plaintiff but belong to the village of Bora Koocha, the property of the defendant. In this case, the boundary between the two villages was laid down by Colonel Davis in 1861, and there are two prominent land-marks alluded to, namely, the Pyna Pahar on the east and Betyatolah on the south. The Moonsiff appears to have made two local enquiries,—the latter enquiry appears to have been a more careful one than the former one—and the Moonsiff appears to have satisfied himself of the position of the disputed lands. He ascended the Pyna Pahar, and ascertained that the lands in dispute appertained to the mouzah of the defendant, and had all along been in his possession. This decision was confirmed by the Judicial Commissioner, who also laid down the proper issue for trial and found, concurring

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with the Moonsiff, that the lands in dispute appertained to Mouzah Bora Koocha, the property of the defendant. It is now said that the Moonsiff ought to have decided the case with reference to both the land-marks, namely, Pyna Pahar and Betya-tolah.

We think there is no force whatever in this contention. There is no doubt that the Moonsiff has found that these lands lie far to the south of Pyna Pahar, which is on the line of boundary as laid down by Colonel Davis, and he has also found on the evidence that the defendant was in possession. In a late case decided by the Privy Council, Ranee Surut Soonduree Dossee *versus* Prosunno Coomar Tagore,* their Lordships held that Appellate Courts in India ought not to interfere with the result of a local enquiry, except upon very clearly defined and sufficient grounds. Now, here we have a local enquiry in which both the Courts below have concurred. In the case before the Privy Council, the judgments were conflicting,—the Zillah Court taking one view and the High Court another view of the local enquiry; and yet their Lordships held that the Appellate Court ought not to have interfered with the results of the local enquiry except on the strongest grounds. Here we have two Courts concurring,—and this is a special appeal.

We dismiss the special appeal with costs.

The 20th April 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Enhancement of rent— Kubooleut — Res-judicata—Maintenance—Jurisdiction.

Case No. 2512 of 1870.

Special Appeal from a decision passed by the Judge of Cuttack, dated the 20th August 1870, reversing a decision of the Moonsiff of that District, dated the 31st March 1870.

Rajah Kristo Chunder Murdraj (Plaintiff) *Appellant,*

versus

Poorosuttum Doss and others (Defendants) *Respondents.*

Baboo Obhoy Churn Bose for Appellant.

Mr. R. T. Allan and *Baboo Unnoda Pershad Banerjee* for Respondents.

Where a suit for a kubooleut at an enhanced rent is decreed without any term being fixed by the Court, the kubooleut executed is inoperative beyond the year of demand.

Such a decree is no bar under Section 2 Act VIII of 1859 to a suit for a declaration of the right of the plaintiff (defendant in the former suit) to hold the same land in lieu of maintenance on payment of a quit-rent, which cannot be tried by a Collector.

Glover, J.—THE plaintiff in this case sues for a declaration of his right to hold certain lands at a fixed rent of rupees 20. To understand the nature of his claim, it will be necessary to go somewhat into detail.

Bikram Singh, zemindar of Pergunnah Sussoo, was sued by his nephew, Jugo Mohun Doss, in 1840 for his share of the family-estate. The result was a compromise, by which Jugo Mohun, in addition to certain other property, got the lands now in dispute as a maintenance grant at a perpetual fixed rent of rupees 20, with a proviso, however, that should the estate be sold for arrears of Government revenue, the grantee would not be protected: under all other circumstances he was to retain the privilege of keeping the land at a rent of rupees 20. Jugo Mohun held possession on these terms till his death, and after him his heirs.

Some time after Jugo Mohun's death, Bikram Singh sold an 8 annas share of his estate to Poorosuttum Doss, and gave a farming lease of the other 8 annas to Huree Kristo Doss, and these two (who are the defendants in this case) ejected Jugo Mohun's heirs from the land on the 5th of March 1860.

The heirs sued to recover possession on the strength of the agreement of 1840, and the Civil Court's decree passed in accordance therewith; but whilst the case was pending they sold their right of suit to the present plaintiff, whose name was added to the record as plaintiff. He carried on the litigation, and on the 8th of March 1862 go

* 15 W. R., P. C., p. 20.

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a decree for possession, and subsequently in 1865 for mesne profits.

On this, Huree Kristo and Poorosuttum sued him for arrears of rent due for the years 1272-73-74 and 75 at the rate of rupees 92 per annum, this being the rate at which the lands are said to have paid revenue to Government under a new settlement. The Collector thought that under the circumstances the suit was only cognizable by the Civil Court, and dismissed it on the 16th July 1868.

Huree Kristo and Poorosuttum then sued the present plaintiff for a kubooleut at the enhanced rent of rupees 92, and on the 1st of September 1868 got an *ex-parte* decree. Rajah Kristo Chunder (the plaintiff before us) tried to get this decree set aside, first by applying for a re-hearing, and afterwards by a regular appeal. He failed, however, and was obliged to give the kubooleut.

On getting it, the landlords sued for the rent of 1276 at the enhanced rate of rupees 92 and got a decree ; and the plaintiff now brings this suit to get rid of the effect of the Revenue Court's decision of September 1868, and to declare his right to retain his lands at a fixed rent of rupees 20.

The Moonsiff held that the plaintiff had a right to bring the action ; and that as the Sudder Ameen's decision of 1840 gave him the disputed lands at a fixed rent of rupees 20, the defendants had no right to take more from him.

The Judge, on appeal, without going into the merits of the case, threw out the suit as barred by Section 2 Act VIII of 1859, holding that the suit was brought on a cause of action that had already been heard and determined by a Court of competent jurisdiction. I do not think it necessary to go into the various points of objection taken in the grounds of special appeal to the competency of the Collector's Court, or to the effect of an "*ex-parte*" decree ; it seems to me sufficient to say that in my opinion Section 2 does not bar a hearing of this case on its merits, because in the former suit in the Revenue Court the question now in issue was not *determined*.

The decree of the 1st of September 1868 was simply for a kubooleut. No term was apparently fixed by the Court, and we have been shown nothing to lead to the conclusion that anything more than a general decree for a kubooleut at rupees 92 was either prayed for or determined. It may, therefore, be fairly assumed that the kubooleut executed was one without a term, and therefore operative as a kubooleut for the current year only ; and as that year has long since expired, the kubooleut is now inoperative. The question was discussed in the case of Mnddoo Ram Dey *versus* Bydnath Doss, IX Weekly Reporter, page 592, and the ruling was that such a kubooleut was inoperative after the year was out and did not prevent further steps being taken.

In the present case, therefore, there is no existing decision of a Court of competent jurisdiction that the plaintiff is to pay to the defendant a yearly rent of rupees 92. The decree of 1868 only makes him liable to give a kubooleut, and to pay that rent for a particular year. The assumption has not been controverted ; and if the kubooleut had been given for a term of years, it would have been easy for the defendants to prove the fact by the production of the kubooleut.

This being so, there is nothing in Section 2 Act VIII of 1859 to prevent the hearing of this suit on its merits, and I would direct the Judge to hear it accordingly.

Kemp, J.—I concur in remanding this suit to be tried on the merits. It appears to me clear that Section 2 Act VIII of 1859 does not apply. The former suit was for the delivery of a kubooleut. No term was fixed, and as shown by my learned colleague, it may well be that the kubooleut was for the year of demand only. But apart from this consideration, I am of opinion that the cause of action in the present suit has not been "heard and determined by a Court of competent jurisdiction in any former suit between the same parties or between parties under whom they claim."

The present suit is for a declaration of the plaintiff's right to hold the lands in dispute in lieu of maintenance on payment of a quit-rent of 20 rupees to the zemindar. Such a suit could not be tried by a Collector, and it is obvious that a suit for delivery of a kubooleut and a suit of the present nature do not and cannot arise out of the same cause of action. The evidence which would support the action for a kubooleut would not support an action for the establishment of the plaintiff's title to hold these lands in

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lieu of maintenance on payment of a quit-rent. Moreover, the particular point determined in the former action is not the point which will have to be determined in the present action nor was it put in issue.

The 20th April 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Appeal — Jurisdiction — Section 35 Act XXIII of 1861.

Cases Nos. 2580 to 2583 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Cuttack, dated the 8th September 1870, *reversing a decision of the Deputy Collector of that District, dated the 16th June* 1870.

Maharanee Adheeranee Narain Coomaree, Rajranee of Burdwan (Intervenor) *Appellant,*

versus

Purkhit Rnootra (Plaintiff) and others (Defendants) *Respondents.*

Baboo Chunder Madhub Ghose for Appellant.

Baboos Nil Madhub Sein and *Mohendro Lall Mitter* for Respondents.

Four suits for arrears of rent, where the sum claimed in each was less than 100 rupees, and no question of title was involved, having been decided by the Deputy Collector, an appeal was preferred to the Judge. It having been found in special appeal that the Judge had no jurisdiction and that the time for appeal had lapsed, the High Court allowed the appellant 30 days to appeal, if so advised, to the Collector.

Glover. J.—THESE were suits for arrears of rent of the year 1266. There is no occasion for us to go into particulars, inasmuch as all four cases are for sums under 100 rupees, and the decisions in each being under Section 77 of Act X of 1859 as to who had been in *bonâ fide* receipt and enjoyment of the rent previous to the date of the institution of the suit, the appeal lay, not to the Judge, but to the Collector.

It has been contended that the Deputy Collector's decision is capable of being construed as a quasi decision on title; but after reading the judgment, we are clear that the only decision the Deputy Collector came to was on the question as to whether or not the plaintiff or the interveror, previous to the institution of the suit, had been in receipt and enjoyment of the rents. The order of the Judge passed in appeal must, therefore, be set aside as being made without jurisdiction.

The question then arises as to whether this Court should exercise the power it possesses under Section 35 Act XXIII of 1861, and make an order sending the case to the only Court which could hear it on appeal. It has been argued by the pleader for the special respondent that the wording of the judgment of the lower Court was, to say the least, ambiguous and sufficient to lead them into the error that a decision has been come to on a question of title, and to induce them to prefer their appeal to the Judge on that supposition. He asks the Court, therefore, to send the case of its own motion for trial on appeal to the Collector, inasmuch as the special appellant could not now appeal himself, being barred by lapse of time. Our attention with reference to this point has been called to two decisions of this Court; one in the case of Kristo Indur Roy Chowdhry *versus* Roopinee Bibee and others in Volume VI. Weekly Reporter, page 56, in which case the learned Judges finding that the appeal had been preferred *bonâ fide* under a mistake to the wrong Court, ordered the case to be transferred to the right Court, that is to say, to the Court of the Collector for disposal. In the other case, J. Erskine and Co. *versus* Golam Khezur in Volume IX. Weekly Reporter, page 520, the learned Judges did not go quite so far, but they gave the parties 20 days from the date of the High Court's judgment to prefer an appeal in the Court having jurisdiction.

We think that under the circumstances of this case, the plaintiffs are entitled to some consideration; and following the precedent of the last of the two cases above-mentioned, we allow the plaintiffs 30 days from the date of this judgment to prefer an appeal, if they are advised so to do, in the Court of the Collector.

With reference to costs, we think that each party should pay his own.

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The 21st April 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge.*

Arbitration award—Chapter VI Act VIII of 1859—Evidence.

Case No. 2059 of 1870.

Special Appeal from a decision passed by the Additional Judge of Nuddea, dated the 25th August 1870, *affirming a decision of the Subordinate Judge of that District, dated the* 18*th February* 1870.

Beejoy Chunder Banerjee (one of the Defendants) *Appellant,*

versus

Bhyrub Chunder Banerjee (Plaintiff) *Respondent.*

Baboos Hem Chunder Banerjee and *Grish Chunder Mookerjee* for Appellant.

Baboos Motee Lall Mookerjee and *Mohendro Lall Shome* for Respondent.

An arbitration award not being one which has been made upon a reference by all the parties to the suit is not capable of being converted into a final decree under the provisions of Chapter VI Act VIII of 1859, though it is evidence against any party who agreed to the reference.

Norman, C. J.—It appears to us quite plain that the decisions of both the lower Courts have proceeded upon a mistake.

The plaintiff brought a suit to establish his right to a one-third share of certain joint, real and personal property, as having descended to the plaintiff and the defendants, Beejoy Chunder and Shoshee Bhoosun, from their father.

The defendant Beejoy Chunder in his reply states that he and the plaintiff were two out of five brothers; that Shoshee Bhoosun Banerjee, the son of a deceased brother, and the widows of two others of their deceased brothers were alive; that the plaintiff therefore was not entitled to a one-third, but only to a one-fifth share of the property. The widows Nistarini and Kashee Monee were made parties to the suit. The case was tried, and on appeal remanded to the Subordinate Judge. After the remand, one of the defendants, *viz.*, Beejoy Gobind, applied to have the case referred to arbitration. To that the plaintiff Bhyrub Chunder Banerjee agreed. But neither the defendant Shoshee Bhoosun nor the widows, who had been added as defendants, Nistarinee and Kashee Monee, were parties to the agreement of reference.

The arbitration proceeded. The arbitrator found that the plaintiff and defendant were members of a family of five brothers, two of whom had died leaving widows.

He found that the marriage of the two deceased brothers took place long ago, and that shortly after their marriage the brothers died leaving widows as alleged. He found that for a long time past neither of the widows had come to the house of their husbands, and that it was not probable that they would do so. He said it was doubtful whether one of the widows was alive. He went on to say that it did not appear that the widows of the uncles of the plaintiff inherited any portion of their property; that persons, such as the parties to this suit, who are "proved of their kulinism" marry several wives; that of these wives, those who live in the house of their husbands and perform religious, social, and domestic duties in the husband's house alone get the property of their husbands and perform their funeral ceremonies; that otherwise the custom is, although this is not in accordance with the rule of the *Dyabhaga*, that the widows of Kulins, though chaste, do not enjoy the ordinary rights of widows. The arbitrator said if either of the widows should afterwards appear and claim it, she would be entitled to maintenance from the family property; or if *entitled to her husband's property, according to the present law* she will get his share; and this (the arbitrator's decision) would be no bar to her rights.

After the making of this award, Kashee Monee appeared, at any rate a mookhtarnamah was put in and a vakeel appeared on her behalf, and witnesses were examined in support of her title.

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The Subordinate Judge, supposing that he is giving effect to the award of the arbitrator, made a decree in favor of the plaintiff, declaring him entitled to one-third of the property as claimed by him in his plaint.

Mr. Pepper, the Judge, affirms the decision of the Subordinate Judge, also supposing that he is giving effect to the award of the arbitrator.

From that decision there is this appeal.

Upon an examination of the award, and looking at all the facts of the case as I have stated them, we are disposed to think in the first place that the award not being an award upon a reference by all the parties to the suit, is not such an award as is capable of being converted into a final decree in the suit under the provisions of the 6th Chapter of Act VIII of 1859. The award, however, is clearly evidence as against the plaintiff. Looking at the findings of the arbitrators and the evidence in the case, it is perfectly clear that the plaintiff has only established his title to one-fifth of the property in suit; because it was for the plaintiff to establish his title, and if he left it doubtful on the evidence whether the widow Nistarini was dead or not, he did not prove a fact which it was essential that he should establish in order to show that he was entitled to anything more than one-fifth of the property in suit.

We do not understand the award as establishing the plaintiff's right to more than one-fifth of the property, because the arbitrator, after stating the practice of Kulins, distinctly avoids giving any decision which shall affect the rights of the widows as they exist according to Hindoo Law; and in our opinion, no decree would be a decree in accordance with that award which awarded to the plaintiff more than a one-third share of the property sued for.

The result is that the decree of the lower Court must be reversed, and it is declared that the plaintiff has therefore failed to establish the claim which he sets up, which was a claim to one-third of the property; as the arbitrators have found that the defendant never dispossessed the plaintiff of the one-fifth share to which he is really entitled. It is clear that he is not entitled to any decree in his favor. The result is that in reversing the decree of the lower Courts, we dismiss the plaintiff's claim with costs in all the Courts.

The 21st April 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Ejectment—Mesne profits—Liability.

Case No. 2062 of 1870.

Special Appeal from a decision passed by the Additional Judge of Nuddea, dated the 14th July 1870, *affirming a decision of the Moonsiff of Kooshteah, dated the 28th August* 1870.

Huruck Lall Shaha and others (Defendants) *Appellants*,

versus

Sreenibash Kurmokar (Plaintiff) *Respondent.*

Mr. Plowden and *Baboo Jadub Chunder Seal* for Appellants.

Baboos Sreenath Doss and *Bhugobutty Churn Ghose* for Respondent.

A superior holder who dispossesses a ryot is liable, not merely for the profit which he makes by letting out the land, but to make good the loss which the ryot sustains by being dispossessed.

Norman, C. J.—We think that this special appeal must be dismissed. The evidence shows that the dur-putneedar, jointly with the persons who are now found to be in possession of land as cultivators, dispossessed the holder who was a ryot having a right of occupancy.

The lower Courts have made the dur-putneedar and the persons now in possession jointly liable for mesne profits.

Mr. Plowden, for the dur-putneedar, appellant, contends that he ought only to be made liable for such profits as he actually made; and he shows that the only profit which the dur-putneedar got by dispossessing the former ryots was by enhancing the rent from 24 rupees to 27 rupees 12 annas, and that his client is therefore only liable for half the difference, namely, for 1 rupee 14 annas a year.

We think that a superior holder who dispossesses a ryot is not liable merely for the profit which he makes by letting out the land at a slightly increased rent, but must make good to the ryot the loss which he

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sustains by having been dispossessed. Upon that principle the judgment of the lower Courts is based, and we think it correct. We, therefore, dismiss the appeal with costs.

The 21st April 1871.

Present:

The Hon'ble A. G. Macpherson and Onoocool Chunder Mookerjee, *Judges.*

Additional evidence—Appellate Court—Special Appeal.

Case 2273 of 1870.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 1st July 1870, *affirming a decision of the Moonsiff of Buxar, dated the 31st March* 1870.

Kulpo Singh (one of the Defendants) *Appellant,*

versus

Thakoor Singh and another (Plaintiffs) *Respondents.*

Baboo Tarucknath Dutt for Appellant.

Baboo Anund Gopal Palit for Respondents.

A special appeal will not lie from the order of an Appellate Court, refusing, in the exercise of its discretion, to admit additional evidence.

Macpherson, J.—THE first ground taken in special appeal is that the Lower Appellate Court acted wrongly in not taking the additional evidence which was tendered in that Court by the defendant.

It has been more than once expressly decided by this Court, that although the Lower Appellate Court has the power to allow additional evidence to be taken under certain circumstances when the case is before it on appeal, a *special* appeal will not lie in the event of that Court in the exercise of its discretion refusing to allow such evidence to be taken.—*See* the case of Golam Mukdoom, to be found in VII Weekly Reporter, page 489.

This is really the only point raised, the other points suggested having been disposed of by the finding of the Judge that there is no proof whatever that the appellant ever satisfied himself as to the legal necessity for the loan.

The appeal is dismissed with costs.

Mookerjee, J.—I concur. I think the appellant has no right to say that the Lower Appellate Court was bound to receive new documentary evidence, which has not been tendered in the Court below and wrongly refused by it. Section 355 of the Code of Civil Procedure lays down that "it shall not "be competent to the parties in an appeal "to produce additional evidence in the Ap- "pellate Court whether of exhibits or wit- "nesses; but if it appear that the lower "Court refused to admit competent evidence, "or if the Appellate Court require any "exhibits to be produced or witnessess exa- "mined to enable it to pronounce a satisfac- "tory judgment or for any other substantial "cause, the Appellate Court may allow "additional exhibits to be received and any "necessary witnesses to be examined, &c., "provided that when additional evidence "is admitted by an Appellate Court, the "reasons for the admissions shall be re- "corded on the proceedings of such Court."

The exhibits that were tendered in this case to the Appellate Court were never tendered to the Court below, and no reason is shown why they should be admitted in the Appellate Court. The law gives a discretion to the Appellate Court to admit new evidence or not, and we in special appeal should not lightly interfere with or disturb the order of that Court. In the case of Gunga Gobind Mundul *versus* the Collector of 24-Pergunnahs,* their Lordships of the Judicial Committee have held that "the provi- "sion in the Code of Procedure which re- "quires the Judges who admit fresh evi- "dence on an appeal to record their rea- "sons, though not a condition precedent to "the reception of the evidence, is yet one "that ought at all times to be strictly com- "plied with. It is a salutary provision "which operates as a check against a too "easy reception of evidence at a late stage "of litigation." It thus appears that the Appellate Court, when it admits new evidence, is bound to record his reasons for the admission. If the Lower Appellate Court

* 7 W. R., P. C., p. 21.

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did not see any good reason for the admission of evidence at such a late stage of the litigation, it was not bound to receive the exhibits tendered. In special appeal, however, we do not think we can interfere with the exercise of the discretion with which the law vests the Court of appeal.—*See* Weekly Reporter, Volume VI, page 196.

The 21st April 1871.

Present:

The Hon'ble A. G. Macpherson and Onoocool Chunder Mookerjee, *Judges.*

Nij-jote lands—Zemindar—Rights of occupancy.

Case No. 2300 of 1870.

Special Appeal from a decision passed by the Judge of Sarun, dated the 26th August 1870, *affirming a decision of the Subordinate Judge of that District, dated the 30th April* 1870.

Mr. A. Reed (Defendant) *Appellant,*

versus

Sreekishen Singh and others (Plaintiffs) *Respondents.*

Mr. R. T. Allan and *Baboo Romesh Chunder Mitter* for Appellant.

Baboo Rughoobuns Sahoy for Respondents.

A zemindar occupying his own lands as *nij-jote* cannot, when the zemindaree passes into other hands, lay claim to them on the ground that he is a ryot with rights of occupancy.

Macpherson, J.—It appears to us that this special appeal ought to be dismissed.

The plaintiff sues to obtain possession of 26 beegahs and 17 dhoors of certain lands, which he says fell to his share under a butwarah made under Regulation XIX of 1814. He states that a 1 anna and 9 pies share of what constituted the joint estate was assigned to the defendant on the butwarah. He further states that the land in suit has been for some time cultivated by the defendant as a proprietor, and that it having now fallen to the plaintiff's share under the butwarah, the plaintiff is entitled to recover possession.

The defendant has pleaded that he cultivated the land as a ryot for many years, and therefore that the plaintiff could not oust him.

The Lower Appellate Court says that it was for the defendant to show that he cultivated the land as a ryot, but that he has entirely failed to do so, while on the other hand the plaintiff has clearly shown that the defendant held the land as a proprietor. In fact, as I understand it, the Judge finds that the defendant, in virtue of the share which he held in the estate before the butwarah, occupied these particular lands as *zeraat* or *nij-jote* lands. If he did so occupy them, no doubt he cannot have any good defence now as against the plaintiff who chooses to insist upon his right to recover. The defendant having pleaded that he held the land as a ryot, and not as *zeraat*, in virtue of his possession as a proprietor, it lay (as the Lower Appellate Court has said) upon him entirely to prove his *status* as a ryot. The Judge finds that he has failed to prove that, and I do not think that we can interfere with his finding or with his decree.

The appeal is dismissed with costs.

Mookerjee, J.—I concur. The Judge substantially finds on the evidence that the defendant was not a ryot on the 26 beegahs claimed by him, but that he held this land as his *nij-jote* or *seer* lands, he having been also a co-partner with the plaintiff in this zemindaree. That being so, it is clear that the defendant cannot hold the land against the will of the plaintiff who is the admitted owner of the property. A joint proprietor who gets a definite share of a zemindaree by butwarah gets the same as his separate zemindaree, and is entitled to the full and complete enjoyment of his rights as a zemindar therein. If the defendant could have satisfied the Lower Appellate Court that he was an old ryot of this land with rights of occupancy and had paid rent for it to the zemindar, he might have been entitled to retain the possession of it as a ryot paying rent to the plaintiff to whose share the land has now exclusively fallen. But the Courts below were not so satisfied. Such being the case, it is impossible to find how the defendant can retain possession of this land, and also hold exclusive possession of the share that has been allotted to him as an 1 anna 9 gundahs proprietor of the zemindaree by the butwarah. A

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zemindar, I apprehend, cannot lay claim to his own *nij-jote* lands on the ground that he is a ryot with rights of occupancy, when that zemindaree has passed into the hands of another. Section 6 Act X of 1859 distinctly lays down that no ryot can acquire a right of occupancy in *khamar*, *nij-jote*, or *seer* land. Much less can the zemindar lay such a claim who cultivates his own *seer* lands as a zemindar. Whether this *nij-jote* land was *nij-jote* land of the defendant or of any other co-parcener of the defendant, he could have acquired no rights of occupancy in regard to it. The defendant has entirely failed to prove that he was a ryot, or that he ever paid any rent for the land in dispute. He has therefore no right to dispute the claim of the plaintiff.

The 21st April 1871.

Present:

The Hon'ble H. V. Bayley and G. C. Paul, *Judges.*

Ex-parte decisions — Review — Sections 119 and 376 Act VIII. 1859— Procedure — Jurisdiction — Mesne profits.

Cases Nos. 2411 and 2412 of 1870.

Special Appeal from a decision passed by the Officiating Judge of Purneah, dated the 13th August 1870, affirming a decision of the Subordinate Judge of that District, dated the 11th May 1870.

Khoob Lall Sahoo and others (Plaintiffs) *Appellants,*

versus

Shaikh Kadir Buksh and others (Defendants) *Respondents.*

Messrs R. T. Allan and *J. S. Rochfort* for Appellants.

Mr. C. Gregory and *Baboo Boodh Sein Singh* for Respondents.

The use in a petition of the words "ছানি তজবিজ" (*i. e.*, second trial, but technically "review"), and their adoption by the Moonsiff, do not make the petition an application for review under Section 376, Code of Civil Procedure, where it is clearly and distinctly one under Section 119 for a re-trial in the presence of the petitioner.

Where the Lower Appellate Court admitted an application under Section 119 for re-trial of a case which had been decided *ex-parte* by the Moonsiff, it was held to have done right in sending for the record in order that the case as a suit should be heard and tried by the Appellate Court; the object of the law being that a suit should assume a complete form and go to a full trial, and not be divided between different Courts.

Bayley, J.—The first of these special appeals, No. 2411, contains the main points for determination in this case, and they are—

Firstly.—That under Section 27 Act X of 1859, the registered tenant, Rujub Ali, could not, without the consent of the special appellant as the putneedar, transfer his right to the tenure to Morad Ali, and consequently the defendants deriving from Rujub Ali were not entitled to claim the same as against the special appellant. The fact, however, is that neither the register of transfer nor any other evidence is put in to show that the name Morad Ali was transferred in the place of Rujub Ali. Further, it has been found as a fact by the Lower Appellate Court, that Morad Ali is a fictitious person altogether; and lastly, Kadir Buksh comes in in this case upon a sale-certificate in execution conveying to him the rights and interests of Rujub Ali. It was, therefore, for the special appellant to prove that Morad Ali was the only person he was to recognize as tenant. As before observed, the recognition on the facts found by the Lower Appellate Court would be that of non-existent holder.

The *second* point is, that the Lower Appellate Court was wrong in admitting a review of the Moonsiff's order rejecting the application of Kadir Buksh, dated the 14th January 1870. Now, if the facts were really so, there might have been some ground for the contention; but it appears that although the words "ছানি তজবিজ" (*i. e.*, second trial, but technically review) are used in the petition and adopted by the Moonsiff in his order, there is nothing to make it an application for review under Section 376 of the Civil Procedure Code. The petition was clearly and distinctly one under Section 119 for re-trial of the case in the presence of the petitioner, the former judgment having been passed *ex-parte* in his absence. Section 119 in distinct terms provides that in such a case, the petitioner showing good and sufficient cause for his non-attendance, the Court may admit the case to a re-hearing in the presence of both the parties.

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The third ground is that the Subordinate Judge had no jurisdiction to transfer to his own file the case, as it was a miscellaneous one and should have been kept by the Judge on his own file; but it is clear in this case that immediately after the filing of the petition under Section 119, the whole records were ordered to be sent to the Subordinate Judge in order that the case as a suit might be heard and tried together with the analogous suit already pending before him. Accordingly the records of the *suit, as a suit and not as a miscellaneous case,* were sent up to the Subordinate Judge and tried by him, the petitioner satisfying him under Section 119 as to the causes of his absence at the first trial. The object of the law also is that a suit should assume a complete form and go to a full trial, not that one-half should go to one Court and the other half to another.

The fourth objection is that the Lower Appellate Court had no power to make Kadir Baksh a defendant in the suit, but the words of Section 73 Act VIII of 1859 are "if it appeal to the Court, at any hearing "of a suit, that *all* the persons who may be "entitled to or who claim some share or in-"terest in the subject-matter of the suit, "and who may be likely to be affected by "the result, have not been made parties to "the suit, the Court may adjourn the hear-"ing of the suit to a future day to be fixed "by the Court, and direct that such persons "shall be made either plaintiffs or defend-"ants in the suit, as the case may be." It may be urged in this case that the order was passed after the date of the *ex-parte* decree became inoperative and an original suit succeeded. These are the objections urged in appeal No. 2411.

In No. 2412 the sole question is, whether upon an area of 35 beegahs damages should be assessed as upon 65 beegahs. Now, on this point I need only observe that the principle on which mesne profits should be calculated has been held to be that a party who may be found to be wrongfully in possession should pay to the party wrongfully ousted such sums as the party wrongfully in possession has collected, or might under ordinary circumstances with care and diligence have collected, in the mean-time of his being ousted.

In this view, I see no reason to disturb the judgment of the Lower Appellate Court, and would, therefore, dismiss both these special appeals with separate costs to the respondents appearing separately.

Paul, J.—I am also of opinion that there is no ground for interfering with the judgment of the lower Court. The judgment appears to me to be perfectly correct.

The 21st April 1871.

Present:

The Hon'ble H. V. Bayley and G. C. Paul, *Judges.*

Additional parties—Section 73 Act VIII. 1859—Discretion.

Case No. 2675 of 1870.

Special Appeal from a decision passed by the Officiating Judge of Purneah, dated the 5th August 1870, *affirming a decision of the Moonsiff of that District, dated the 20th May* 1870.

Mŏtee Chund Doss and another (Plaintiffs) *Appellants,*

versus

Moorulee Dhur Doss and another (Defendants) *Respondents.*

Mr. R. E. Twidale for Appellants.

Baboo Luckhee Churn Bose for Respondents.

The object of Section 73 Act VIII of 1859 is to prevent needless litigation, and there are cases, *e. g.*, as when it is necessary to make plaintiff's co-parceners defendants, when a Judge should exercise the discretion vested in him by that Section, even if the plaintiff omits to ask him to do so.

Bayley, J.—We think the decision of the Lower Appellate Court is wrong. We have heard the plaint in this case, and we are of opinion that there is a cause of action on the face of the plaint. The plaintiff alleges a putnee title, and prays to have a declaration of that title on the ground that it is opposed by the defendant. There is thus a cause of action to the plaintiff.

As to the second ground, we think that Section 73 Act VIII of 1859 is expressly enacted to avoid needless litigation, and that this is one of those cases in which the Judge should exercise the discretion vested in him under that Section, even if the plain-

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tiff omits to ask him for it. The Lower Appellate Court ought, therefore, to have made the admitted co-parceners of the plaintiff defendants in this case. The object of the Code is to simplify and shorten the litigation of Courts, whereas if in this case we are to give that construction to Section 73 which the respondent contends for, we evidently mar that object.

The case is remanded to be re-tried with reference to the above remarks.

Paul, J.—I concur.

The 22nd April 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Hindoo Law—Succession—A sister's son.

Case No. 2557 of 1870.

Special Appeal from a decision passed by the Officiating Judicial Commissioner of Chota Nagpore, dated the 31st August 1870, *affirming a decision of the Moonsiff of Rughoonathpore, dated the 2nd December* 1869.

Seeta Ram Gossain (Plaintiff) *Appellant,*

versus

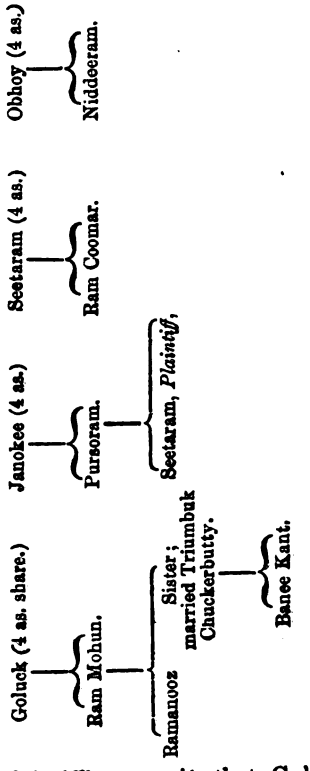
Fukeer Chand Chuckerbutty and others (Defendants) *Respondents.*

Baboo Bungshee Dhur Sein for Appellant.

Baboo Bama Churn Banerjee for Respondents.

If a sister's son is alive at the death of his uncle's last preceding female heir who succeeded to the property, he takes the succession.

Glover, J.—GOLUCK, Janokee, Seetaram, and Obhoy were four brothers joint in estate. The state of the family will be best seen from the following genealogical table.



The plaintiff's case is that Goluck's 4 annas share descended from son to grandson, and thence to the grand-son's nephew, Banee Kant; that on Banee Kant's death unmarried, his father Triumbuk succeeded and gave the share to the father and uncle of Seetaram, from whom it came to the plaintiff; that one-third of this share was put up for sale in execution of a decree against Niddeeram, and bought by the defendant as the rights and interests of the judgment-debtor; that plaintiff made a claim under Section 246 of the Civil Procedure Code which failed, and he was therefore obliged to bring the present regular suit for declaration of his right to that portion of the family property sold as Niddeeram's, but which portion was never divided amongst the family but was given by the heir to plaintiff's father and uncle.

The defence was that Ramanooz's share came to the other members of the family, Banee Kant having predeceased his uncle; and that Niddeeram took a one-third share

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of the 4 annas left by Ramanooz, which share was properly sold as the interest of the judgment-debtor.

Both lower Courts have decided the case adversely to the plaintiff, on the ground that as Banee Kant died before Ramanooz, Triumbuk never succeeded to the property, and consequently could not have given a good title to the plaintiff's father and uncle.

It is contended in special appeal that the real issue between the parties has not been tried; that it was immaterial, according to Hindoo Law, whether or not Banee Kant was born after the death of Ramanooz, if he were alive at the time the last preceding female heir died; and that if it were proved that Banee Kant was alive when Ramanooz's mother or grandmother, both of whom are stated to have succeeded to the property, died, he would have been entitled to the succession; and if so, his (Banee Kant's) father, Triumbuk, would have inherited, and the plaintiff's title be established.

We think that the lower Courts have mistaken the issue, or rather have only partially decided it. They both considered it sufficient to bar the plaintiff's claim, if it were shewn that Ramanooz died before Banee Kant was born,—ignoring apparently the fact that if Banee Kant was alive at the death of the female heir of Ramanooz, he would, according to Hindoo Law, take the succession.—(*See* Vyavasta Durpana, No. 96, page 234, and the cases bearing on it. *See* also Rash Beharee Roy *versus* Nimaye Churn, Gap No. Weekly Reporter, 223.)

It is argued by the pleader for the special respondent that even if this be a correct view of the Hindoo Law, the plaintiff has no right to take advantage of it (*vide* case of Eshan Chunder, VI Weekly Reporter, 57, Privy Council Rulings), inasmuch as it was never his case; the point on which issue was joined being whether Banee Kant was or was not born at the time of his uncle Ramanooz's death. To some extent this contention is correct, but it must not be forgotten that the point for decision was in the first instance recorded in very general terms, *viz.*, who was the nearest heir of Ramanooz, nor that the Judicial Commissioner in remanding the case to the Moonsiff for trial on the merits restricted that officer to the issue "whether or not Banee Kant was born before his uncle died." It appears to us, therefore, to have been as much the action of the Court itself as of the plaintiff that the question of inheritance was limited, and it would not, we think, be fair to deprive the plaintiff of the privilege of proving, if he can, that Banee Kant was alive when the heir of Ramanooz, who succeeded to his property, died. We are not unmindful of the Privy Council ruling above quoted, but it does not, we think, apply to the circumstances of the present case.

We remand the case, therefore, for a finding on this issue. If it be decided in favor of the plaintiff, nothing more need be done; if adversely to him, the Courts will consider and decide the plaintiff's plea that he had been in adverse possession of the disputed property for more than 12 years before the sale to the defendants and had thereby got a title.

Costs will follow the result.

The 24th April 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Tenancy — Solehnamah — Mowrosee mokurrurree rights.

Case No. 2079 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Judge of 24-Pergunnahs, dated the 28th July 1870, *affirming a decision of the Deputy Collector of Buseerhaut, dated the* 31*st March* 1870.

Bhoobun Mohinee Dossee and others (Plaintiffs) *Appellants*,

versus

Dhonaye Karigur and another (Defendants) *Respondents.*

Baboos Chunder Madhub Ghose and *Bhowanee Churn Dutt* for Appellants.

Baboo Jogendronath Bose for Respondents.

A member of a Hindoo family, who had the management of the ancestral property, was sued by one of the tenants for illegal distraint. Plaintiff put in a pottah in which the rent was described as a fixed rent

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and the tenancy an old and existing tenancy. The result of that suit was a solehnamah or compromise between the parties, in which the manager fixed or confirmed the rent of the tenure, and agreed that that rent should not be enhanced.

HELD that the effect of the solehnamah was to confer upon the tenant and his descendants a mourosee mokurruree right in the land at a fixed rent, as far as the manager was capable of conferring such a right.

Norman, C. J.—WE do not think it is necessary to call upon the other side.

This is a suit for arrears of rent at an enhanced rate after notice. The plaintiffs allege that the defendants hold 170 beegahs of land in Mouzah Kamarparah, for which they have hitherto paid as rent 161 rupees 4 annas and 23 *arrees* of dhan. The defendants contend that they hold the land at a fixed rent, and that the plaintiffs are not entitled to enhance.

The facts are as follow :—One Luckhee Narain Bose had three sons, Radha Mohun, Kristo Mohun and Juggut Chunder. Radha Mohun left a son Sisteedhur, whose son was Kylash Chunder, and the plaintiffs are the widows of Kylash Chunder. Kristo Mohun had a son Huro Gobind and six other sons. Juggut Chunder left two sons, Prosunno Coomar and another. Luckhee Narain being the original owner of the land within which the defendants' tenure exists, appears to have been succeeded in the possession and management of the property by Kristo Mohun, whose son Huro Gobind afterwards got possession of and managed the property.

The defendants are in possession of a pottah fixing their rent, dated 21st Chyet 1238, in which the rental of their land is stated to be rupees 150-4 sicca. The rent is described in that pottah as a fixed rent, and the tenancy of the defendants as an old and existing tenancy. In 1844, Asseen Karigur, the ancestor of the present defendants, brought a suit against Huro Gobind for illegal distraint. In that suit he put in the pottah of Chyet 1238, and the suit eventuated in a solehnamah or compromise, dated 20th September 1845, by which the parties compromised their differences, and Huro Gobind "fixed" or "confirmed" (it is doubtful which is the exact signification of the word) the rent of that tenure at 161 rupees and 4 annas, including *parbunee* (a sort of cess) and one *biss* and three *arrees* of paddy. By that instrument, he agreed that that rent should not be enhanced; and therefore the effect of that solehnamah is to confer upon the defendants a mourosee mokurruree right in the land at a fixed rent, so far as Huro Gobind was capable of conferring such right upon them.

It appears that before the date of the suit by Asseen Karigur in 1844, Huro Gobind had put Sisteedhur, the son of his uncle Radha Mohun, out of possession. On the 15th September 1848, Sisteedhur obtained a decree for possession of his one-third share against his co-sharer Huro Gobind. From the date of that decree down to the commencement of this suit, neither Sisteedhur, nor his son, nor the plaintiffs have ever called in question the arrangement entered into by Huro Gobind with the defendants fixing an increased rent of rupees 161-4 annas and one *biss* and three *arrees* of paddy as the rent of the tenure; and it appears that the plaintiffs have constantly received that rent.

We are of opinion that this fact affords very strong evidence that Sisteedhur and his son confirmed and ratified the arrangement made by their co-sharer Huro Gobind by the solehnamah of the 20th September 1845. There is no doubt that in receiving the new rent and 7 *arrees* of paddy from this land, they must have known perfectly what was the arrangement made in the suit against Huro Gobind by which that rent was fixed. Had they refused to abide by that arrangement, and had they not accepted the rent fixed in the solehnamah, it is clear that the ancestors of the defendants would have been in a position to set up as against them their rights under the pottah of 1238, and we should be doing the greatest injustice to the defendants if the plaintiffs, who for so many years have received the benefit of the agreement contained in the solehnamah, could at this distance of time disavow the authority of Huro Gobind to enter into it. If this were permitted, the effect might be that the plaintiffs would be able to defeat the ancient mourosee mokurruree rights of the defendants under a document which, for all that appears, would have been valid and enforcible but for the compromise by which it was put an end to. For these reasons, we are of opinion that the decision of the Judge confirming the arrangement contained in the solehnamah is correct, and that the appeal must be dismissed with costs.

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The 24th April 1871.

Present:

The Hon'ble E. Jackson and W. Ainslie, *Judges.*

Invalid lakheraj — Resumption—Limitation.

Case No. 2123 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Furreedpore, dated the 10th August 1870, *affirming a decision of the Moonsiff of that District, dated the 29th November* 1869.

Gunga Ram Chowdhry and others (Plaintiffs) *Appellants,*

versus

Huree Nath Chowdhry and others (Defendants) *Respondents.*

Baboos Kalee Mohun Doss and *Jadub Chunder Seal* for Appellants.

Baboo Bungshee Dhur Sein for Respondents.

In a suit by a dur-putneedar for the resumption of land alleged to be held as lakheraj under an invalid title, limitation must be calculated not from the date of the creation of his dur-putnee title, but from that of possession of the party from whom the putneedar originally derived his title.

Ainslie, J.—THE question in this special appeal is, as to what is the period of limitation to be applied to suits now instituted to resume lands alleged to be held as lakheraj under invalid titles. The remarks at page 205 of the second edition of Thomson's Law of Limitation so clearly set forth the present state of the law on the subject that there is nothing to add to them. The tenure in dispute has been admittedly in existence for 54 years. The plaintiff is a dur-putneedar, and in calculating limitation we must not calculate from the date of the creation of his dur-putnee title, but we must go back to the date on which the party from whom the putneedar originally derived his title obtained possession of this estate. It is not attempted to be shewn that the title originated within 12 years.

The appeal is dismissed with costs.

The 24th April 1871.

Present:

The Hon'ble A. G. Macpherson and Onoocool Chunder Mookerjee, *Judges.*

Joint-debtors—Right of action—Fraud—Issues.

Case No. 2236 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 22nd July 1870, *affirming a decision of the Moonsiff of Chuprah, dated the 22nd February* 1870.

Sheo Churn Narain Singh (Defendant) *Appellant,*

versus

Chukraree Pershad Narain Singh and another (Plaintiffs) *Respondents.*

Baboo Romesh Chunder Mitter for Appellant.

Baboos Mohesh Chunder Chowdhry and *Runghoobuns Sahoy* for Respondents.

Where property in which two members of a Hindoo family are jointly interested is sold in order to raise money for the payment of a debt jointly contracted by both, the son of one of them cannot sue to recover his own, or his own and his father's share, in the absence of the other.

In such a suit, if it is alleged that the father is connected with the institution of the suit with a view to defraud creditors, an important issue is raised which should be tried and decided.

Macpherson, J.—IN this case, we are of opinion that the first and second grounds taken in the written memorandum of appeal are good grounds, and that the plaintiff's suit ought to be dismissed.

The case is exactly parallel to a case reported in XII Weekly Reporter, page 482, in which it was held that the property having belonged jointly to the plaintiff's father and uncle (the father's brother), the plaintiff could not sue to recover either his own share, or his own and his father's share, in the absence of the father's brother, who, jointly with the father, was interested in the property, and jointly with the father had contracted the debt to raise money for the payment of which the estate was sold.

As to the third ground of appeal, which is—"that it was distinctly pleaded that the "suit was not *bonâ fide*, but brought by the

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"father who is living in the same mess with "his son the plaintiff, and at his father's "expense, to defraud the joint dues of cre- "ditors; and evidence was adduced to prove "these facts; the Lower Appellate Court "has not at all considered this important "question." I may say that the allegation as to the father's connection with the institution and prosecution of this suit raised an important issue in the case, which ought to have been distinctly tried and decided.

As to the fourth ground of appeal, we cannot say whether the Court below was right or wrong in holding that the evidence did not prove that the debts were contracted for necessary purposes. But as the decrees of the lower Courts are set aside and the suit is dismissed, the finding of the Court below as to the necessity for incurring the original loan becomes unimportant and of no effect.

Following the course adopted in the case referred to above, we reverse the decree of the Lower Appellate Court and dismiss the plaintiff's suit with costs in all the Courts.

Mookerjee, J.—I concur.

The 24th April 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Admissions.

Case No. 2419 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Hooghly, dated the 31*st August* 1870, *reversing a decision of the Moonsiff of Sulkhea, dated the* 29*th June* 1870.

Grish Chunder Lahoree (Plaintiff) *Appellant,*

versus

Shama Churn Sandyal (Defendant) *Respondent.*

Mr. R. E. Twidale for Appellant.

Mr. M. Datta and *Baboo Jadub Chunder Seal* for Respondent.

An admission made in a verified petition by an intervenor in an Act X suit, and repeated in a verified plaint filed by him in a regular suit, was held to be binding in a subsequent suit on the party who made it.

Kemp, J.—THE plaintiff in this case is the special appellant. He sued for recovery of possession of a moiety in 5 cottahs of land, together with the buildings standing thereon. The first Court gave him a decree, relying upon the admission of the defendant, Shama Churn, in the Act X suit as well as in the plaint filed by him in the Civil Court. In appeal, this decision was reversed by the Subordinate Judge of Hooghly. It appears that the gist of his decision is that because the defendant has been occupying this house for some time, therefore it would be hard upon him, although the plaintiff is the rightful heir, to turn him out of the house. The law point is not disputed by the pleaders; it is clear that the plaintiff must succeed as heir, if Ram Dhunee died leaving her son Tara Chand.

It appears that the plaintiff sued some ryots for rent of the lands left by Ram Dhunee. The defendant Shama Churn intervened in that case, and in a verified petition put in by him he said that Ram Dhonee died leaving her son Tara Chand as her heir. Shama Churn, the defendant, having failed in that Act X suit instituted a regular suit; and in the verified plaint filed by him in that suit, he repeated that assertion that Ram Dhunee had left Tara Chand as her heir. In special appeal, it is contended that these admissions are binding upon the defendant, and that if they are not conclusive, the Subordinate Judge ought at all events to have tested the evidence by these admissions and taken them into consideration. On the other side it is contended that such admissions are not binding, and two decisions have been brought to our notice; one to be found in Volume VI, Weekly Reporter, page 286; and the other in Volume XII, page 39. The first decision, that in Volume VI, is to this effect, that a party is not bound by an erroneous admission in a petition. In that decision the Judges held that the statement made by the parties in that petition was a simple error, and therefore the plaintiff was not bound by a pure error in a petition; and we are not shewn in the decision whether the petition alluded to was a verified petition.

The next decision is to the effect that a written statement is not legal evidence. In that case, it appears that the written state-

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ment was sought to be made use of as evidence against the co-sharers of the defendants, and the Judges held that the written statement of one party is no evidence against the other party.

In the case before us, we have the defendant, on failing in his intervention in the Act X suit, resorting to a regular suit in which there is a verified statement in the plaint, not put in by a karpurdaz but by himself, stating that Ram Dhunee died leaving her son Tara Chand.

We, therefore, think with the first Court that the defendant was bound by these admissions made by him in the Act X suit, and more formally afterwards in the regular suit. We, therefore, reverse the decision of the Lower Appellate Court, restore and confirm the decision of the first Court, and decree this appeal with all costs payable by the special respondent.

The 24th April 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Notice of enhancement—Ejectment.

Case No. 2660 of 1870.

Special Appeal from a decision passed by Subordinate Judge of Hooghly, dated the 8th December 1870, *affirming a decision of the Moonsiff of that District, dated the 20th September* 1870.

Nubo Kishen Mookerjee (Plaintiff) *Appellant,*

versus

Kalachand Mookerjee (Defendant) *Respondent.*

Baboos Mohesh Chunder Chowdhry and *Chunder Madhub Ghose* for Appellant.

Baboos Kalee Mohun Doss and *Radhika Churn Mitter* for Respondent.

A childless Hindoo widow granted a pottah to defendant. On her death there was a dispute as to the heirship to her husband, and the right of plaintiff's vendor having been declared the latter brought a suit against defendant for a kubooleut at enhanced rates of rent. Defendant disputed the claim, setting up the title of the opposite party, but the suit was decreed to the extent of the rate of rent admitted by defendant. Subsequently plaintiff issued a notice of enhancement, and, defendant not coming to terms, sued to set aside the pottah and obtain possession.

HELD that the decree obtained by plaintiff's vendor created a new contract between the parties under the kubooleut, by which defendant was entitled to hold at the rent admitted by him till plaintiff took further steps. And that plaintiff's vendor having conveyed his whole title to plaintiff, who then gave defendant distinct notice, plaintiff was entitled to succeed in the present suit.

Case at 12 W. R., p. 299, distinguished.

Kemp J.—THIS was a suit to set aside a pottah granted by a childless widow, and to obtain possession of a tank, comprising 4 cottahs of land, valued at 150 rupees. It appears that Kashee Monee, a childless Hindoo widow, on the 30th of Kartick 1260, granted a mourosee pottah of this disputed tank to the defendant Kalachand Mookhapadhya, receiving from him a bonus of 20 rupees. The widow died in Aughran 1269. There was some contention between Raj Kristo, the plaintiff's vendor, and Bama Soondurree as to who was the heir of the widow's husband, and that question was finally decided in favor of Raj Kristo. Raj Kristo, immediately upon his right being declared, brought a suit against Kalachand Mookhopadya, the defendant, to enhance the rent of this disputed tank, claiming to receive a kubooleut at 5 rupees for the 4 cottahs, which would be at the rate of 20 rupees per beegah. The defendant Kalachand in that suit, instead of acknowledging the plaintiff's title which had been judicially established by the decision of a competent Court, chose to dispute it and to set up the title of Bama Soondurree. He also set up his pottah, and the result of that suit was that the Court declared that the plaintiff in that suit, Raj Kristo, was not entitled to obtain a kubooleut at the enhanced rate claimed, but that he was to receive the rent at the rate admitted by the defendant, *namely*, rupees 1-8 on the four cottahs occupied by the tank. This decision having created a new contract between the parties, the plaintiff, Raj Kristo's vendee, continued to receive at the rate of rupees 1-8 for a certain period. Subsequently, or in 1276, he issued a notice on the defendant intimating to him that in future he would have to pay 7 rupees for this tank, instead of the rent hitherto paid of rupees 1-8, and

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on failing to do so that he would have to quit. The defendant not coming to terms, the plaintiff brings this suit to set aside the pottah granted by Kashee Monee, the childless widow, and to eject the defendant.

As much stress has been laid by the pleader for the defendant upon the question of the defendant having expended money upon this tank, we may here observe, before entering further into the case, that the defendant in his written statement took exception to the valuation put upon the tank by the plaintiff, and said that it was not worth more at the utmost than 50 rupees.

Both Courts have found against the plaintiff and dismissed his suit. The grounds upon which the Lower Appellate Court has found for the defendant are, first, that he has acquired a right of occupancy, inasmuch as he has enjoyed possession of the disputed tank for upwards of 15 years; second, that there has been a ratification of the pottah of Kashee Monee by the plaintiff's vendor and by the plaintiff himself; and third, that according to the terms of the conveyance by Rajkristo to the plaintiff, the plaintiff is not entitled to sue to eject the defendant.

On the first ground, we may say that the pleader for the respondent has admitted that this land not being held for agricultural or horticultural purposes, is not land which comes within the purview of Section 6 of Act X; and he distinctly stated that he did not rely on that Section, but that he relied upon the conduct of the plaintiff's vendor, as well as on the conduct of the plaintiff himself after the death of the grantor, Kashee Monnee, which took place in 1269. He also said that he stood or fell according to the interpretation which this Bench might put upon the the decision to be found in Volume XII, Weekly Reporter, page 299, in the case of Juggesshur Bhuttobyal *versus* Rajah Bodydro Narain Roy. In that case Mr. Justice Markby held that it seemed to him that "if "a person being aware that another is in "possession claiming to hold under a lease "accepts rent from him, he does thereby "ratify the lease so far as he has the power "to do so;" and his Lordship further says "that if a lessor wishes to protect himself "from the ordinary inference that by the "acceptance of the rent he re-cognizes the "the lease, he is bound to give distinct "notice to the tenant that he intends to "dispute the validity of the lease under "which he claims to hold; because if he "intends to dispute the tenant's title, he "ought to leave to the tenant an opportunity of refusing payment of the rent "under the lease."

Now, in this case, we think that looking to the conduct of the plaintiff's vendor, it is clear to us that this case does not come within the remarks above quoted. In the present case, the plaintiff's vendor immediately the success opened out to him, that is to say, as soon as he was declared to be the rightful heir to this property, did give the defendant, the ryot, distinct notice of his intention to dispute the validity of the lease under which the defendant claimed to hold. He brought a suit, immediately on his acquiring the right to this property, to enhance the rent but was unsuccessful in the suit. That suit, however, as already observed, created a new contract as between the parties—a contract under the kubooleut—by which the defendant was declared to be entitled to hold the lands at the rent admitted by him until the plaintiff took further steps. The plaintiff, the vendee of Raj Kristo, did give the defendant an opportunity of accepting his terms or refusing payment on those terms; and therefore it is clear that he has "given distinct notice to the tenant of his intention to dispute the validity of the lease;" and further that he has given the tenant an opportunity of accepting or refusing the terms upon which he was willing to permit the tenant to hold on, by the notice to the defendant which has already been mentioned above. The defendant, although he knew by the former litigation in 1863 of the intention of the plaintiff to enhance, and in the face of the notice enabling him to hold the lands at 7 rupees for good, chose to come to no terms with his landlord.

We, therefore, think that the decision which has been quoted in Vol. XII does not apply to this case.

The next point is whether the conveyance from Raj Kristo to the plaintiff entitles the plaintiff to bring the present suit. That conveyance has been read to us, and we find that it passes the whole title of Raj Kristo. There is no question that Raj Kristo could have brought this suit, and having conveyed his whole title to the plaintiff we think that the plaintiff is in a position to bring this suit.

We reverse the decision of the Courts below, and decree the plaintiff's suit with costs of the lower Courts and of this Court.

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The 25th April 1871.

Present:

The Hon'ble W. Ainslie and G. C. Paul, *Judges.*

Resumption decrees—Regulation II. 1819 — Presumptions — Errors of procedure—Invalid decrees.

Case No. 1967 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Additional Judge of Nuddea, dated the 13th August 1870, *affirming a decision of the Deputy Collector of Meherpore, dated the 26th May* 1870.

Modhoo Soodun Sagoory and others (Plaintiffs) *Appellants,*

versus

Nepal Khan and others (Defendants) *Respondents.*

Baboos Romesh Chunder Mitter and *Grish Chunder Mookerjee* for Appellants.

Baboo Doorga Dass Dutt for Respondents.

In a suit for resumption where plaintiff stated that defendant was holding the land in dispute under a pretended lakheraj title, without specifying whether that title was anterior or posterior to December 1790, it was found that defendant had not proved that his alleged lakheraj existed prior to that date, and the suit was decreed.

HELD that from the fact of the Court having adopted a procedure which is only sanctioned in the special cases provided for by Section 30 Regulation II of 1819, it was not a necessary inference that the decree was made under that Regulation.

HELD that even if made under Section 30 Regulation II of 1819, a resumption decree bearing an earlier date than the Full Bench Ruling of 25th January 1865 (II Weekly Reporter, page 91) would not establish that the grant resumed was of earlier date than 1st December 1790.

Decrees made under Regulation II of 1819 prior to the 25th January 1865, for the resumption of grants of later date than 1st December 1790, cannot be held to be void; for error in procedure in a trial does not *per se* render void a decree which on the face of it is one the Court was competent to make.

Ainslie, J.—PLAINTIFF sues to obtain from the defendant a kubooleut for certain lands, which were resumed as invalid lakheraj under a decree dated 14th March 1862.

Defendant denies that the relation of landlord and tenant exists.

Both the Courts below have based their decision dismissing the suit, on a ruling of this Court, reported in XII Weekly Reporter, page 442, in which it was held that when land is resumed as invalid lakheraj under Section 13 Regulation II of 1819, the proper procedure for assessing it is that laid down in Section 9 Regulation XIX of 1793.

Plaintiff appeals specially and contends that the resumption decree was not made under Section 30 Regulation II of 1819.

Apparently in the case cited the decree purported to have been made under the particular Regulation, though from the terms of the judgment it was attempted to be shewn that that Regulation did not really apply. The Court remarked that they were bound to take the decree as it stands, and had nothing to do with the reason on which the judgment which led to that decree was based. It was also observed, that if the lands in question were really alienated as lakheraj subsequently to the 1st December 1790, the Court which passed the decree had no jurisdiction to pass it under the provisions of Section 30 Regulation II of 1819.

In the present case, there is nothing on the face of the decree to show that it was made under Regulation II of 1819, and it is further urged that the plaint in the suit was not framed as a plaint under that Regulation. Plaintiff contends that the Court made the decree under the general powers of the Court to hear and determine Civil suits. On the other hand, it is admitted that the Court adopted a procedure which is only sanctioned in the special cases provided for by Section 30 Regulation II of 1819, and from this it is argued that the decree was made under that Regulation.

This inference is not one which must of necessity be drawn. But even if I thought myself bound to take this decree as a decree made under Section 30 Regulation II of 1819, I could not concur in holding that this would of itself fix the date and character of the grant resumed and determine the procedure to be adopted for assessing the lands. It must be borne in mind that up to the Full Bench ruling in Sonatun Ghose's Case, II Weekly Reporter, p. 91, decided on 25th January 1865, it was supposed* that all resumption suits were triable under Section 30 Regulation II of 1819. Three out of seven Judges, who sat at the

* *See* II Weekly Reporter, page 259. "Previous to the enactment of Act X &c., ... (down to) had grown into a custom."

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hearing of that case maintained this view of the law, and the contrary view was only affirmed by a majority of one. Therefore, I do not think that we can infer from the form of a decree of earlier date then 1865, even when professedly made under Regulation II of 1819, that the resumed grant was of earlier date than 1st December 1790. Consequently, when the nature of the title set aside is not stated on the face of the decree, we are entitled to look to the judgment (and record if necessary) to ascertain it. If we do so in the case in hand, we find that it was not alleged by plaintiff or shown by defendant that the grant resumed by the decree was in existence prior to 1st December 1790.

Although the Full Bench decision determines that decrees cannot properly be made under Regulation II of 1819 for the resumption of grants of later date than 1st December 1790, it certainly did not and could not lay down that decrees had never been made as under that Regulation for the resumption of such grants;—the contrary was admitted.

I do not think that we can hold all such decrees to be void, or that we are bound to hold that the existence of a decree under Regulation II of 1819 establishes that the grant resumed was of earlier date than 1st December 1790. Granting that the Courts acted under a mistaken view of the law, we cannot assume for the purpose of making those decrees technically good a state of facts which in many cases is contradicted by the records. We must take the decrees as we find them, and as doubtless they were intended to be, as establishing resumptions of the particular tenures found existing in each case, whether they were created before or after 1st December 1790. If the decrees can be impeached and set aside, well and good; but if they cannot, or so long as they are not set aside, we must take them to be binding as they stand, and not resort to a fiction contradicted by the records, and assume that they establish what, in the view of the law taken when they were passed, they were never intended or supposed to establish. If the resumption decree now before us professed to be a decree under Regulation II of 1819, I think we should be obliged to refer the case to a Full Bench; but as I have already said, it does not on the face of it appear to be anything but a decree made in the exercise of the ordinary jurisdiction of the Court.

It is true that the Court did adopt a procedure only applicable to suits under the special law; but as the decree does not show that it was made under that law,—and therefore, according to recent construction of the law, wrongly made,—I think we are bound to presume that it was rightly made; and, if we are to qualify facts to suit our views of the law, that it should be treated as a decree on confession of judgment, which substantially it was, as soon as the defendant in answer to the notice to disclose his title failed to show any grant earlier than 1st December 1790. At any rate, error in procedure in the trial does not *per se* render void a decree, which on the face of it is one which the Court was competent to make. Taking this, then, to be a good decree for the resumption of lakheraj land held under a grant of later date than 1790 made in the exercise of the ordinary jurisdiction of the Court, I hold that the plaintiff is entitled to recover the rents of the resumed land and to institute a suit under Clause 1 Section 23 Act X of 1859 for the determination of the rate of rent to be paid and to obtain a kubooleut accordingly. In this view, I would remand the case to the first Court for trial on the merits.

The appellant should get the costs of this Court and of the Lower Appellate Court, costs in the first Court being left as costs in the suit.

Paul, J.—I agree with Mr. Justice Ainslie in holding, for the reasons assigned by him and under the circumstances of this case, that no presumption arises that the decree of March 1862 was passed under the provisions of Regulation II of 1819.

The plaintiff in his plaint, filed in the suit in which the last mentioned decree was made, stated that the defendant was holding the lands in dispute under a pretended lakheraj title, without specifying whether that title was alleged to be anterior or posterior to 1790, and prayed for the resumption of the lands so held.

In the judgment on which the decree of March 1862 is based, it is found that the defendant had not proved that this alleged lakheraj existed prior to 1790. Under these circumstances, it cannot be contended either that the plaintiff admitted or the defendant substantiated the existence of the alleged lakheraj prior to 1790.

Having regard to the silence of the plaint and decree in the resumption suit with

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reference to Regulation II of 1819, it would be unfair and unreasonable to infer, merely from the reference made to the Collector with a view to ascertain the validity or otherwise of the lakheraj title pleaded, that the proceedings in which the decree of March 1862 was pronounced were taken under Regulation II of 1819. The decree of March 1862, as it appears to me, was one for resumption passed in a suit in which there was no admission of the existence of the defendant's alleged lakheraj prior to 1790, and it is final between the parties. The result of such finality is that the plaintiff is entitled to assess the lands in the possession of the defendant, and his suit is consequently maintainable.

I concur in the propriety of the order made by Mr. Justice Ainslie.

The 25th April 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Joint Hindoo family—Partition—Reunion—Rights of co-parceners—Inheritance—Hindoo Widow.

Case No. 2100 of 1870.

Special Appeal from a decision passed by the Officiating Judge of Chittagong, dated the 28th June 1870, *affirming a decision of the Moonsiff of Howlah, dated the 19th February* 1870.

Ram Huree Surmah (Plaintiff) *Appellant,*

versus

Tribee Ram Surmah (Defendant) *Respondent.*

Baboo Kishen Succa Mookerjee for Appellant.

Baboo Aukhil Chunder Sein for Respondent.

The special rule of Hindoo Law under which a reunited parcener takes the heritage to the exclusion of a separate claimant of an equal decree, whether brothers of the whole or half blood, or sons of such brothers or uncles, applies only in cases where after separation the co-parceners re-unite through affection, and not only dwell together in the same house but with entire community of interest on the understanding that whatever belongs to one belongs to the other.

The mere fact of two brothers living in the same dwelling-house is not conclusive proof of their living as a re-united or joint family. Even without actual partition by metes and bounds, if two co-parceners enjoy the rents and profits of their shares without throwing them into a common fund or box, it must be held that there was a partition between them and that they are not members of a joint undivided Hindoo family.

In order to determine who is the heir to a deceased Hindoo who left a widow as his heir at the time of his death, it is not sufficient to see who was his nearest sapinda at the time of his death,—it must be seen who was the nearest sapinda alive at the time of the death of the widow.

Mookerjee, J.—This case must be remanded to the Court of first instance for re-trial. The dispute in this case appears to be about the estate of one Ram Manicko, the paternal uncle of plaintiff and defendant No. 1. The defendant No. 2, being the grandson of another brother of Ram Manicko, is excluded from inheritance by the plaintiff and defendant No. 1 who are nearer sapindas to the deceased. It appears that Ram Manicko left a widow Sharoda, who died on the 5th Assin 1231 M. Plaintiff claims a moiety of the estate of Ram Manicko as his brother's son. Defendant No. 1 denies that the property ever belonged to the deceased, and took an alternative plea to the effect that the deceased Ram Manicko having lived as a re-united or associated brother with defendant's father Ram Bullub, he, the defendant, is entitled under the Hindoo Law to the whole of the inheritance to the exclusion of plaintiff, who is the son of a separated brother of the deceased.

The Court of first instance dismissed the plaintiff's suit, on the ground that "it was "fairly proved by the evidence of the wit- "nesses of both the parties that Ram Bullub "and Ram Manicko were two uterine bro- "thers; that they jointly held their shares and "that no division took place between them." The Court held therefore "that defendant's "rights of heirship to the disputed property "are preferable to those of plaintiff."

On appeal the Judge confirmed this decision, holding that the evidence in the case proved "that Ram Manicko and Ram Bul- "lub lived in commensality up to the date of "the former's death, and that Ram Ma- "nicko's widow lived in commensality with "the surviving brother Ram Bullub."

It is contended before us that the findings of the Courts below are insufficient under the Hindoo Law to establish an exclusive right in the defendant to the property left by Ram Manicko. It is said that it may be that Ram Manicko and Ram Bullub lived together in commensality, but as it is an

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admitted fact that Ram Manicko left a widow as his heir, it should have been seen whether at the time of her death she was or was not living as a re-united co-parcener with the defendant No. 1, the nephew of the deceased Ram Manicko.

It appears that at the time when Saroda, the widow of Ram Manicko, died, all the brothers of that individual were dead. It does not appear either in the pleadings or in the evidence when Ram Bullub, the father of the defendant, died; nor does it appear that the defendant as a re-united co-sharer continued to live with the widow in a state of re-union down to the period of her death.

The authorities on the Hindoo Law are not very clear on the subject of the rights of an associated brother in preference to that of an unassociated one. The only clear distinction they make is between separated and re-united parceners, and the definition given by Vrihaspati of the term re-union is—"He who being once separated dwells again through affection with his father, brother, or paternal uncle is termed re-united." This text of Vrihaspati is explained and interpreted by the author of the Dayabhaga in para. 30, Section 1, Chapter XI in the following manner:—"That persons who by "birth have common rights in the wealth ac- "quired by the father and grandfather, as fa- "ther (and son), brothers, uncle (and nephew) "are re-united, when, after having made a "partition, they live together, through mu- "tual affection, as inhabitants of the same "house, annulling the previous partition and "stipulating that 'the property which is "mine is thine'; and 'that which is mine "is thine.'"

Thus, it appears that a special rule is laid down by the Hindoo Law for cases in which a separation once takes place, and then afterwards the co-parceners re-unite through affection, and not only dwell together in the same house, but there takes place an entire community of interest among them on an understanding that "whatever is thine is "mine, and whatever is mine is thine." In such a case only the law says that a "re-united parcener shall take the heritage" in preference to and in utter exclusion of a separated claimant of an equal degree, whether brothers of the whole or half blood or sons of such brothers or uncles.

The parties in this case are nephews of the late proprietor Ram Manicko; they are therefore claimants in an equal degree of affinity to him. Now, before one of them can be preferred to the other and adjudged the whole estate of Ram Manicko, it should be enquired into and found whether the one was a re-united parcener according to the meaning of that term given in the Hindoo Law, and whether the re-union, if there was any, subsisted down to the time of the death of the widow.

Now, it is an undoubted principle of Hindoo Law that in order to determine who is the heir to a deceased Hindoo, who left a widow as his heir at the time of his death, the status of the family at the time of the death of that widow is to be looked at, and not the status at the time of the death of the proprietor. If *A* a proprietor of an estate died leaving two uterine brothers and no widow, the brothers would undoubtedly be entitled to succeed to his estate; but if *A* also leaves a widow, the widow would take the estate as the surviving half of her deceased husband and enjoy it as his representative. Now, if one of these brothers die in the life-time of this widow leaving a son, that son would not inherit the estate, but the surviving brother would get the entire estate after the death of the widow. It is, therefore, clear that in order to find the true heir to a Hindoo proprietor on the death of his widow, it is not sufficient to see who was his nearest sapinda at the time of his death, but it must be seen who was his nearest sapinda alive at the time of the death of his widow.

In this case, the Lower Courts have only found that "Ram Manicko lived with his "brother, Ram Bullub, in commensality up "to the date of the former's (Ram Manicko's) "death, and that Ram Manicko's widow "lived on in commensality with the surviv- "ing brother, Ram Bullub." If the widow had died during the life-time of Ram Bullub, this finding might have been sufficient to entitle Ram Manicko as a re-united parcener to obtain the property of his brother; but it is an admitted fact that Ram Bullub died before the widow, and the defendant in this case is his son. It does not appear at all whether the family continued to live in the same state in which it was at the time of Ram Bullub's death.

The contention in this case is between two nephews or brother's sons of Ram Manicko, who are sapindas of an equal affinity. Under the ordinary Hindoo Law, both of them would have been equally entitled to the estate if there was no question of re-union,

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In order to defeat the claims of the plaintiff, the defendant must prove clearly that the widow continued to live with him in the same state of re-union in which her husband lived with defendant's father. It is, therefore, incumbent on the defendant to show that not only was there a re-union between the husband of the widow and defendant's father, but that the widow lived in that state of re-union with him down to the time of her death.

It may be that the widow, though she lived as a member of a re-united family with Ram Bullub, did not so live with the defendant. She had an undoubted right to a partition and a separate enjoyment of the share of her husband; and it may also be the case that at the period of her demise, she was actually living separate from both the nephews of her husband. I do not think that in that case the defendant could have claimed the property of her husband to the exclusion of the plaintiff, who would ordinarily be entitled to share with him the heritage of their common uncle.

I would, therefore, remand the case to the Court of first instance to lay down an issue, as to whether the widow of Ram Manicko lived in a state of re-union with defendant, as did her husband with Ram Bullub, his brother, or whether she at the time of her death lived separate from him, though living in the same family-house. The Moonsiff should, after framing this issue, give full opportunity to the parties to adduce evidence on this issue, and then decide the case according to the result of that enquiry and with advertance to the remarks made above. It has been stated in the course of the argument that the evidence adduced in this case merely goes to show that Ram Manicko and his widow lived in the same house with Ram Bullub, but that there is no evidence to show that they lived as members of an united or joint Hindoo family. The Moonsiff should bear in mind that the mere fact of two brothers living in the same dwelling-house is not conclusive proof of their living as a re-united or joint family. It must be shown that there was an actual re-union, and that the husband, and after his death the widow, lived with the defendant as members of a joint family, and that there was a community of interest between them. Even if there had been no actual partition by metes and bounds, yet if the two co-parceners had enjoyed the rents and profits of their respective shares, and did not throw them into a common fund or box as is the case in all joint families, it must be held that there was a partition between them, and that they cannot be said to be members of a joint undivided Hindoo family.

The costs of this appeal will be costs in the case and will abide the final result.

Jackson, J.—I concur.

The 25th April 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Evidence—Boundary dispute.

Case No. 2700 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of West-Burdwan, dated the 20th September 1870, affirming a decision of the Moonsiff of Bishtopore, dated the 26th April 1870.

Radha Churn Gangooly (Defendant) *Appellant,*

versus

Anund Sein (Plaintiff) *Respondent.*

Baboo Bama Churn Banerjee for Appellant.

Baboo Petumber Chatterjee for Respondent.

In a suit to recover possession of land contained in a certain Government resumed mehal, where defendant's plea was that the land had been purchased by him at an execution sale for arrears of rent as belonging to a jungle mehal, the Lower Appellate Court refused defendant's application for a comparison with the maps and chittahs made on the occasion of a boundary dispute between the zemindar and Government, when it had been decided in a local inquiry that the land belonged, not to the resumed mehal, but to the jungle mehal.

HELD that the Subordinate Judge ought to have entertained the application,—the evidence proffered having been the very best.

Glover, J.—THE plaintiff in this case sues to recover possession of 7 beegahs of land as contained in Dâg No. 52 of the Government resumed mehal Mouzah Kateebun No. 549. He alleges that the land was the jummae tenure of one Modhoo Soodun Lohar, from whom he purchased it on the 2nd of Aghrain 1273, and that he retained possession until ousted by the defendant No. 1, who purchased the land at a sale in execution of a rent-decree obtained

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by the defendant No. 2 against the defendant No. 3. The plaintiff made a claim under Section 246 of the Code of Civil Procedure in which he failed, and he therefore brings this suit to establish his title.

The defendant, after pleading that the suit is barred by limitation, states that the land forms part of the jungle mehal Ghat Shamnuggur; that it was held heretofore by one Khatoo Lohar under a pottah from the Rajah of Burdwan; that Khatoo fell into arrears, and in execution of a decree against him this land was put up for sale and purchased by the defendant. He also alleges that in a suit No. 1 of 1860 between the Government and the Rajah of Burdwan, it was decided on a local enquiry that the land in dispute did not belong to resumed mehal No. 549 but to jungle mehal Ghat Shamnuggur.

Both the Courts below decided the case in favor of the plaintiff, holding that the measurement chittahs made in the resumption suit brought by Government against the lakherajdars in possession were sufficient to prove that the disputed land was included within Dâg No. 52, and appertained to mehal No. 549 and therefore belonged to the plaintiff.

It is contended in special appeal that the Ameen's report and the resumption chittahs in the resumption proceedings between the Government and the lakherajdar could not be taken as evidence against the present defendant, he being not a party to the suit and claiming moreover to hold the land as belonging to a different mouzah; that there was in existence the very best evidence by which it could have been shown whether it really did belong to the one mouzah or to the other, which evidence ought to have been produced and acted upon; that in the boundary suit between Government and the Rajah of Burdwan, through whom defendant claims, such chittahs were drawn up and maps made; and that by comparing the land now in dispute with the maps and chittahs then made, it would be easy to see within which boundary the disputed land lay.

The special appellant further contended that he had made an application for such comparison to the Court below, but that the Subordinate Judge had refused to entertain it because he, special appellant, had been unable to point out in his petition the precise dâg in which the disputed land was to be found. It appears to us that this objection is a reasonable one and should be allowed. If there was anything on the record to show that the Subordinate Judge and the Moonsiff had decided the case in favor of the plaintiff on any thing else but the Ameen's report and the chittahs in the resumption case; if, that is to say, there was any evidence taken for the express purpose of proving the fact as to which of these two mouzahs the disputed land belongs to, it might not, perhaps, be necessary to remand the case; but where the very best evidence was proferred by the defendant,—evidence which would have conclusively disposed of the case between the parties, inasmuch as the defendant claims through the Rajah of Burdwan and would be bound by any previous decision which had previously bound him, we think that the Subordinate Judge ought to have entertained the application made by the defendant before him, and to have decided the dispute between the parties on a reference to the chittahs drawn up in the suit No. 1. The chittahs in the resumption suit manifestly could not be evidence of any high character against the present defendant even if it was evidence at all.

We, therefore, remand the case to the Court below in order that an Ameen may be deputed to ascertain by a local enquiry and from an inspection of the maps and chittahs made in suit No. 1, whether these disputed 7 beegahs of land fell within the boundary of Kateebun or within the boundary of the jungle mehal, as laid down in the decision of the suit between the Rajah of Burdwan and Government.

Costs to follow the result.

The 26th April 1871.

Present:

The Hon'ble G. Loch and G. C. Paul, *Judges.*

Putnee lease—Construction—Sale of putnee—Regulation VIII. 1819.

Case No. 2089 of 1870.

Special Appeal from a decision passed by the Additional Judge of Nuddea, dated the 10th August 1870, *affirming a decision of the Subordinate Judge of that District, dated the 22nd January* 1870.

Mohadeb Mundul (Defendant) *Appellant,*

versus

Mr. H. Cowell, Receiver of the estate of Baboo Promothonath Dey (Plaintiff) *Respondent.*

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Baboo Bhowanee Churn Dutt for Appellant.

Baboo Rash Beharee Ghose for Respondent.

A putnee lease containing words to the effect that the putneedar could give no dur-putnee or mokurruree lease at a jumma less than the jumma of the putnee, was held to confer no such power as that described in Clause 1 Section 11 Regulation VIII of 1819.

A portion of a putnee tenure cannot be sold under the provisions of Regulation VIII of 1819; and if an auction-purchaser acquires any of the rights of the putneedar, he is bound by the acts of the latter as regards the grant of leases.

Loch, J.—Baboo Joy Chunder Paul Chowdhry, the proprietor of 8 annas of Pergunnah Haldah, on the 22nd of Pous 1244, made a putnee settlement of his entire rights in favor of Messrs. Cockerell and Company, at a jumma of rupees 22,800. Baboo Promothonath Dey subsequently became the owner of a 4 annas share of a moiety of this zemindaree, and subsequently Mr. Doyle purchased the putnee from the representatives of Cockerell and Company, and on the 9th Jeyt 1274 gave a mokurruree of 4½ of the disputed mouzahs to the defendant in this case.

In 1275 Promothonath Dey applied to the Collector for the sale of his share of the putnee tenure on account of arrears of rent of 1274, and a moiety of the putnee was sold on the 1st Jeyt 1275 (corresponding with 1868) and was purchased by him. He now sues to set aside the mokurruree granted by Doyle to the defendant; and both the lower Courts have held that as an auction-purchaser under the provisions of Regulation VIII of 1819, he is entitled to set aside the lease granted by Doyle; and it is alleged that Doyle had no authority to make such leases.

In special appeal, it is urged first of all that the putneedar had authority to grant the mokurruree; and we are referred to certain words in that putnee lease, which are to the effect that the putneedar could give no dur-putnee or mokurruree at a jumma less than the jumma of the putnee. But this is very different from the power described in Clause 1 Section 11 of Regulation VIII of 1819, by which the right to make incumbrances has been expressly vested in the putneedar. There is no such power given him by the lease.

It is then contended by the special appellant that the sale could not have been held under the provisions of Regulation VIII of 1819, because under the provisions of that law the *whole* of the putnee tenure, and not a portion of it only, must be sold, and the sale of a portion is in fact no sale.

The respondent's pleader admits the force of this argument, and endeavours to meet it by saying that the old putnee engagement was set aside by a fresh engagement which was substituted, as was shown by the putneedar paying one-half of the rent to one zemindar and the other half to the other zemindar. But the respondent is unable to show that any fresh lease was drawn up, or that the engagement amounted to anything more than an arrangement entered into for the convenience of the parties in the payment of the rent.

We think it quite clear that according to law, a portion of a putnee tenure cannot be sold under the provisions of Regulation VIII of 1819, and therefore the auction-purchaser of such portion under the provisions of that law would acquire nothing. If by the sale he has acquired any of the rights of the putneedar, he must be bound by the acts of the putneedar who gave the lease to the defendant.

It appears to me for these reasons that this suit is bad, and the judgment of the lower Courts must be set aside and the suit dismissed with all costs. The defendant will be restored to possession, and will recover the mesne profits for the period during which he was out of possession with interest, as also all costs realized by plaintiffs in execution of their decree.

Paul, J.—I concur.

The 26th April 1871.

Present:

The Hon'ble G. Loch and G. C. Paul, *Judges.*

Joint family—Presumption of Hindoo Law.

Case No. 2129 of 1870.

Special Appeal from a decision passed by the Judge of 24-Pergunnahs, dated the 28th July 1870, *modifying a decision of the Subordinate Judge of that District, dated the 21st March* 2870.

Gunga Dhur Chatterjee (Defendant) *Appellant,*

versus

Soorjo Nath Chatterjee (Plaintiff) *Respondent.*

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Baboo Romesh Chunder Mitter for Appellant.

Baboo Nil Madhub Sein for Respondent.

Where a member of a family claims an exclusive right to a house which he has built, the presumption of Hindoo Law against his claim arises only if the family is joint having possession of joint property.

Loch, J.—In this case there appears to be no family property from which the funds could have been procured for the building of the house. I think, therefore, that the presumption of Hindoo Law does not arise, and that the Judge is wrong in throwing the burden of proof on the defendant in this case.

The plaintiff states that during his residence up-country, he remitted monthly sums of between 25 and 30 rupees. But this is not found by the lower Courts, and the Judge himself says that the evidence as to the source from where the money came is very vague. But he throws the onus on the defendant, because, as he says, the parties being members of a joint Hindoo family, when the defendant claimed an exclusive right he was bound to prove it.

Looking to the fact, which is apparent, that there was no ancestral source of wealth, that plaintiff was absent for many years, and has failed to prove that he made remittances which were to be used for the purpose of building the house, I think that this was not a correct course, and that the decision of the Lower Appellate Court should be reversed and that of the first Court restored with all costs.

Paul, J.—This case strikes me in three different lights.

First.—Supposing that the presumption of Hindoo Law did arise to an insignificant extent, I think the defendant has sufficiently discharged himself of the onus of proof, by proving that the house was built by him and that he paid the money.

Secondly.—Looking to the broad facts of this case, I agree with my learned colleague in saying that even if the presumption of Hindoo Law did arise, it should for the purposes of justice be restricted to its very strictest limit; and I consider that the presumption of Hindoo Law arises only when the family is joint, having possession of joint property.

In the present case, Baboo Romesh Chunder Mitter has shewn satisfactorily that the only thing which the defendant received from the plaintiff was the sum of rupees 5 monthly, and that this would be quite insufficient for the purpose of erecting the house in question.

Thirdly.—I say that if the onus does not fall on the defendant, the plaintiff has got to prove his case. He says that the house was built from the remittances which he sent. But there is no proof of these remittances having been sent. They must have been forwarded by letter, and there must have been some acknowledgment of them. In fact there is no proof whatever by which any connexion between the alleged remittances and the building of the house can be established, neither does it appear that the plaintiff was ever consulted or in any way interested in the erection of the house. For these reasons, I think that the case was very properly decided by the Subordinate Judge, Baboo Kylash Chunder Deb, and that his decision has been incorrectly set aside by the Judge. I would reverse the decree of the Lower Appellate Court, and restore that of the first Court with all costs.

The 26th April 1871.

Present :

The Hon'ble E. Jackson and W. Ainslie, *Judges.*

Summons— Commission— Rights of parties.

Case No. 2340 of 1870.

Special Appeal from a decision passed by the Judge of Dacca, dated the 23rd July 1870, *affirming a decision of the Additional Subordinate Judge of that District, dated the 27th September* 1869.

Huree Dass Bysack (Defendant) *Appellant,*

versus

Meer Moazzum Hossein (Plaintiff) *Respondent.*

Baboos Hem Chunder Banerjee and *Luleet Chunder Sein* for Appellant.

Baboos Kalee Mohun Doss and *Doorga Mohun Doss* for Respondent.

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A party to a suit has a legal right to apply to a Court for a summons to a witness, or for a commission to examine a witness. The Court should grant the application as a matter of course, without considering whether the applicant can derive any advantage therefrom.

Jackson, J.—We think that this case must be remanded to the Judge in order that the witnesses whom the defendant cited to prove that Abdool Mujid was a partner in the shop should be examined either on commission, or it would be better perhaps if he should summon them to Dacca and examine them himself.

The Judge says :—"I do not see what "useful end would be attained by examining "the witnesses of whose non-examination "the appellant makes complaint." It is very difficult to say what might be the result of their evidence. We understand that they were called to prove the partnership between the defendant and Abdool Mujid. The evidence which has been given to prove that partnership has been held by the Judge insufficient, and it is just possible that these witnesses might give evidence to prove that which the Judge has held not sufficiently proved yet.

As to the right of the defendant to have these witnesses summoned, we find on the record that he applied that a commission might issue for their examination on the 16th September. The day fixed for the hearing of the case was the 24th September, and the witnesses were not wholly examined until the 27th September. Although it is evident that even in this application there was a good deal of delay, as it might have been made nearly a fortnight sooner, still there was time for the commission to issue, and the defendant was therefore entitled to have that commission issued. The facts of the case are somewhat peculiar, and it is just possible that the evidence of these witnesses may throw light upon it. We think that the defendant is entitled to have them examined before the question is decided against him.

We, therefore, remand this case for such examination of the witnesses. After hearing that evidence the Lower Appellate Court will pass a fresh decision in the case.

Costs of this appeal will abide the result.

Ainslie, J.—I wish to add that in my opinion it is not the business of the Court, on receiving an application for a summons to a witness or for a commission to examine a witness, to consider whether it is likely that the summons can be served, or the commission executed so as to bring the witness or his deposition before the Court on the day fixed for the hearing of the suit. A party to a suit has a legal right to ask the assistance of the Court in these matters, and the Court should grant it as a matter of course. It is for the party and not for the Court to consider whether he can derive any advantage from his application. If he has delayed it so long that he fails to get the process executed in sufficient time, he of course must take the consequences of his delay, and the Court will not adjourn the case to remedy his neglect. But unless it appears clearly that it is not only improbable, but impossible, for the process to be effectually issued, the application should certainly be complied with. Indeed, I have great doubts whether it should not be complied with in every instance, as it may happen that the case may not be called up for hearing on the day originally fixed, and possibly the witness or the return to the commission might be in Court on the day to which it may be adjourned. If a party to a suit thinks it worth his while to incur the expense of taking out a process on the chance of deriving benefit from it, I would not prevent his doing so; I would only take care that he did not use the late issue of the process as an excuse for delaying the final hearing of the case.

I would call the attention of the Courts below to the remarks of Mr. Justice L. S. Jackson in page 419, XI Weekly Reporter.

The 27th April 1871.

Present :

The Hon'ble G. Loch and G. C. Paul, *Judges.*

Mortgage by tenants — Liabilities of mortgagees.

Case No. 1888 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 8th August 1870, *modifying a decision of the Deputy Collector of Perozepore, dated the 24th February* 1870.

Lalla Mitterjeet Singh (Plaintiff) *Appellant,*

versus

Raj Chunder Roy and others (Defendants) *Respondents.*

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Baboo Anund Chunder Ghossal for Appellant.

Baboo Romesh Chunder Mitter for Respondents.

Where tenants after mortgaging their land agree to pay an increased rent to their landlord who is ignorant of the mortgage, and the property is afterwards sold in satisfaction of the mortgage-debt, the zemindar is entitled to recover the increased rent from the tenants or from the party who has succeeded to their rights and interests.

Loch, J.—THE contention in this case is whether the rent payable to the zemindar is rupees 155 or rupees 115. It appears that up to the year 1269, the defendant tenants, called the Dutts, had paid to the zemindar 115 rupees 10 annas and some odd gundahs a year; that in Pous 1269 they mortgaged that property to one Raj Chunder Roy, the special respondent before us; that subsequent to the date of their mortgage, they agreed to pay the zemindar an increased rent of rupees 10 *per annum;* and the zemindar has realized the increased rent of rupees 125 for two or three years from that date.

Raj Chunder got a decree against the Dutts in 1270, and put up the pleaded property to sale and purchased it himself in 1272; and the contention before us is that he cannot be bound by the acts of the mortgagor, inasmuch as the rents had been increased by the mortgagor after the property had been mortgaged to him.

It appears to me that, so far as the zemindar is concerned, this contention will not stand. The zemindar, as is admitted, was ignorant of the mortgage. He was dealing with tenants in possession. They had applied to him to have their names registered in the place of the party whose name was then in the books, namely, Ram Churn Bhuttacharjee, and being unable to pay rupees 500 which he demanded for this transfer, they agreed to pay an increased rent of rupees 10 *per annum*. It is found by the lower Courts that they did agree to this increase.

Under the circumstances in which the zemindar was placed with respect to the tenants, it appears to me that anything which the tenants might have done injurious to the mortgagee, the zemindar had nothing to do with that; and if the tenants agreed to pay an increased rent, he is entitled to recover that rent from them or from the party who has succeeded to their rights and interests. For these reasons, I would reverse the decision of the Lower Appellate Court, and restore that of the first Court with all costs.

Paul, J.—In this case Baboo Romesh Chunder Mitter, who appears for the respondent, admits that the decision of the Lower Appellate Court can only be supported on the construction which can be put upon a certain decree. He candidly admits that that decree has not been filed, and practically this admission is equal to an abandoning of his contention.

I, therefore, agree with my learned colleague in reversing the decision of the Lower Appellate Court, and restoring and affirming that of the first Court with all costs.

The 27th April 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Application for partial execution—Proceedings.

Case No. 432 of 1870.

Miscellaneous Appeal from an order passed by the Judge of Beerbhoom, dated the 27th October 1870, *affirming an order of the Subordinate Judge of that District, dated the 2nd March* 1870.

Koylas Nath Ghose (Decree-holder) *Appellant,*

versus

Nitya Shama Dossee (Judgment-debtor) *Respondent.*

Baboo Gopal Lall Mitter for Appellant.

Baboo Mohinee Mohun Roy for Respondent.

An application to execute an aliquot part of a decree though irregular and ineffectual for the purpose, must, if made *bonâ fide* under a misapprehension of the law, be regarded as a proceeding which keeps the decree alive.

Glover, J.—THIS is an application for execution of a decree of which the present judgment-creditors are the purchasers. The purchase was made in 1865. The first

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execution was taken out by the orignal decree-holder in June 1861, and further proceedings were taken from time to time up to the 10th of December 1864, and there is no question that up to that date every thing was conducted according to the regular procedure. From the date of their purchase, the two decree-holders made several attempts acting separately, each one on account of his own share, to get execution of the decree, and the proceedings in connection therewith went on up to June 1869, when, on a special appeal decided by Justices L. S. Jackson and Markby, it was held that these purchasers of an aliquot part of a decree were not entitled to take out execution in the form in which they had taken it. Upon this, the two purchasers joined together and took out one execution as for the whole decree against the judgment-debtors. That application was made on the 9th of July 1869. The Judge, whilst finding that up to 1865 effectual proceedings had been taken and money paid for the purpose of executing the decree, holds that in accordance with a decision of this Court of the 15th of March 1869, in the case of Poorno Chunder Mookerjee and others *versus* Sharoda Churn Roy, to be found in Volume XI, Weekly Reporter, page 241, execution could not proceed upon an application made with a view to execute an aliquot part of a decree, and that therefore all proceedings between December 1864 and the last application for execution in 1869 were null and void, and consequently that the present purchasers of the decree were barred by the Statute of Limitation, more than three years having elapsed since any *bonâ fide* proceeding had been taken to keep the decree alive.

This decision appears to us to be wrong. In the first place, the order passed by the learned Judges of this Court in special appeal on the 24th of June 1869, merely decided that the application for execution could not proceed in its then separate form, and the decision of the 15th March 1869 on which the Judge places special reliance distinctly left this question of limitation undetermined. The learned Judges say that with reference to whether the proceedings which had been taken would be effectual proceedings to keep the decree in force so as to save the decree-holder from the operation of Sections 20 and 21 of Act XIV of 1859, was a question with which they did not deal. The decision went simply on the question as to whether the proceedings in execution were legal.

There is another case which the Judge thinks to have been set aside by the ruling last quoted, namely, the case of Roy Preonath Chowdhry and others *versus* Pran Nath Roy Chowdhry,* in which it is distinctly laid down that an application made by one or more out of several decree-holders is an application made in the interests of all and that every proceeding taken by one is a proceeding taken for the benefit of all to enforce the judgment or to keep it in force. This decision, which has, we may observe, been followed in more than one instance, is certainly not set aside or overruled by the decision in the case of Poorno Chunder Mookerjee. It is clear that all that the Judges meant to lay down in that case was that the purchaser of an aliquot share or part of a decree could not take out execution proceedings for the particular share he had purchased; but they did not say that if such proceedings were taken under a misapprehension of the law but with a *bonâ fide* endeavour to recover the amount due the decree-holders might not be successful when the proceedings were legitimatised by all the purchasers joining together in one application for execution. In the present case, therefore, the point to be decided was whether the previous proceedings of the purchasers, admitting them to have been irregular, were *bonâ fide* proceedings taken to keep the decree alive. It appears that money was paid by these parties on several occasions between 1865 and 1867, and it is nowhere contended that these payments on the part of the purchasers were not *bonâ fide*. On the contrary, the only objection made to them in the petition of appeal to the Judge was that they were illegal. This being so, and taking the whole tenor of the Judge's decision into consideration, we think that there was a *quasi* finding that these proceedings were *bonâ fide*, and the Judge was quite justified in presuming them to have been so when no *mala fides* was insinuated. If the proceedings taken between 1865 and 1867 were *bonâ fide*, it is clear that the present application by both the purchasers of the decree jointly is an application made within 3 years of the last proceedings taken in execution, and therefore is within time.

The decision of the Judge below is therefore reversed, and execution will be allowed to proceed in the usual way.

* 8 W. R., p. 100.

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The 27th April 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Jurisdiction—Illegal Distraint—Section 23 Act X. 1859.

Case No. 1831 of 1870.

Special Appeal from a decision passed by the Deputy Commissioner of Maunbhoom, dated the 28th March 1870, *affirming a decision of the Moonsiff of Rughoonathpore, dated the 30th September* 1869.

Ram Bishto Acharjee (Defendant) *Appellant,*

versus

Chyet Lall Tewarry (Plaintiff) *Respondent.*

Baboo Bhowanee Churn Dutt for Appellant.

Baboo Pitambur Chatterjee for Respondent.

A suit by a ryot for the recovery of the value of his property illegally distrained as the property of another ryot, is one falling under Section 23 Act X of 1859 and cannot be brought in the Civil Court.

Glover, J.—THE point for decision in this special appeal is whether the Civil Court had jurisdiction to try the suit.

The plaintiff sued for the value of certain paddy said to have been illegally distrained by the defendant landlord for rent due by a third party.

It appears that the plaintiff brought a suit under Act X of 1859 Section 139, in 1869, which was dismissed.

There was considerable argument as to what was the nature of this suit. The Deputy Commissioner in his judgment styles it "a claim preferred on the ground that the crop distrained belonged to the plaintiff and not to the distrainee." To clear up the point, the record of the case was sent for, and it appears from it that the suit was one for "illegal distraint" under Section 139, Act X of 1859.

In the case of Joy Lall Shah *versus* Brojonath Paul Chowdhry, IX Weekly Reporter, 162, the question as to whether a party between whom and the distrainor there existed no relationship of landlord and tenant, could sue for damages in a Civil Court was much discussed, and it was decided that such a suit would fall either within Section 139 or Section 143 of Act X of 1859, and would, under the Clauses of Section 23, be cognizable solely by a Revenue Court.

The precedent* quoted by the Deputy Commissioner has been virtually overruled by later decisions.

We think that the ruling in Joy Lall Shah *versus* Brojonath Paul is the correct one, and that the plaintiff's suit for the recovery of the value of his property illegally distrained as the property of another ryot, was one falling under the provisions of Section 23 Act X of 1859 and could not have been brought in the Civil Court.

The appeal must be allowed and the order of both lower Courts reversed with costs.

The 27th April 1871.

Present:

The Hon'ble E. Jackson and W. Ainslie, *Judges.*

Authority of Full Bench Rulings—Age of majority—Section 26 Act XL of 1858—Admissions.

Case No. 2073 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 16th August 1870, *affirming a decision of the Moonsiff of Furreedpore, dated the 26th January* 1870.

Tarinee Pershad Sein (Defendant) *Appellant,*

versus

Dwarkanath Rukheet (Plaintiff) *Respondent.*

Mr. Mun Mohun Ghose and *Baboo Bungshee Dhur Sein* for Appellant.

Baboos Kalee Mohun Doss and *Grija Sunkur Mojoomdar* for Respondent.

* 1 W. R., p. 36.

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In preference to rulings of the Bombay High Court, the High Court at Fort William held itself bound to follow a ruling of its own Full Bench to the effect that the provision as to majority in Section 26 Act XL of 1858 applies though proceeding may not have been taken in the Civil Court for the care of the person, or protection of the property of one (not being an European British subject) who has attained the age of 18 years.

A plaintiff abandoning his own case and falling back on the admission of the defendant is bound to take those admissions as they stand and in their entirety.

Ainslie, J.—DWARKANATH RUKHEET sues on his own account and as guardian of his minor brother Mohima Chunder Rukheet to recover possession from the defendant, Tarinee Pershad Sein, of a 6 annas share of an ancestral jote and a 10 annas share of the family khanabaree out of 8 annas of the former and 12 annas of the latter, which have come into the possession of the latter under a conveyance purporting to be executed by all the members of the family.

The first Court decreed the claim as stated by the plaintiff.

The Subordinate Judge of Furreedpore, on appeal by the defendant disallowed the claim as to 2 annas of each property, but affirmed the decree as to the remainder.

The defendant appeals to this Court, and the first ground urged is that the suit was wrongly brought by Dwarkanath as guardian, inasmuch as it has been found that his brother Mohima has attained the age of 16 years and under Hindoo Law is not a minor.

The question of majority is in this case one of procedure only. The plaintiff has been allowed to proceed with the suit under Section 3 Act XL of 1858, and by Section 26 of that Act it is enacted that "for the purposes of this Act every person shall be held to be a minor who has not attained the age of 18 years;" and it was held by a Full Bench of this Court (X Weekly Reporter, Full Bench Rulings, page 36) that this provision applies though proceedings may not have been taken in the Civil Court for the care of the person or protection of the property of a person (not being a European British subject) who has not attained the age of 18 years.

Mr. Ghose for the special appellant has referred to two Bombay cases reported in the 2nd and 5th Volumes of the Bombay Reports at p. p. 329 and 95 respectively; but we think we are bound to follow the ruling of the Full Bench of this Court on the point.

The objection on the merits is that the Lower Appellate Court has come to no proper finding as to the state of the family.

It appears that there were two cousins, Gour and Nihal Chand, who held 12 annas of the jote or homestead, Gour owning 4 annas of each and Nihal Chand 8 annas of each.

Gour had 4 sons who lived to inherit from him, Puddo Lochun, Suroop, Ram Coomar, and Bunsee Buddun. The plaintiffs are the sons of Puddo Lochun. They aver that their father and his brother Suroop lived in union while the other two brothers lived separate. Consequently, on the death of Suroop, his one-fourth share of their father's estate was taken by Puddo Lochun to the exclusion of Ram Coomar and Bunsee Buddun. Thus Puddo Lochun became possessed of 2 annas of both jote and homestead.

It is further alleged that Puddo Lochun acquired by purchase from Nihal a further share of 2 annas in each, and that Indro Monee, his wife and mother of the plaintiffs, subsequently purchased 2 annas of the jote and 6 annas of the homestead from certain persons who had bought the same from Nihal Chand.

These acquisitions are stated by the plaintiffs to have been made entirely on their separate account by their father and mother.

The plaintiffs' share as stated by them comes to 6 annas of the jote and 10 annas of the homestead.

	Jote.	*Homestead.*
Puddo Lochun's share inherited from his father	1 anna	1 anna.
Ditto inherited from Suroop...	1 anna	1 anna.
Ditto purchased by himself ...	2 annas	2 annas.
Ditto ditto by Indro Monee ...	2 annas	6 annas.
Total ...	6 annas.	10 annas.

The defendant on the other hand denies that Puddo Lochun and Suroop lived in union, but separate from the other brothers, and states that the whole family held 6 annas of the jote and homestead which on the death of Suroop was divisible in equal shares between the three survivors, and that these survivors jointly purchased 2 annas of the jote and 6 annas of the homestead from the representatives of Nihal Chand and thus held in common 8 annas of the former and 12 annas of the latter, which they conveyed to him by the deed of sale put forward in the suit. He also denied that Puddo Lochun purchased a 2 annas share from Nihal.

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The Subordinate Judge has found that plaintiff has entirely failed to prove any purchase by Puddo Lochun.

He then goes on to find as follows:—"Both "the plaintiff and defendant have admitted "that with the exception of the aforesaid 2 "annas share, the share of the plaintiff's "father Puddo Lochun amounted to 2 annas "inclusive of the share enjoyed by Suroop. "Hence, under the aforesaid circumstance, I "do not see the necessity for determining in "this case whether the said Puddo Lochun "obtained the entire share enjoyed by Su-"roop or the one-third of the same."

It is true that the plaintiff claims 2 annas out of 4 annas and that the defendant assigns to him 2 annas out of 6 annas, and thus there is no difference in the actual quantity of the share to which plaintiff is entitled under either allegation; but there is a most material difference in the quality; in one case it is a separate estate,—in the other a share of a joint estate.

If the plaintiff is to have the benefit of the defendant's admission, he must take it in its entirety and accept the share offered to him, as a share of an undivided estate. The Subordinate Judge has treated the admission of the defendant as conclusive; but if the plaintiff were to abandon his own case and fall back on the admissions of the defendant, he would be bound to take them as they stand, and by so taking them he would on his own part admit that at least up to the death of Suroop the family remained undivided. Now we think it is quite clear that the plaintiff never intended to take up this position, and that the Subordinate Judge, in refusing to try plaintiff's case as stated by him and relying upon defendant's statement as an admission, has taken up ground for the plaintiff which he (plaintiff) would be the last to occupy himself. No doubt the Subordinate Judge did not do this intentionally. He seems to have thought there was no objection to taking defendant's statements piecemeal, holding him to what suited his purpose and refusing to notice what was adverse; but in this he was clearly wrong. His judgment on this point as it stands, is founded solely on defendant's admission. That admission, if properly and fairly construed and deliberately accepted, involves the acceptance of the allegation that the family was undivided at least up to the death of Suroop, and this would have a most important bearing on the remaining part of the case, namely, the question whether the purchase in Indro Monee's name was really a separate purchase by her or a joint purchase by the family. This was entirely overlooked by the Subordinate Judge.

If the plaintiff deliberately elects to stand by the admission of the defendant, taking the whole of it as it stands, the Lower Appellate Court will have to re-try the question as to this last purchase, assuming as a fact that the family was undivided at the date of Suroop's death, and to find whether plaintiff has proved that there was an actual separation in estate between the date of Suroop's death and the date of Indro Monee's purchase.

If the plaintiff, on the other hand, declines to take the 2 annas assigned to him in defendant's answer as a part of a joint estate, it will be necessary for the Judge to try whether Puddo Lochun and Suroop were living separate in estate from their other two brothers, and whether the former consequently took exclusive possession of the 1 anna share of Suroop. If the plaintiff cannot establish this, he will, as regards this part of the case, only be entitled to one-third of 4 annas stated by him to be the total ancestral estate of his father and uncle, for the Subordinate Judge has already found as a fact that Puddo Lochun's purchase from Nihal Chand is not in any way established; and as plaintiff has framed his title specifically in one way, he cannot, on failure to establish his own case, fall back upon a case taken from defendant's statements unless he consents to take it in its entirety; and this, we are supposing, he refuses to do.

Plaintiff has stated the ancestral estate to be limited to 4 annas and by this statement he is bound, and beyond this he cannot go. He claims one half: if he can establish a right to this, well and good. If not, he can only get a one-third share.

If plaintiff does not succeed in proving the separation in estate of Suroop and Puddo Lochun from the other brothers, the Subordinate Judge will have to re-consider the judgment as to Indro Monee's purchase, for the suit will they stand as in the first considered case of plaintiff agreeing to accept defendant's admissions in their entirety. There will be no proof of separation up to Suroop's death and plaintiff will have to establish the subsequent separation by

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evidence sufficient to rebut the presumption of union.

In conclusion, we would remark that the finding of the Judge on the point of separation is, as it stands, very incomplete and unsatisfactory. He says nothing about separation in estate and speaks only of separation in food. Then the date of separation, if there really was any, is only given as "from a long time." But as there is nothing in the judgment to show when Suroop died or when the sale to Indro Monee took place, and for all we know these may have been a still longer time ago, it cannot be said that there is any valid reason given for the conclusion,—"Hence the plea set up by the "defendant Tarinee Pershad that the said "shares were purchased with joint funds is "not fit to be admitted."

The case is remanded for re-trial with reference to the above remarks. Costs to follow the result.

The 27th April 1871.

Present:

The Hon'ble A. G. Macpherson and Onoocool Chunder Mookerjee, *Judges.*

Section 19 Act X. 1859—Section 20 Act VIII (B. C.) 1869—Landlord and tenant—Notice of re-linquishment — Holding over — Onus probandi.

Case No. 2417 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 26th August 1870, *modifying a decision of the Moonsiff of Chuprah, dated the 18th June* 1870.

Tiluck Pattuck (Defendant) *Appellant,*

versus

Mohabeer Pandey and another (Plaintiffs) *Respondents.*

Baboo Debendro Narain Bose for Appellant.

Baboo Bama Churn Banerjee for Respondents.

A ryot is under no obligation to give any notice under Section 19 Act X of 1859, or under Section 20 Act VIII (B. C.) of 1869, merely to entitle him to give up the land at the termination of a short lease under which he holds.

A landlord claiming rent from such ryot for a period after the expiry of his lease, is bound to prove that the latter held on subsequently to the term of the lease.

Macpherson, J.—THE case must be remanded to be re-tried upon the question as to whether the defendant did or did not remain on after the year 1274, so as to be liable to the plaintiff for the rent which the plaintiff claims from him in this suit.

The Subordinate Judge has entirely misapplied Section 20 Act VIII of 1869 (Bengal Council), which has no reference to this case. Section 19 Act X of 1859 is almost equally inapplicable, because the tenant held under a lease which came to an end in the year 1274; and it is clear that a ryot is under no obligation to give any notice under Section 19, merely to entitle him to give up the land at the termination of a lease for a short term under which he holds.

The Subordinate Judge has also gone wrong in thinking that it lay wholly and exclusively upon the defendant to prove the fact of his having given up the land. It appears to me that it lies upon the plaintiff, who says that he did not relinquish when the term of his lease expired, to prove that the defendant held on.

The Court must look at the whole of the evidence on the record, and find whether as a matter of fact, after the expiry of his lease, the defendant did hold on. If he did, he will be liable to pay rent; if not, the plaintiff's case must fail.

The appellant is entitled to the costs of this appeal.

Mookerjee, J.—This was a suit to recover arrears of rent for the years 1274, 1275, 1276, and 12 annas kist of 1277. The defence was that as the lease expired in 1274, defendant had given up possession at the end of that year. The defendant also pleaded that he has paid the rent for 1274.

The first Court gave a decree for the rent of 1274 and dismissed the rest of the claim. Both parties appealed to the Subordinate Judge, Moulvie Itrut Hossein, who decreed the appeal of the plaintiff and dismissed that of the defendant. The

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Subordinate Judge holds that, inasmuch as the defendant ryot has not given any written notice to the plaintiff under Section 20 Act VIII of 1869 (B. C.) of his intention to relinquish the land, he is liable for the rent of the same. He also lays it down as a proposition of law that "parole evidence of "witnesses is not sufficient proof to establish" the point of relinquishment, but that the defendant ought to have produced a written notice.

I think the Judge is wrong in every point that he has decided. He is wrong in holding that the onus of relinquishment is on the ryot. It is admitted that the lease under which the ryot entered was a lease for three years certain, and extended from 1272 to 1274. The allegation of the plaintiff is that although the lease expired at the end of 1274, the ryot continued to hold on and has consequently made himself liable for rent. The plaintiff must, therefore, prove his allegations.

Then it is said that the duty of the ryot was to give a written notice under Section 20 of Act VIII of 1869, B. C. This Section has been wrongly applied by the Subordinate Judge. It does not apply to cases where the ryot holds under a lease which was for a limited period, which period has expired. After the expiry of the lease, the ryot had no right to hold. He might have been considered to be a trespasser by the plaintiff and would have rendered himself liable to wasilat. He would, therefore, be perfectly justified in giving up possession. The plaintiff ought to have known that the lease had expired, and not required a written notice.

The defendant, however, had adduced witnesses to prove that he left the jote on the expiry of the term of the lease. The Subordinate Judge was of opinion that parole testimony was insufficient in law to prove the fact of the relinquishment. In this view, he is entirely wrong. Parole evidence, if believed, is as sufficient to prove a fact as documentary evidence. The Subordinate Judge should not have rejected it as insufficient in law to prove the defendant's averments. I would, therefore, remand the case for a proper decision with advertence to the above remarks. The Judge should in the first instance call on the plaintiff to establish his case, and if he succeeds in doing so will then see whether the defendant has been able to rebut the evidence produced by the plaintiff, and decide the case according to the result of that inquiry.

The 27th April 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Pre-emption—Execution sale.

Case No. 2711 of 1870.

Special Appeal from a decision passed by the 1st Subordinate Judge of Hooghly, dated the 22nd November 1870, reversing a decision of the Moonsiff of Serampore dated the 8th August 1870.

Shaikh Ferasut Ali (one of the Defendants), *Appellant,*

versus

Ashootosh Roy Singh and another (Plaintiffs) *Respondents.*

Baboos Romesh Chunder Mitter and *Hem Chunder Banerjee* for Appellant.

Baboo Kishen Succa Mookerjee for Respondents.

During the minority of two out of four brothers, an ikrarnamah was entered into between them to the effect that no separation was to take place without the consent of all, and that if one of them separated without such consent he was to forfeit his share of the family property, and that if any one wished to dispose of his share he was to give his brothers the preference. One *F* purchased at a private sale the share of *M*, one of the brothers. On this, two of the brothers, *A* and *J*, brought a suit against *F* to set aside the sale as contrary to the terms of the ikrarnamah, and urged their claim to pre-emption. The suit was decreed with a stipulation that the purchase-money should be paid back. This not having been done, *F* sued *M*, got a decree, and in execution put up for sale *M's* rights and interests in the family estate, bought them himself, and took possession. The present suit is by *A* and *J* to recover possession on the ground that *M* had no rights and interests left which could be sold in execution.

HELD that as *M* had never separated his share had not been forfeited, and that the only other privilege left to the plaintiffs under the ikrar, *viz.*, pre-emption, could not be exercised, inasmuch as *M* had not sold his share the sale having been the act of the Court.

Glover, J.—THE plaintiffs in this case are two of the four sons of Nobokishore Roy Singh, the other two sons being Mohabharut, a *pro formâ* defendant, and Juggernath who died without issue. During the minority of Joykishen and Juggernath an ikrarnamah was entered into between the brother

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in 1273, the terms of which were that they were to continue to live jointly, that no separation was to take place without the consent of all, that if any one of the brothers did separate without such consent he was to forfeit his share of the family property; and that if any one wished to dispose of his share he was to give his brothers the preference.

The plaintiffs' statement is that their brother Mohabharut separated himself from the rest of the family without their consent and thereby forfeited his share of the estate. They also say that the defendant Ferasut Ali, who purchased in execution of a decree the rights and interests of this Mohabharut, in reality bought nothing at all, inasmuch as before the sale took place Mohabharut had lost his share by separating without the consent of his brothers.

It appears that the defendant Ferasut Ali purchased in the first place at a private sale Mohabharut's 4 annas share in the property. On this, Ashootosh and Joykishen brought a suit against Ferasut Ali to set the sale aside on the ground that it had been made contrary to the terms of the ikrarnamah and that they were entitled to pre-emption. The suit was decreed against Ferasut Ali, the decree stipulating that the purchase money should be paid back to the purchaser. The money was not paid back, and Ferasut Ali brought a suit against Mohabharut to recover it. He got a decree and in execution put up for sale the rights and interests of Mohabharut in the family estate, bought them himself, and took possession. The present suit is brought to recover possession from him on the ground that Mohabharut had no rights and interests left which could be sold in execution.

It was alleged on the part of the defendant that the ikrar between the brothers was not a *bonâ fide* proceeding; that it was an arrangement in fraud of creditors. There was also a further allegation that Mohabharut had not separated and was still living jointly with his brothers. The Court of first instance found that the ikrar was *bonâ fide* and that Mohabharut had not separated from his brothers. The Moonsiff, therefore, dismissed the plaintiffs' suit.

The Subordinate Judge agreed with the Court below in considering the ikrar to be *bonâ fide* on the ground that it had already in a previous judgment been so declared to be, and he found that that being so Mohabharut's share could not be sold. He, therefore, reversed the decision of the Court of first instance.

This decision appears to us to be erroneous. The Moonsiff has found clearly, and the Subordinate Judge has likewise found (though not in precise words) inferentially that Mohabharut never did separate from the rest of his brothers; and that being so, there would be no forfeiture of his share even if we were to admit that the ikrar was an instrument which could be supported on grounds of public policy. There being no forfeiture, the only other privilege which the brothers had left to them under the ikrar was the right to become purchasers by pre-emption of Mohabharut's share in the event of Mohabharut selling; but Mohabharut has not sold his share. It has been sold it is true, but by the action of the Court in execution of a decree passed against Mohabharut, which is quite a different thing. Moreover, if the plaintiffs Ashootosh and Joykishen wished to purchase their brother's share, they could easily have done so by bidding at the sale which took place in execution of the decree.

It seems to us that the plaintiffs have no case and that the defendant was quite justified in taking possession of Mohabharut's share which he bought in execution of decree. The decree of the Lower Appellate Court must therefore be reversed, and the plaintiffs' suit dismissed with all costs.

The 28th April 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble A. G. Macpherson, *Judge*.

Court Fees' Act, 1870—Stamp duty—Trust property.

In the goods of H. B. Beresford, *deceased*;

and

In the goods of Sir T. H. Maddock, *deceased*.

Reference to the Chief Justice by Mr. Robert Belchambers, Taxing Officer of the High Court, under Section 5 of the Court Fees' Act, 1870.

Under the Court Fees' Act, 1870, trust property descending on the death of the trustee is liable to the *ad valorem* stamp duty prescribed by Schedule I, Number 11, to that Act.

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Reference in the first case.—On the 22nd of September last Mr. Samuel Cochrane (the Manager of the Agra Bank,) under a power from the Executors in England of the Will of Henry Brown Beresford, deceased, applied for and obtained from this Court letters of administration (with a copy of the Will annexed) of the property and credits of the deceased.

The petition for letters of administration contains the following statements :—

"That there are assets *belonging to the* "*estate of deceased* within the jurisdiction "of this Honorable Court to be adminis- "tered.

"That the amount of such assets likely to "come to your petitioner's hands will not "exceed the sum of rupees 24,000."

The *ad valorem* fee, prescribed by the Court Fees' Act, 1870, Schedule 1, Number 11, was, upon the facts stated in the petition, properly charged on the sum of rupees 24,000, and was paid without any claim being made to exemption.

Mr. Cochrane now applies that the fee so paid by him may be refunded, on the ground that the property in respect of which the fee was paid belongs not (as stated in the petition for letters of administration) to the estate of the deceased, but to a marriage settlement of which the deceased was the last of three trustees.

The question to be considered is whether the *ad valorem* fee was payable in respect of property belonging (as it now appears) to a trust. This question may be determined under Section 5 of the Court Fees' Act ; but there is no provision in the Act under which an order may be made by the High Court, or by any Judge or officer of the Court, for the refund of the *ad valorem* fee after it has been paid.

Under the English Stamp Act (55 Geo. 3 C. 184 Sec. 38, probate duty is not payable on trust property.

It is reasonable that probate duty should not be payable in respect of property which was vested in the deceased as a trustee and not beneficially, to which his Executor or Administrator can have no title as such, and to effect the transfer of which to new trustees is the sole purpose for which it is sought to obtain probate or letters of administration.

There is no provision in the Court Fees' Act similar to that in the English Stamp Act for exempting trust property from the payment of the *ad valorem* fee : and the words in Schedule 1, if read literally, would require the fee to be paid in all cases, if the property be above the value of 1,000 rupees, irrespective of any question as to how the property is circumstanced. It was, however, held by the Chief Justice (Sir Richard Couch) in the case of Olivia Hovenden George* (decided on the 10th of May 1870) that the words in the Schedule must be understood to mean "property which the deceased was possessed of or entitled to." In that

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* The 14th May 1870.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice.*

In the goods of Olivia Hovenden George, *deceased.*

Case referred to the Chief Justice by Mr. R. Belchambers, Taxing Officer of the High Court, under Section 5 of the Court Fees' Act, 1870.

Reference.—By a deed of settlement, dated 21st July 1866, and made between Olivia Hovenden Tiery, widow, and Charles Lazarus, certain shares of and in real and personal estate were granted, conveyed and assigned to Mr. Lazarus, upon trust to pay the income to Mrs. Tiery during her life for her separate use, and after her death to hold the property for all her children for the time being in such manner and form as she should by deed or Will appoint.

Mrs. Tiery afterwards intermarried with Mr. James George.

In July of last year, shortly previous to her death, Mrs. George, in exercise of the power reserved in the Deed of Settlement, made a Will and appointed her husband and the trustee of the settlement executors.

The husband alone has applied for and obtained probate of the Will, but the probate has been detained in the office pending the decision of the question whether the *ad valorem* fee prescribed by the Court Fees' Act, 1870, is chargeable in the present case.

By Schedule 1 (Number 11) of the Act, if the amount or value of the property in respect of which probate or letters of administration be granted exceeds 1,000 rupees, a fee of two per centum is payable on such amount or value.

It is submitted on behalf of the Executor that the above fee is payable in respect of property which passes under the Will, and not in respect of property which, as in this case, does not pass under the Will.

By the deeds of July 1866, Mrs. Tiery settled the property on her children, reserving to herself the income during her life, as also power to determine by deed or Will the manner in which the property should after her death be enjoyed by those for whom it was held in trust.

The power so reserved was not an absolute power of disposition, under which she was at liberty to recall the trust and dispose of the property in some other way; but it was a power under which she could only direct how the property, which she had already secured to the

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case the deceased was neither possessed of the property in respect of which probate had been obtained nor was she entitled to it—not even legally as opposed to beneficially. She had the right (and only the bare right) under a settlement, to direct, either by Deed or Will, how property already secured to her children should be enjoyed, and she exercised such right by a testamentary instrument which was proved in this Court and admitted to probate. As that case is, in its principal facts, different from the present case, it is referred to the Honorable the Chief Justice to determine the question whether property which the deceased in this case was possessed of and entitled to as trustee, and not beneficially, was chargeable with the *ad valorem* fee. [*See* Tilsley's Stamp Laws, p. 604.]

Reference in the second case.—Andrew Ross Bell died in 1841, having first made his Will and thereby appointed Thomas Herbert Maddock (afterwards Sir Thomas Herbert Maddock) one of the Executors.

On 28th January 1842, Thomas Herbert Maddock alone proved the Will in the late Supreme Court, and obtained probate.

Thomas Herbert Maddock has since died in England, leaving no property of his own in this country, but leaving Government securities for rupees 21,600 standing in his name but belonging to the estate of Andrew Ross Bell.

The Administrator General has obtained from this Court letters of administration (with a copy of the Will annexed) of the unadministered property and credits of Andrew Ross Bell, and has also obtained letters of administration of the property and credits of Thomas Herbert Maddock, the latter for the sole purpose of effecting the transfer of the Government securities for rupees 21,600 to himself as administrator of the estate of Andrew Ross Bell, and the former for the purpose of administering the Government securities after such transfer.

The Government securities admittedly belong to the estate of Andrew Ross Bell, and it is only because they stand in the name of Thomas Herbert Maddock that it has been necessary to obtain letters of administration of his estate.

The question referred for the determination of the Hon'ble the Chief Justice is whether under the Court Fees' Act, 1870, Schedule I, Clause II, the *ad valorem* stamp fee is payable in respect of each of the letters of administration obtained by the Administrator General.

The decision of the question *sub judice* in the goods of H. B. Beresford, deceased, will probably govern the question in the present case.

If in that case it should be decided that the *ad valorem* stamp fee is payable in respect of trust property, the result will be that the property in the present case will be chargeable with the stamp fee twice—once as trust property in the hands of Thomas Herbert Maddock, and to effect the transfer of which it has been necessary to obtain letters of administration of his estate, and again as the property of Andrew Ross Bell, and for the administration of which it has been necessary to obtain letters of administration of his estate.

The Court delivered the following judgments on the point referred to it :—

Norman, C. J.—The 11th Clause of Schedule I of the Court Fees' Act of 1870 provides for the fee which is to be payable on the probate of a Will or letters of administration with or without Will annexed. The 12th Clause provides for the fee payable upon a certificate granted under Act XXVII of 1860 for facilitating the collections of debts on successions and for the security of parties paying debts to the representatives

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children, should be enjoyed by them. It seems to me that a distinction should be drawn between the case of a Will made in exercise of an absolute power of disposition reserved in a deed of trust, and the case of a Will made under a power limited, as in the present case, to the act of prescribing the mode of enjoyment of property by persons whose rights to the property itself is independent of the Will. In the one case the property passes under the Will, and is therefore properly chargeable with probate duty; in the other it does not pass under the Will at all.

As the question is one of general importance, I am desired to refer it for the decision of the Honorable the Chief Justice under Section 5 of the Court Fees' Act.

Judgment of the Chief Justice :—

The words in the Schedule, if read literally, would require that the *ad valorem* fee should be paid in respect of this property, but I think that they must be understood to mean property which the deceased was possessed of or entitled to and that the *ad valorem* fee is not payable. I consider the case to be substantially the same as if it had arisen upon the English Act where it has been decided that probate duty is not payable;—Drake, *viz.*, the Attorney-General, 12 Cl. and Fin., 257; and I decide that the *ad valorem* fee is not payable in this case.

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of deceased persons. The fee is thereby fixed at 2 per centum on the amount or value of the property in respect of which the probate or letters or certificate shall be granted, if such amount exceeds the sum of 1,000 rupees. The Court Fees' Act contains no such exception of trust properties as is to be found in the 38th Section of the English Stamp Act, 55 Geo. 3 C. 184. I am of opinion that the term "property" as mentioned in those Clauses includes not only property to which the deceased was beneficially entitled during his lifetime, but also all property which stood in his name as trustee or of which he was possessed benamee for others.

The language of the Clause so far as it relates to the amount payable upon property in respect of which probate is to be granted appears clear, but the meaning becomes still more clear when the note at the foot of those Clauses is looked to, which is as follows:—"The person to whom any such "certificate is granted, or his representa-"tive, shall, after the expiration of twelve "months from the date of such certificate, "and thereafter whenever the Court grant-"ing such certificate requires him so to do, "file a statement on oath of all monies "recovered or realized by him under such "certificate.

"If the monies so recovered or realized "exceed the amount of debts or other pro-"perty as sworn to by the person to whom "the certificate is granted, the Court may "cancel the same and order such person to "take out a fresh certificate and pay the "fee prescribed by this Schedule for such "excess."

Now reading that note, it appears that in order to avoid any mistake, the Act expressly says that if the amount recovered or realized under the certificate exceeds the amount of debts or other property as sworn to, a fee is to be payable for the excess. The fee therefore on the certificate is payable on the total amount of the monies recovered or realized, without any reference whatever to the amount of the beneficial interest to be disposed by the person obtaining the certificate. If the monies realized, or in other words the debts collected, under the certificate amounted to 20,000 rupees, and the liabilities of the testator were 19,000 rupees, the fee would be payable by the person obtaining the certificate upon the entire amount collected, and not upon the surplus assets available to or distributable by him. It is clear, therefore, that the value of the property alluded to in the 11th and 12th Clauses does not mean the beneficial interest of the testator in such property. For these reasons I am of opinion that the full *ad valorem* duty is payable in the case both of Mr. Beresford and of Sir Herbert Maddock.

The decision of Chief Justice Sir Richard Couch in the case of Mrs. George, appears to me not to be in any way touched by any thing which we have said to-day. The probate there was granted in respect of a Will made in execution of a naked power of appointment against particular persons, which was not, either in the hands of the testatrix or of the Executor, *property* of any description.

Macpherson, J.—I am entirely of the same opinion, and think that there is nothing whatever in the Court Fees' Act to show that there was any intention to exempt trust property from the operation of Schedule I Clause 11. Trust property was expressly exempted by the English Stamp Act; and if the Legislature had intended that it should not be chargeable in this country, there would doubtless have been an express exemption to that effect in the Court Fees' Act. There is no such exemption: and the language used clearly includes trust property.

The 28th April 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge.*

Decree—Instalment—Bond—Execution.

Case No. 476 of 1870.

Miscellaneous Appeal from an order passed by the First Subordinate Judge of 24-Pergunnahs, dated the 16th September 1870.

Bishto Chunder Chuckerbutty and another (Decree-holders) *Appellants,*

versus

Woomanath Roy Chowdhry (Judgment-debtor) *Respondent.*

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Baboos Issur Chunder Chuckerbutty and *Bhowanee Churn Dutt* for Appellants.

Mr. R. T. Allan and *Baboo Ashootosh Dhur* for Respondent.

A judgment-debtor executed two kistbundees in favor of parties interested in the decree, making provision for the payment of certain instalments on these terms, that if one of the kists fell due the party to whom it was to be given might claim the whole amount with interest and realize it in execution of the decree.

HELD that the decree was not satisfied by the taking of the kistbundee, and that the payments made in pursuance of the kistbundee were made towards satisfaction of the decree, and the remedy of the decree-holder under the decree continued although he agreed, so long as he received the instalments under the kistbundee, not to execute the decree.

Norman, C. J.—THIS case, which at first looked a little complicated, resolves itself ultimately into a very simple point. The facts are briefly these. A decree had been obtained against the defendants in January 1861 for rupees 39,000. The interest of the decree-holder in the decree became divided into two parts; one of which came to Bishto Chunder Chuckerbutty, who had 9 annas 12 gundahs of the whole amount; and the other in succession to two persons, named respectively Indro Narain Prodhan and Kalee Doss Chuckerbutty, who were entitled to 6 annas 8 gundahs of the decree.

The judgment-debtor entered into arrangements for the payment of their several shares to the parties interested, executing two kistbundees dated respectively the 22nd February 1864 and the 4th June 1866. The kistbundees which made provisions for the payment of certain instalments contained these terms:—That if one of the kists falls due, the party to whom the same was to be given might claim the whole amount with interest, and might proceed to execute the decree and realize the amount in execution thereof.

On the 5th of June 1867, Bishto Chunder Chuckerbutty, who is now executing the decree, applied for execution, and later in the same day put in an application stating that he had received the sum of rupees 2,500 from the judgment-debtor in satisfaction of his demand, and therefore did not desire to take further proceedings at that time. On the 26th September 1867, the decree-holders, Kalee Doss and Bishto Chunder, respectively filed petitions informing the Court that they had received the sum of rupees 2,000 towards satisfaction of the decree. It does not appear that at that time any further proceedings were taken to execute the decree. If the statement in those petitions is true, and the judgment-debtor then paid the decree-holder rupees 2,000 on account of the debt, that would be within three years before the present proceedings for execution of decree were taken.

The Subordinate Judge says that the proceedings of the 26th September were not proceedings taken for the execution of decree; and in support of the judgment of the Subordinate Judge in this respect, Mr. Allan and Baboo Ashootosh Dhur have argued that the payment made on the 26th September 1867 were made on account of the kistbundee and not on account of the decree.

We are of opinion, however, that on these proceedings, and looking at the terms of the kistbundee, it appears that the decree remained in force and was not satisfied by the taking of the kistbundee; that the payments made in pursuance of the kistbundee were made towards satisfaction of the decree, and the remedy of the decree-holder under the decree by execution continued although he agreed, as long as he received the instalments under the kistbundee, not to execute that decree. The application for payment and the enforcing payment from the judgment-debtor on the 26th September, although in pursuance of the stipulation contained in the kistbundee, was the taking of a step to enforce the plaintiff's right under the decree; or in other words, the decree of the Court; and the very point now before us appears to have been decided by Chief Justice Sir Barnes Peacock and Mr. Justice Mitter in the case of Bhoobunessuree Debee *versus* Dinonath Sandyal, reported in 11 Weekly Reporter, page 232.

The case must, therefore, go back to the Subordinate Judge, and if he finds that the rupees 2,000 alluded to in the petition of the 26th September 1867 were paid in the manner and at the time alleged in those petitions, he will allow execution to proceed if no other cause be shown against it. It is clear that the right to execute the decree will not be barred by limitation.

The decree-holder is entitled to his costs of this appeal, which we assess at rupees 64.

Loch, J.—I concur in the order of remand.

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The 28th April 1871.

Present :

The Hon'ble E. Jackson and W. Ainslie, *Judges.*

Ownership — Submersions — Accretions.

Case No. 2265 of 1870.

Special Appeal from a decision passed by the Officiating Judge of Mymensingh, dated the 16th August 1870, *affirming a decision of the Subordinate Judge of that District, dated the 25th February* 1869.

Dwarkanath Roy Chowdhry (Defendant) *Appellant,*

versus

Dinobundhoo Singh Chowdhry and others (Plaintiffs) *Respondents.*

Baboos Romesh Chunder Mitter and *Hem Chunder Banerjee* for Appellant.

Baboos Sreenath Doss, Mohinee Mohun Roy and *Kishen Dyal Roy* for Respondents.

Ownership in soil is not lost because the subject of it becomes submerged; the owner of the site or sub-soil remains owner of the surface, and on re-formation of the surface soil takes whatever falls within his known boundaries. Ordinarily there can be no right of accretion when the new formation is on the site of what was formerly held by an individual as his private property.

Ainslie, J.—THE plaintiff sues to recover certain chur lands divided into two blocks ; plot No. 1 containing lands said to be accretions to plaintiff's village Khidder, which have re-formed on the sites of two other villages belonging to him, named Bahir and Bheetur Seernul, which were washed away by the river Jumoona ; and plot No. 2 containing re-formations on the site of an estate named Bheel Gungureeah. The defendant, who is the proprietor of mouzah Mollancha, is in possession, and has in his favor an award made by the Magistrate under Chapter XXII of the Criminal Procedure Code. It is, therefore, incumbent on the plaintiff to prove a good title to the whole of the lands claimed by him. No question of limitation arises to complicate the case.

The Judge of Mymensingh, on the 16th August 1870, affirmed the decree of the Subordinate Judge, by which the whole of plot No. 1 was awarded to the plaintiff, and his claim to the entire plot No. 2 was dismissed.

The finding of the Judge on the facts in respect of plot No. 1 is in the following terms :—

" The fact which seems to have been very " clearly established in this case is that the " churs of plot No. 1 are not only a re- " formation on the old site of mouzahs once " in the plaintiff's possession but long since " washed away, that is, since 1860 ; but " they are also an increment to the plaint- " iff's estate, and they cannot be regard- " ed in any way as appertaining to the " defendant's village of Mollancha on the " other side of the branch of the Jumoona.

" A careful inspection of the survey maps " of 1851-52 and those of 1860 leads me to " think that the river changed its course " materially between those dates, as the " survey map of 1852 of mouzahs Chow- " dhry Mollancha, and Nulcha Mollancha " shows that there was a large river " between Nulcha Mollancha and Bahir " Seemul; whereas in 1860 the survey " map of Bahir Seemul shows no river as " intervening between Chowdhry Mollancha " and Bahir Seemul, and the circumstance " is one which, I think, goes to substantiate " the allegation of the plaintiff that Bahir " and Bheetur Seemul were washed away " subsequently to 1860, and by the river " once more changing its course the churs " of plot No. 1 in dispute became re-formed " on the site of the villages."

Both the Courts below have accepted the report of the Ameen as trustworthy.

The defendant appeals specially to this Court on two grounds :—

1st.—That the Courts below have erred in applying the law to the facts found, in that the Ameen's report, which has been accepted by the Judge as good evidence, shows that certain portions of plot No. 1 are re-formations on the site of mouzah Nulkhola, and therefore no title founded on accretion can be maintained.

2nd. — That neither Court has come to a distinct finding on the objection to the Ameen's report raised by the defendant, to the effect that the point from which he started when defining the boundaries shown in his map, and which he assumed to be the point of junction of the boundaries of mouzahs Pâl Moogree, Allapore and Khidder, was not in reality the true point of junction.

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As to this second ground of special appeal, it appears that the Ameen was brought into Court and was examined by the defendant. He stated that he had taken and recorded the evidence of three witnesses, proprietors of mouzah Allapore, in the presence of the agents of both parties; that these witnesses concurred in pointing out a particular spot as the point of junction of the boundaries of the three villages; and that by comparison with the thâk maps, he satisfied himself that this point was correctly given. There is not a single fact adduced on the examination of the Ameen inconsistent with the assumption that this point has been correctly found, and there is not a particle of evidence to establish the contrary. The Courts below have both characterized the proceedings of the Ameen as most careful, and although this particular objection has not been specifically noticed we cannot doubt that it was considered. We think that the omission to record any direct finding resulted from the fact that there was no conflict of evidence on the point calling for a judicial declaration. It would be mere waste of the time of the Courts to remand the case for a finding on a point on which the evidence is all one way, when the Courts have evidently acted on the assumption that the objection was wholly unfounded. It may be further noticed that the irregularities in the boundary of mouzah "Uslee Khidder," which was not washed away, are such that it is impossible to believe that any material error in the starting point would not very soon have become apparent to the Ameen himself and all parties present, when he began to lay off the boundary line on the ground from the maps in his hand.

The first objection is founded on a recent construction of Regulation XI of 1825, by their Lordships of the Privy Council in the case of Lopez *versus* Muddun Thakoor, 14 Weekly Reporter, page 11. This judgment was delivered on the 11th July 1870, and had not been published in this country when this suit was before the Courts below; but it is unnecessary to remand the case as the facts to which the law as now construed has to be applied have been fully found, and are set forth in the Ameen's map and report which the Lower Appellate Court has approved.

The view of the law by which we are to be guided may be stated in the following terms:—

That ownership is not lost because the subject of it becomes submerged—the owner of the site or sub-soil remains owner of the surface, be it land or water, and on re-formation of the surface soil takes whatever falls within his known boundaries. The right by accretion is limited to gains from that which was not previously private property—therefore ordinarily there can be no right of this kind when the new formation is on the site of what was formerly held by an individual as his private property, though under peculiar circumstances there may be such a right as in the case of Lord Yarborough cited by their Lordships.

In this case, we have, as found by the Judge, complete destruction and re-formation since 1860; therefore the case does not fall within the class of exempted cases in which the acquisition has been so *gradual*, *slow*, and *imperceptible*, as to make the right of the owner of the site one incapable of being enforced.

On referring to the Ameen's map, we find that in the south-west angle of the land in dispute, there is a block laid down as formed on the site of what previously to the last washing away of the lands was demarcated by the survey authorities in 1860 as mouzah Nulkola. The plaintiff denies the existence of any such mouzah, and claims this block as a gain from the river of what never was appropriated by an individual. But from his own plaint, as well as from the fact of a survey of this village having been made in 1860, this denial is of no weight. The block of land with which we have to deal in this appeal has been shown by the Ameen to lie outside the boundaries of *Bahir* and *Bheetur* Seemul as defined in 1860, and within the boundary of what was then surveyed and recorded as mouzah Nulkhola. The plaintiff, who now denies the existence of any such village as Nulkhola in this plaint, described the southern boundary of the land claimed as follows:—To the south the lands of *Bahir* Seemul, unjustly occupied by the proprietors of Pergunnah Kagmaree as belonging to Nulkhola. Clearly, there was and still is land which is occupied by third parties as mouzah Nulkhola, and the plaintiff cannot in this suit go into the question of their title. The land in dispute now is on the site of that village of Nulkhola; and so long as the right of the plaintiff to the site is not established, he cannot be said to have proved a right to the surface. The appellant must consequently succeed.

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The plaintiffs have put in cross-objections to the decision against them in respect of plot No. 2, which the Ameen has found to be a re-formation within the boundaries of estates formerly belonging to the plaintiffs. The special appellant admits that the judgment of their Lordships of the Privy Council, on which he relies in respect of the re-formations on the site of Nulkhola, disposes of this cross-objection in favor of the plaintiffs.

The appeal and cross-appeal are both allowed. The decree of the Court below is modified as follows:—The claim of the plaintiff to the lands in plot No. 1 shown in the Ameen's map as re-formations on the site of mouzah Nulkhola is dismissed, and his claim to the lands in plot No. 2 is decreed.

Each party will bear his own costs of this appeal.

The 29th April 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Rent of land with buildings—Jurisdiction.

Case No. 1953 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Additional Judge of Nuddea, dated the 15th June 1870, *affirming a decision of the Assistant Collector of that District, dated the 26th June* 1869.

Mothoora Nath Koondoo (Defendant) *Appellant*,

versus

Mr. W. Campbell, manager on behalf of Mr. Scott Moncrieff (Plaintiff) *Respondent*.

Mr. J. S. Rochfort for Appellant.

Mr. R. T. Allan and *Baboo Bhowanee Churn Dutt* for Respondent.

A suit by a semindar against a putneedar or ijaradar for rent is cognizable in a Collector's Court under Section 23 Act X of 1859, although there may be houses on the land demised.

The price for the use of land in its improved state is rent which can be sued for in the Collector's Court whether the improvement consists in the clearance of jungle, draining, fencing, accessibility by means of roads made upon or leading to it, contrivances for irrigation, or buildings erected upon the land.

Where the principal subject of occupation is a building or buildings, when the rent is substantially the price of such occupation, the land on which the buildings stand being a merely subordinate matter, the rent cannot be truly described as "the rent of land either kherajee or lakheraj."

Norman, C. J.—This is a suit brought in the Collector's Court under Act X of 1859, for the rent of a very considerable tract of land described as a 12 annas dur-putnee talook of mouzah Majumpore and all the jotes lately held by Mr. Kenny in the 16 annas of the village, two brick buildings in the shape of a half moon, each containing 20 apartments, with a brick-built godown standing on the said jotes, with khas, fallow, julkur, bunkur, churs, &c., lakheraj lands in mouzah Majumpore, a 4 annas dur-ijarah of mouzah Majumpore, mouzah Moorareepore, and lakheraj lands in Bahadoor Khalee, containing in all 1330 beegahs. The enumeration of the different tenures and ryots' holdings in the kubooleut, which was duly registered, is written in Bengalee and occupies 25 closely written sheets of the largest sized brief paper.

There are hâts upon the land in question, and the brick houses included in the lease are apparently of considerable value.

The Assistant Collector of Kooshtea, Mr. Luttman Johnson, who tried the case, says:—"There are certain pucca houses on the "land, and no doubt part of the rent stipu-"lated is really on account of house-rent. "But neither is the amount of house-rent "nor the fact that anything is due on ac-"count of house-rent mentioned in the "kubooleut. The houses are merely men-"tioned in a list of property,—the mention "of them is merely descriptive." There is also "a clause whereby the tenant is bound "to keep the houses in good repair, and the "right of letting them is made over to him "specifically."

The defendant objected before the Assistant Collector that a suit for rent could not be maintained in the Collector's Court.

The objection was overruled by the Assistant Collector, and his decision has been affirmed by the Judge on appeal.

The objection has now been renewed on special appeal before this Court.

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It seems to be supposed that there is a considerable conflict of decisions on the question before us. But I think that when the cases are closely examined, it will be found that such is not the case.

The preamble of Act X of 1859 recites that "it is expedient to re-enact with certain modifications the provisions of the existing law relative to the rights of ryots with respect to the delivery of pottahs and the occupancy of land, to the prevention of illegal exaction and extortion in connection with demands of rent, and to other questions connected with the same; *to extend the jurisdiction of Collectors*, and to prescribe rules for the trial of *such questions, as well as of suits for the recovery of arrears of rent*, and of suits arising out of the distraint of property for such arrears."

Upon the language of this preamble, I desire to observe that the suits for the recovery of arrears of rent do not appear to be limited in any way. There is nothing to restrict the word "rents" to rents due from ryots.

The 23rd Section enacts that all suits for arrears of rent due on account of land either kherajee or lakheraj, or on account of any rights of pasturage, forest-rights, fisheries, and the like, shall be cognizable by the Collectors of land revenue, and shall be instituted and tried under the provisions of this Act, and except in the way of appeal as provided in this Act *shall not be cognizable in any other Court* or by any other officer, or in any other manner.

We have to consider whether the suit with which we have to deal is a suit for the rent of land. If so, the Collector's Court and the Collector's Court alone had cognizance of it under Act X.

If the principal subject of the demise—that for which substantially the rent is reserved is land, I think it matters not that the value is increased by houses or other buildings standing upon the land. This Court so held in Tarinee Pershad Ghose *versus* the Bengal Indigo Company, II Weekly Reporter, Act X Rulings, page 9.

The rent of land does not represent its value in a state of nature or as jungle, but as improved land; and whether the improvement consists in the clearance of jungle, draining, fencing, accessibility by roads made upon or leading to it, contrivances for irrigation, or buildings erected upon the land does, not, in my opinion, in any way affect the question. In all cases such as I have supposed, the price for the use of the land in its improved state is rent which can be sued for in the Collector's Court.

By way of analogy, I desire to refer to the fact that in England it has long been settled that though the value of demised premises may be increased by the goods on the premises, yet the rent must be deemed to issue out of the house and land and not out of the goods; and consequently a landlord does not lose his remedy by distress when goods are let with a house as where a furnished house is the subject of the demise, one rent only being reserved. *See* Newman *versus* Anderton, 2 Bosanquet and Puller's New Reports, page 224.

On the other hand, where the principal subject of occupation is a building or buildings,—when the rent is substantially the price of the use and occupation of such building or buildings, the land on which the buildings stand being a merely subordinate matter,—it may well be that the rent for such buildings cannot be truly described "as the rent of land either kherajee or lakheraj."

The cases of Maharajah Dheeraj Mahtab Chand Bahadoor *versus* Mokoond Bullub Bose, XIV Weekly Reporter, page 246; Bipro Dass Dey *versus* William Woollen, I Weekly Reporter, page 223; and Hurry Mohun Sircar *versus* Moncrieff,* 7th December 1870, fall apparently within this class of cases.

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* The 7th December 1870.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Case No. 1341 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Additional Judge of Nuddea, dated the 9th May 1870, *reversing a decision of the Deputy Collector of that District, dated the 5th April* 1869.

Huree Mohun Sircar and others (Defendants) *Appellants,*

versus

Mr. R. Scott Moncrieff (Plaintiff) *Respondent.*

Mr. R. E. Twidale for Appellants.

Mr. R. T. Allan and *Baboo Bhowanee Churn Dutt* for Respondent.

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If a zemindar could not sue a putneedar or an izaradar for rent under Section 23 of Act X of 1859 merely because there were a few houses on the land demised, he would in fact be wholly without remedy.

I am of opinion that in the present case the suit is a suit for the rent of land, and therefore that the decisions of the lower Courts must be affirmed with costs.

Loch, J.—I quite concur.

Jackson, J.—THIS is a suit for two months' rent of 46 beegahs of land, and of certain *arhuts*, *ghauts*, *hauts*, and *bazaars* thereon, in Mouzah Kennypore near the town of Kooshtea. The lower Courts have come to opposite conclusions as regards the points which were raised before them, namely, as to whether the defendant was entitled to an abatement of rent or not. On special appeal in this Court, we are asked to set aside the decision of the Lower Appellate Court on the ground that the Revenue Court in which this case was instituted had no jurisdiction to receive the plaint. Under the precedents of this Court, the Revenue Courts have no jurisdiction to entertain suits like the one before us. The rent under the lease does not come from the land, but the rent comes from the *arhuts* and from the *ghauts* and from the *bazaars*, as well as from the land, which explains the fact that 46 beegahs are let out at the rent of rupees 5,000 annually. The case seems to be on all fours with the cases noted in the margin* in which it has been held that such suits do not form the subject of Act X of 1859; they must be brought in Civil Courts. However reluctant we may feel to remand this case, still following those precedents we think we are obliged to set aside the decision of the Judge and direct that the suit may be brought in the proper Court. The costs of the appeal, as far as it has gone, will be borne by the parties respectively, inasmuch as no such objection was raised in any of the lower Courts.

The decision of the Judge is set aside and the plaintiff's suit is dismissed.

* Weekly Reporter, Vol. 14, page 246.
Ditto " 11, " 183.
Ditto " 8, " 250.
Ditto " 11, " 400.
Ditto " 9, " 552.

The 1st May 1871.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Exaggerated claim—Decree—Costs.

Case No. 1801 of 1870.

Special Appeal from a decision passed by the Additional Judge of Hooghly, dated the 19th July 1870, *reversing a decision of the Second Subordinate Judge of that District, dated the 24th March* 1870.

Ram Chunder Chowdhry (Plaintiff) *Appellant,*

versus

Captain E. M. Mariott, Executive Commissariat Officer and Superintendent of Government Elephants (Defendant) *Respondent.*

Mr. R. E. Twidale and *Baboo Mohinee Mohun Roy* for Appellant.

Baboo Unnoda Pershad Banerjee for Respondent.

A Judge in appeal was held to have done wrong in dismissing a plaintiff's case *in toto* with all costs, on the ground that he had monstrously exaggerated his claim in the first instance, when there was a ground, although small, for the plaintiff's contention.

Where a plaintiff is entitled to some part of his claim, he ought not to be deprived of the benefit of the decree by such an order as to costs as would make him liable to the defendant for more than he would himself recover.

Glover, J.—THE plaintiff in this suit took a lease of certain marshy lands from the zemindar, Baboo Poorno Chunder Roy, on pottahs, dated the 18th and 24th of July and 5th of August 1868, at a yearly rent of rupees 20.

It appears that the Government elephants stationed at Serampore had been in the habit of taking fodder, or dul grass, from these lands with the permission of the zemindar. After the plaintiff, however, got his lease, he applied to the Assistant Commissary General at Barrackpore, stating the fact of his having got a lease, and demanding payment for the dul which the elephants

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were in the habit of taking from his property. This was on the 8th of August 1868. The Commissariat Officer replied stating the fact that the Government elephants had always been accustomed to get fodder from the bheel with the permission of the zemindar, and he therefore desired the plaintiff to prove that he was entitled to the ownership of the land, and asked how it was that he had made no previous application for payment. Some correspondence then took place between the Commissariat Officers and the plaintiffs, to which it is not necessary to allude more particularly here, except with reference to the letter of the 17th of August in which the Commissariat Officer, after denying the plaintiff's claim for any grass taken by the elephants during the period for which he made a demand, offered to enter into some arrangement for the supply of fodder for the future, and asked what terms the lessee of the property was prepared to agree to. The plaintiff in his reply to this letter, dated the 19th of August, demands either 8 annas per head per day for each elephant taking fodder, or at the rate of 5 maunds of fodder for the rupee. This arrangement the Commissariat Officer promptly rejected, and so far the correspondence closed with an expressed determination on the part of the Commissariat Officer to have nothing further to do with the plaintiff's jheel and to remove the elephants elsewhere. A few days after this the Commissary General thought of applying to the zemindar, and got in return a letter from Baboo Poorno Chunder Roy in which he declared that he had no intention whatever of taking payment for any fodder which might be required for the Government elephants, and that the Commissariat Officers might still take fodder from the jheel as usual, only that care should be taken that no damage be done to what the Baboo calls "the subjects," by which term we presume the Baboo means the tenants or people holding some rights in the jheel given by himself.

The next communication made by the plaintiff to the Commissariat Officer was through his solicitor, and in this he demanded a sum of 6,000 rupees as the price of the fodder which the Government elephants had consumed. The only reply given to this letter was that the Commissariat had taken the dul because the zemindar had permitted it. On this the plaintiff brought the present suit, and he valued it, after taking advice as to how far he was likely to succeed, at rupees 1,317.

The defence is generally that the moment the Commissariat Officer was aware of the plaintiff's claim, and found that he was unable to come to any arrangements with him as to the price of the fodder, he at once withdrew the elephants; that he had done no wilful damage; and that the plaintiff was not entitled to succeed.

The first Court settled the plaintiff's claim at rupees 658-8 annas with proportionate costs. The Judge, on appeal, whilst apparently admitting that the Commissariat elephants did take fodder from the plaintiff's jheel from the 9th to the 19th of August, refused to allow him any payment for that period, on the ground that he had monstrously exaggerated his claim in the first instance and ought to get nothing; and in support of his order he cited a decision of this Court in the case of Thakoor Luleet Narain Deo, plaintiff, appellant, *versus* Juggernath Misser and another, defendants, respondents, published in Volume VIII, Weekly Reporter, page 476. He, therefore, dismissed the plaintiff's case *in toto* with all costs. We think that this decision of the Judge cannot be sustained.

In the first place, the decision which he quotes from the 8th Volume, Weekly Reporter, does not apply; because in this case there was undoubtedly a ground, though probably a small one, for the plaintiff's contention, and we cannot find that the defendant took such steps as he certainly might have taken to prevent the suit coming into Court. From the very first, he seems to have kept the plaintiff at arms' length and did not make any offer of paying what, even according to his own admission, was due to the plaintiff for dul consumed by the elephants.

With reference to the amount which the plaintiff is entitled to claim, the Judge has found on the evidence that the only days on which the Commissariat elephants took fodder were from the 9th to the 19th of August, or for a period of 10 days. The Judge has refused to believe the evidence adduced by the plaintiff, which went to show that the elephants consumed the plaintiff's dul from the 5th to the 26th of August, and afterwards for some 15 days in October.

Taking this finding of fact as the basis on which to make a calculation, we consider that according to the defendant's own showing the plaintiff is entitled to the value of the grass

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which the Government elephants consumed during 10 days. We find also that the number of these elephants is shewn by the evidence to have been 70. As to the price of the dul grass, there is no special evidence on the record to show with any clearness what the value of it was when taken from the jheel, although there is some as to its value when taken to the market; but it is proved by the evidence of the Commissariat Officer that Government was in the habit of paying its Mahouts 4 annas a day for the expenses of dul grass, and therefore we think that we should not be far wrong in setting down the value of the grass consumed at 3 annas per head per day; and 3 annas a day on a total of 70 elephants for 10 days would make a total sum of rupees 131-4 annas,—and this amount we consider that the plaintiff is entitled to recover.

There remains the question of costs. It has been argued on the part of Government that this suit was brought without the slightest foundation; that it was a monstrously exaggerated suit; that no attempt was made to settle matters without coming into Court; and that the Government were bound to come in and defend their interests, as the plaintiff had made it impossible by his exorbitant demands to come to any settlement. Baboo Unnoda Pershad Banerjee, the Senior Government Pleader, therefore, contends that the usual rule in cases in which the decision of the lower Court is partly upheld and partly reversed should be followed, namely, that the costs should be made payable in proportion to the amounts decreed and dismissed. On the other hand, it is contended that the Government, though knowing of the claim made and admitting that a certain portion of it at all events was correct, there being no denial on the part of the Commissariat Officer that the Government elephants had been fed on the plaintiff's jheel, made no attempt to settle that portion of the case, and did not even pay into Court the value of the dul admitted to have been used for 10 days, but forced the plaintiff to come into Court.

We think that on the whole the fairest way would be to order that each party should bear their own costs. Had the defendant endeavoured to put a stop to this litigation, and offered to pay into Court the amount due on account of the 10 days forage, we should have had no hesitation in ordering that the costs should be fixed in proportion to the amounts decreed and dismissed on either side; but to do so in this case would be to take away every advantage which the plaintiff will get from this decree, and to give the Government a pecuniary benefit to which it is not entitled; for on a calculation made by us of the costs as they would be on this basis, we find that the Government would be a gainer, although it loses the suit, by some 20 or 30 rupees. Now, as we think that the plaintiff is entitled to some part of his claim, it would be manifestly improper to take away from him the entire benefit of the decree, by passing an order for costs which would make him liable to the defendant for a larger sum than that which he will himself recover.

We, therefore, modify the order of the Judge as above stated, and direct that each party bear his own costs.

The 1st May 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. C. Paul, *Judge.*

Sale by manager of joint family property—Consent—Presumption.

Case No. 2198 of 1870.

Special Appeal from a decision passed by the Judge of 24-Pergunnahs, dated the 28th July 1870, *reversing a decision of the First Subordinate Judge of that District, dated the 19th February* 1870.

Gopal Chunder Lahoory (Plaintiff) *Appellant,*

versus

Raj Kishore Lahoory and others (Defendants) *Respondents.*

Baboos Bama Churn Banerjee and *Rajender Misree* for Appellant.

Baboo Hem Chunder Banerjee for Respondents.

On the death of *R S*, his eldest son *R K* undertook the management of the family property, plaintiff (a grandson of the deceased through his third son) being then an infant. Not long after, *R K* purchased some land which he subsequently sold to *R D* and *H S D*, who are now represented by the defendants *H S* and *L N D*. In the present suit plaintiff alleges that the

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property had been purchased by *R K* with money belonging to the joint funds of the family. The first Court found for plaintiff, and adjudged him one-fourth share of the property in suit. From that decree *H S* and *L N D* did not appeal, but *R K* did appeal. The Judge, assuming the lower Court's finding to be correct, held that as plaintiff who was of age at the time did not object to the sale, he could not recover possession of property sold by *R K* as the recognized agent and manager.

HELD that *R K* could not found any right upon the presumption of plaintiff's consent, however such presumption might have availed the other defendants, purchasers from *R K*, who had not appealed.

Norman, C. J.—THE plaintiff, Gopal Chunder Lahoory, the special appellant before us, was the son of Nobo Kishore, the third of five sons of Ram Soonder Lahoory. On the death of Ram Soonder Lahoory, his eldest son Raj Kishore undertook the management of the family property, the plaintiff at that time being an infant. Ram Soonder died in Assin 1253. In 1255, the defendant Raj Kishore purchased certain land in Punchannogram, which, on the 4th Magh 1266, he sold to Romonee Dasee and Hurro Soonduree Dassee, who are now represented by the defendants Hurro Soonduree and Lukhee Narainee Dassee.

The plaintiff brings this suit alleging that the property so purchased by Raj Kishore was purchased with the money belonging to the joint funds of the family, and that Raj Kishore sold it without authority to Romonee and Hurro Soonduree. The defendant Raj Kishore adduced a great deal of evidence to show that the property was his own and that it was purchased out of his own funds. His case is that he sold it to Romonee and Hurro Soonduree to pay his own debt. He puts forward, in a somewhat indirect way, a statement that he sold the property for his own purposes; but in the evidence he states that the sale took place in the presence of the plaintiff, Gopal Chunder Lahoory, and he attempts to show that Gopal Chunder consented to the sale.

The first Court finds that the accounts and other documents put in by Raj Kishore to prove that the money out of which this property was purchased belonged to him are fabricated, and that the property was really purchased out of the joint funds, and by its decree adjudges to the plaintiff one-fourth share of the property in suit.

From that decree, Hurro Soonduree and Lukhee Narainee did not appeal to the Judge. Raj Kishore did appeal. The Judge seems to have assumed throughout that the finding of the lower Courts upon the facts is correct, and that the property was at the time of the sale in 1266 the joint property of the plaintiff and the other members of the joint family. He says, however, that "the judgment of the lower Court ought to be reversed and the suit ought to be dismissed. "It is admitted that Raj Kishore was the "manager of the joint estate up to 1270, and "that in that capacity he bought and sold "properties on account of the joint estate. "At the time of the sale of the property in "question, the plaintiff was some 23 years "old; but he did not object to the sale,—he "allowed Raj Kishore and the purchasers to "complete the transaction." The Judge then says:—"I apprehend that the purchasers were justified in purchasing from the "recognized manager, and that the plaintiff "was a consenting party to the sale and is "bound by the acts of the defendant." He then goes on to say that the plaintiff "cannot recover possession of the property, "which Raj Kishore sold while he was "the recognized manager and agent of the "family."

Now, we think that there would have been very great force in these observations of the Judge, if the defendants Hurro Soonduree and Lukhee Narainee had come before him on the appeal and contended that they bought the property in reliance on the representation implied by the conduct of the now plaintiff in having been present at, and not dissenting from, the sale. It is clear, however, that these ladies have no real interest whatever in this matter. They do not come forward. They do not pretend that they have any special right as purchasers from Raj Kishore.

It is not the case of Raj Kishore that the plaintiff consented to the sale of this property as a portion of the joint property. There is no evidence whatever that he consented to the sale of this property as the property of Raj Kishore. Whatever rights Hurro Soonduree Dassee and Lukhee Narainee Dassee might have been able to build on the presumption of the consent of the plaintiff to the sale, we think that Raj Kishore cannot found any right upon such presumption, and that upon the appeal of Raj Kishore the Judge ought not to have given a decree in favour of those two ladies, who themselves did not object by appeal to the decision of the first Court.

We think, therefore, that the decision of the Judge must be reversed, and the decision of the lower Court restored with costs as against the defendant Raj Kishore.

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The 1st May 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. C. Paul, *Judge*.

Sub-lessees—Rights of occupancy.

Case No. 2625 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Jessore, dated the 14th September 1870, affirming a decision of the Moonsiff of Magoorah, dated the 3rd December 1869.

Nil Komul Sein (Plaintiff) *Appellant*,

versus

Danesh Shaikh (one of the Defendants) *Respondent*.

Baboo Grija Sunkur Mojoomdar for Appellant.

Baboo Bipro Doss Mookerjee for Respondent.

By holding for 12 years, a ryot does not acquire a right of occupancy, if the land has been sub-let to him for a term, or year by year, by a ryot having a right of occupancy.

Norman, C. J.—THE facts of this case are as follow :—

A person of the name of Titooram Tantee held a small quantity of land (it does not appear how much) as tenant to the plaintiff for some years. In 1260 he under-let a portion of the land to Danesh Shaikh and others, who are the defendants in the present suit. In 1275, Titooram being in arrears of rent absconded and relinquished his tenure, upon which the plaintiff brought this suit for possession against Danesh Shaikh and others to get possession of the portion of the land which had been under-let by Titooram Tantee to them. The plaintiff's title then is that the land was his property, and that it was under-let to the defendants by a tenant whose title has now expired. Therefore, unless the defendants can make out some title, the plaintiff must get a decree for possession.

The defendants show that since 1260 they have been paying rent as tenants from year to year to Titooram. The pottah granted to Titooram has not been put in,—and it does not appear what the nature of his holding was.

I think it is impossible, upon the evidence as it stands, to assume that Titooram had any greater interest than that of a ryot having a right of occupancy. Now, a ryot cultivating or holding land for 12 years does not acquire a right of occupancy, if the land which he has been cultivating has been sub-let to him for a term, or year by year, by a ryot having a right of occupancy. That is the express provision of Section 6 ; and it appears to me probable that the facts of the present case bring it within the words of that enactment. If Titooram had any right greater than that which I have supposed, the defendants have failed to prove it ; and it is for them to show that they have some title which they can set up as a bar to the plaintiff's right of absolute possession to the land in question.

For these reasons, it appears to us that the decisions of the Courts below must be reversed, and a decree will pass adjudging possession to the plaintiff of the piece of land in dispute with costs in all the Courts.

Paul, J.—I concur.

The 2nd May 1871.

Present :

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Privy Council decree—Execution—Interest—Section 10 Act XXIII of 1861.

Case No. 44 of 1870.

Miscellaneous Appeal from an order passed by the Judge of Purneah, dated the 29th January 1870.

Rajah Ahmed Reza (Judgment-debtor) *Appellant*,

versus

Mussamut Khujoorunnisa (Decree-holder) *Respondent*.

The Advocate General and *Messrs. G. Gregory* and *C. Gregory* for Appellant.

Messrs. J. W. B. Money and *R. E. Twidale* for Respondent.

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Where a decree of the Privy Council ordered possession with mesne profits but without interest:

HELD that the decree did not interfere with the power of the Judge who executed it to award interest under Section 10 of Act XXIII of 1861 on the aggregate sum adjudged, and costs from the date of decree to date of payment.

Norman, C. J.—THIS is an appeal against the decision of the Judge of Purneah in the execution of a decree of Her Majesty in Council.

The decree directs that the appellant in the original suit, Syed Enayet Hossein, shall be "put into possession of 21-120ths of the "half of the zemindary together with the "mesne profits of the same, whereof an ac-"count is to be taken against the respond-"ent from the 16th February 1862, but "without interest."

After two several remands by this Court, the account has ultimately been taken and has resulted in a final decree for rupees 94,114 and 2 annas, with costs bearing interest at the rate of 12 per cent. per annum from the 8th of January 1870 till date of payment,—the 8th January 1870 being the date of the final decree awarding such mesne profits to the plaintiff.

From that decision, an appeal has been presented by the defendant, and two principal points have been taken.

The first is that in estimating the mesne profits, the defendants ought to have been allowed something for the wages of the amlah and servants engaged in making the collections.

The Judge has disposed of this matter by saying that in the decision of the High Court of the 30th November 1864* it is ruled that 10 per cent. cannot be allowed on the *mostajiri jummah* for amlah expenses, and he says—"This order is quite reasonable "as the rents collected were not on the de-"hatee jummah, but on the mostajiri or "farming leases." He goes on to say:—"This claim is put forward in addition to "those under objections 285 and 286, and is "most unreasonable, as the sum claimed as "a deduction is again entered in those two "objections." The High Court has already "ruled that such a claim is untenable, and "it is therefore rejected."

The appellant's Counsel has referred to the evidence taken in 1862, and which goes to show that the defendant's expenses for the servants employed in collecting the mostajiri jummah were at the rate of rupees 1,504 monthly, which would bring up the expense of collection to an amount much larger than what it would be if calculated at the rate of 10 per cent. on the gross collections.

Now, it is impossible to shut our eyes to the fact that in making collections from farmers holding considerable tracts of land the cost of collecting the rents and of keeping the account is very small. We think that the Judge may be right in supposing that all the expenses for the amlah required for this purpose were included under an item called "miscellaneous expenditure contained in the jummah-khuruch account."

We observe that in the former decision, which was passed on the 15th June 1868, the Judge refers to this miscellaneous expenditure or "durbar expenses" as "charges "for stationery, cutcherry expenses, and "wages of amlah, servants, &c."

The details of this expenditure are not before us, and we are not in a position to say that the "miscellaneous expenditure" may not contain some items of charge for wages of servants employed in the cutcherry and in keeping the accounts, as distinct from the wages of servants employed in making the collections from the ryots or tenants of the land.

At any rate, if the "miscellaneous expenditure" does not include the cutcherry servants, so far as we can see the defendant has not put forward any claim for the expenses of such servants or attempted to support such claim by any evidence.

The defendant's claim seems to be precisely that which the Court disallowed when put forward in another shape on a former occasion.

If this Court, when the matter was before it on the former occasion, had considered that the defendant's claim for the wages of the zemindary servants at rupees 1,504 per month could be sustained, and if the evidence of the witnesses examined in 1862 had been treated as trustworthy, the Court would not have disallowed a claim at the rate of rupees 10 per cent., which would have been less than that which, if those witnesses are to be believed, the defendant actually expended in making the collections.

We think that this claim of rupees 1,504 a month is preposterous, and it is the only one advanced by the defendant.

* 1 W. R., Misc., p. 20.

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We are disposed to think that he has been treated only too liberally in some of the allowances that have been made to him.

The next point taken is that interest ought not to be allowed from the date of the final decree for mesne profits, because the Privy Council did not allow interest.

It appears to us that this argument proceeds upon a fallacy. The Privy Council decree is that the appellant in the original suit be "put in possession of 21-120ths of "the half of the zemindary, together with "mesne profits of the same, whereof an ac- "count is to be taken against the respondents "from the 16th February 1862, *but with- "out interest.*" The order of the Privy Council, therefore, is that in taking the accounts of the mesne profits, interest on the arrears of mesne profits should not be allowed, and accordingly such interest has not been allowed. But the 10th Section of Act XXIII of 1861 empowers the Court, where a sum of money is decreed to the plaintiffs, to award interest on the aggregate sum adjudged and costs from the date of decree to date of payment. Now, there is nothing in the decree of the Privy Council which interferes with the power of the Judge to make the order which he has properly made under that Section.

We, therefore, dismiss the appeal with costs.

Mr. Money for the respondent has made some objections which it is not now necessary to enter into.

One of his objections might have been pressed before, or it might have been brought to the notice of the Court by application for a review. The matter has been long since disposed of. Mr. Money's client did not express any dissatisfaction with the order when it was passed. It is too late to take any objection at this stage. It refers to the expenses of the Emambara. His cross-appeal must also be dismissed.

We modify the decree of the Lower Appellate Court by allowing interest at the rate of 6 per cent. on the amount decreed. We allow 25 gold mohurs as the costs of this appeal.

The 2nd May 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Butwarah—Regulation XIX of 1814—Title—Jurisdiction—Right of suit—Possession.

Case No. 2358 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 27th July 1869, *reversing a decision of the Moonsiff of Tegrah, dated the 29th January* 1869.

Mr. H. Spencer (Plaintiff) *Appellant,*

versus

Puhul Chowdhry and others (Defendants) *Respondents*

Mr. G. Gregory and *Baboos Umurnath Bose* and *Toolsee Dass Seal* for Appellant.

Mr. C. Gregory and *Moonshee Mahomed Yusoof* for Respondents.

The Revenue authorities acting under the butwarah law have no jurisdiction to determine any disputed question of right and title in shares; and there is nothing in Regulation XIX of 1814 or any other Regulation to bar the maintenance of a suit in a Civil Court for a declaration of plaintiff's right to a larger share than that recorded in his name after a butwarah in the paper of partition.

If the plaintiff in such a case can establish his title, and is not barred by lapse of time, he should not be denied the declaration sued for, merely because he might have been ousted by the defendant under colour of the butwarah proceeding.

The Civil Court has no authority to interfere with the division of the land and jumma, which is a matter exclusively within the jurisdiction of the Revenue authorities.

Mitter, J.—We are of opinion that the Lower Appellate Court has erred in holding that the failure of the plaintiff to appear before the Collector within the period prescribed by Clause 2, Section 4, Regulation XIX of 1814, is sufficient to bar the maintenance of this suit.

It is true that Section 20 of that Regulation says "the *determination* of the Board of Revenue or Board of Commissioners on the paper of partition shall be final." But this Section evidently refers to those questions only which can be legally *determined* by the authorities mentioned therein. Now, it is beyond all dispute that Revenue authorities acting under the Butwarah Law have

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jurisdiction to assess a certain jumma on certain shares, but have no jurisdiction to determine any disputed question of right and title in shares. It follows, therefore, that the provisions of Section 20 cannot be urged as a bar to the maintenance of the present suit so far as the question of right and title is involved in it; while, on the other hand, the Civil Court has no power to interfere with the division of the lands and jumma, which is a matter within the exclusive jurisdiction of the Revenue authorities, and that portion of the plaintiff's prayer by which he seeks to have a re-distribution of the lands and Government revenue must therefore fall to the ground. But there is nothing in the Butwarah Law, or in any other Regulation that we are aware of, to prevent the Civil Court from entertaining this suit for the declaration of the plaintiff's right to a larger share than that recorded in his name in the paper of partition. Suppose, for instance, that a Butwarah is made by the Collector at the instance of certain parties who have no real interest in the estate. Can it be contended that the real owner of that estate would be prevented by such a Butwarah from bringing a civil suit for the establishment of his right, merely because he did not appear before the Collector within the fifteen days allowed by the second Clause of the fourth Section of the Regulation, and that even when he is fully prepared to show that his failure to do so arose from causes perfectly beyond his control, such as absence in a foreign country, minority, lunacy, &c. Such a construction is no way warranted by the provisions of Section 20. This view was taken by a Division Bench of this Court in its decision in a Special Appeal No. 2420 of 1870, 20th of March 1871.*

It has been urged by the respondent that the plaintiff has to thank himself for the injury he complains of, inasmuch as there was nothing to prevent him from appearing before the Collector within the time required by law; and that this Court ought, therefore, to refuse to entertain his suit, which is one merely for declaration of title, in the exercise of the discretion vested in it by the 15th Section of the Code of Civil Procedure. This objection cannot be allowed at this last stage of the proceedings. It was not raised in the Court of first instance, and as that Court has given a decree to the plaintiff upon the merits, it would be improper for us now to dismiss this suit on the strength of an objection which, it must be admitted on all sides, does not affect the real justice of the case.

It has been further urged that the plaintiff is not entitled to have his right declared in an undivided 2 annas 11 gundahs and 1 cowree share in the zemindaree, notwithstanding the butwarah which was duly made according to law, and as this is what he has asked for in his plaint the suit cannot be maintained in its present form. This objection is a technical one only. There is no dispute as to the plaintiff's title to a 2 annas and 10 gundahs share, and as the Revenue authorities have assigned to him in lieu of that share certain specific lands with a certain amount of Government revenue assessed thereupon, none of the parties litigant can complain if the plaintiff's right to those lands is declared in this suit. The real contest between the parties is about the extra additional share of 1 gundah and 1 cowree claimed by the plaintiff. But if the plaintiff can show that he is justly entitled to that share also, and if at the same time it is found to have been allotted by the Revenue authorities to any one of the defendants, we see no legal reason why the Court should refuse in this suit to declare his title to the same, treating him as a shareholder to that extent only in the putee in which it may have been so included. Justice requires that our Courts should always try, as far as they legally can, to avoid causing multiplicity of litigation; and, in the absence of any valid objection affecting the real merits of the case, we should be wrong to dismiss this suit merely for a mere formal defect in the plaintiff's prayer—a defect which can be easily cured by our decree without interfering with the substantial rights of any of the parties concerned in this litigation. If the plaintiff's allegations are correct, there can be no doubt whatever that some of the defendants at least, if not all of them, have got by the butwarah a larger share than that to which they are justly entitled; and there is nothing whatever in the circumstances of this case to prevent the Court from doing complete justice between the parties by declaring in this very suit that the plaintiff is entitled to the additional share in question out of the putees assigned to those defendants by the butwarah.

* *Ante*, p. 291.

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Lastly, it has been urged that there is no satisfactory proof that the plaintiff is still in possession of the additional share in question, and as the suit is one for declaration of title and confirmation of possession the Court is bound to dismiss it in the absence of such proof. This objection is founded upon a mistake. The plaintiff has given ample evidence to prove his possession. That evidence is strongly corroborated by the testimony of several witnesses examined by the defendants themselves. But be this as it may, it is clear that this was not one of the issues raised by the defendants in the Court of first instance, and they are not entitled to raise it now at this late stage of the cause. If the plaintiff can show that he has a title to the additional share in question and that that title is not barred by lapse of time, he should not be denied the declaration he has sued for merely because he might have been ousted by the defendants under the colour of the butwarah proceedings.

We, therefore, remand this case to the Lower Appellate Court for a decision upon the merits with reference to the issues laid down by the first Court, and with reference to those issues only.

The 2nd May 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Application for execution — Limitation—Section 7 Act XXIII of 1861.

In the matter of

Taruck Chunder Chuckerbutty (Decree-holder) *Petitioner,*

versus

Huro Chunder Chuckerbutty (Judgment-debtor) *Opposite Party.*

Baboo Bhowanee Churn Dutt for Petitioner.

No one for Opposite Party.

A decree-holder having allowed the term of 3 years to run to within a very few days of expiry before applying for execution, and then, though allowed 5 days to pay tullubanah, having neglected to do so, his application was found to be not *bonâ fide:*

HELD that Section 7 Act XXIII of 1861 did not apply to the case, that Section applying only to suits dismissed under the provisions of Section 5 of that Act.

Kemp, J.—THIS application for the admission of a miscellaneous special appeal must be rejected. It appears that on the 26th March 1870 the applicant was told to deposit tullubanah within 5 days. He failed to do so, and on the 7th of April 1870 the execution case was struck off. On the 17th April 1870 the applicant applied to have the case restored. It appears that the first Court allowed the case to be restored, but the Judge of Hooghly reversed that decision. The grounds given by the Judge we consider to be grounds with which we cannot interfere in special appeal. The Judge finds that the application of the 26th of March 1870, which, we may observe, was made when only a very few days remained of the 3 years allowed by law, was not a *bonâ fide* application.

It is also clear that on the 17th of April 1870, when the applicant asked for the restoration of the case, he was barred by limitation. It has been attempted in argument to show that Section 7 Act XXIII of 1861 applies to the present case. On turning to that Section, we find that it applies only to suits dismissed under the provisions of Section 5 of that Act, that is to say, if it be found that the defendant has not been served with summons to appear on the day fixed for him to appear, and in consequence of the failure of the plaintiff to deposit within the time allowed him the sum necessary to defray the cost of service of the summons, the Court may order the suit to be dismissed. It is in such a case that Section 7 will apply, and under that Section the plaintiff is at liberty to satisfy the Court that there was a sufficient excuse for his not making the deposit.

Now, that Section clearly does not apply to this case. In this case, we have an applicant allowing his time for execution to run to within a very few days of 3 years before he makes any application at all. Then the application made is found not to be *bonâ fide*. Five days are allowed the petitioner to pay the tullubanah, and with the knowledge that his first application was made within a very short time of the expiry of the term of three years, he still neglects to pay tullubanah. We think that the Judge has held rightly that the application was barred, and we reject this application.

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The 3rd May 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge.*

Dependant talookdars — Regulation VIII of 1793.

Case No. 2139 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Jessore, dated the 14th July 1870, *affirming a decision of the Deputy Collector of Baghat, dated the 30th November* 1869.

Rajah Suttyanund Ghossal (Plaintiff) *Appellant,*

versus

Huro Kishore Dutt and others (Defendants) *Respondents.*

Baboo Hem Chunder Banerjee for Appellant.

Baboo Kalee Mohun Doss for Respondents.

The "dependant talookdars" mentioned in Regulation VIII of 1793 are actual proprietors, not merely talookdars whose talooks are held under documents granted by proprietors which do not transfer property in the soil.

Norman, C. J.—This is a suit to recover arrears of rent at an enhanced rate after service of notice under Section 13 Act X of 1859.

The suit has been dismissed by the Lower Appellate Court upon the ground that the defendant's holding is a dependant talook. The Judge says—if the plaintiff considers himself entitled to enhance the rent of the defendant, he must proceed under Section 51 Regulation VIII of 1793, and not under Act X of 1859.

We are wholly unable to understand upon what ground the Judge supposes that the tenure, apparently created by the Soondurbuns Commissioner in 1257 under the name of an ousut talook while the land was in the possession of the Government as a khas mehal, can be treated as a dependant talook within the meaning of that term in Regulation VIII of 1793. The "dependant talookdars" there spoken of are talookdars being actual proprietors of the lands composing their talooks, as described in Section 5 of that Regulation. Section 51 does not include talookdars whose talooks are held under writings, sunnuds, or other documents granted by proprietors of lands which do not expressly transfer the property in the soil. These persons, as will be seen from Section 7, are treated under Regulation VIII of 1793 as lease-holders only.

The defendant is clearly an under-tenant; and if he is able to establish a right to exemption from enhancement when the case goes back for trial before the Judge, it will be on some grounds of which we know nothing at present.

With these observations, we remand the case to the Judge for trial.

The costs in the lower Courts and of this appeal will abide the ultimate result of the suit.

The 3rd May 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge.*

Lakheraj grants—Resumption—Section 10 Regulation XIX. 1793 — Landlord and tenant.

Case No. 2549 of 1870.

Special Appeal from a decision passed by the Judge of Moorshedabad, dated the 22nd September 1870. *affirming a decision of the Moonsiff of that District, dated the 29th June* 1870.

Ranee Shama Sooduree Debia (Plaintiff) *Appellant,*

versus

Seetul Khan and others (Defendants) *Respondents.*

Baboos Mohinee Mohun Roy and *Sreenath Dass* for Appellant.

Baboo Pitumbur Chatterjee for Respondents.

Where grants for holding lands exempt from payment of revenue have been made since 1st December 1790, and the person who succeeds to the proprietory right in the estate takes possession under Section 10 Regulation XIX of 1793 and dispossesses the grantee of his *proprietory right*, he is authorized and required to collect the rents from such lands at the rates of the pergunnah. A decree therefore declaring the zemindar's right to assess rent on lands held under such grants, establishes, as between him and the person in possession, the relation of landlord and tenant.

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Norman, C. J.—THIS is a suit for assessment of rent and for a kubooleut in respect of certain lands formerly held as lakheraj, and in respect of which a decree in a suit for resumption was passed in 1862 declaring them liable to be assessed to the payment of rent, and the plaintiff's right to assess such rent.

The decree in that suit is in evidence. It recites the substance of the plaint, which stated that as the defendant held the lands now in question as invalid lakheraj, the plaintiff brought his suit to resume and assess the lands as *appertaining to the talook* belonging to the plaintiff.

The lower Courts have dismissed the plaintiff's suit, holding that a decree in a resumption suit under Regulation XI of 1819 cannot create the relation of landlord and tenant between the parties, and therefore that this suit will not lie. They refer to a decision of the High Court in the case of Madhub Chunder Bhadooree, reported in the 12th Volume of the Weekly Reporter, p. 442.

From that decision there has been an appeal to this Court. In determining the question of the liability of the defendant, who continued in possession after the decree in the former suit to pay rent to the plaintiff, after notice, under Section 13 of Act X of 1859, we must see what is the nature of the right which the defendant has in the lands in question. Now, on referring to the decision in the 12th Weekly Reporter, page 442, and Regulation XIX of 1793, Sections 6 and 9, it appears very clearly that where lands, not exceeding 100 beegahs, alienated by a grant made prior to the 1st of December 1790, are resumed under Regulation XI of 1819, they become liable to payment of *revenue;* and thereupon the revenue assessable on such lands belongs to the person responsible for the discharge of the revenue of the estate. The land adjudged to be subject to the payment of revenue is to be considered as an independent talook. Section 9 shows how the revenue is to be assessed on resumed lands held under such a grant. The produce is to be ascertained by the proprietor to whom the revenue is payable, who is to submit the accounts of it to the Collector, and the Collector is to fix the revenue to be paid from the lands in perpetuity, reporting the matter for the confirmation of the Board of Revenue. If the proprietor agrees to pay the revenue required of him, he and his heirs and successors are to *hold the lands on payment of such fixed revenue in perpetuity.*

It is clear, therefore, that a decree for resumption of lakheraj lands held under an invalid grant prior to 1st December 1790 does not vest the proprietory right in the zemindar who resumes, or make the former lakherajdar liable to the payment of any *rent.* That is substantially the decision in the 12th Weekly Reporter, page 442.

But where grants for holding lands exempt from payment of revenue have been made since 1st December 1790, and the person who succeeds to the proprietory right in the estate, acting under the authority of the 10th Section of Regulation XIX of 1793, takes possession and *dispossesses* the grantee of his *proprietory right,* he is authorized and required to collect the *rents* from such lands at the rates of the Pergunnah. If, therefore, a decree in a suit declaring the right of the zemindar to assess rent on lands held under grant subsequent to 1st December 1790 is made, that decree establishes as between the person in possession of such land and the zemindar the relation of landlord and the person liable to pay rent to such landlord.

Then comes the question whether in the present suit this invalid lakheraj was lakheraj falling within the description of land held as rent-free under a grant prior to 1st December 1790, or whether it falls within the class of cases where the lakherajdar held under an invalid grant made subsequent to 1st December 1790. Now, by the decree in the resumption suit the land is adjudged as liable to be assessed to the payment of rent upon the grounds stated by the plaintiff in his plaint. Therefore, the decree on the face of it shows that it was adjudged that the land was part of the mâl estate of the zemindar.

Mr. Justice Ainslie, in a decision which has been very recently passed on the 25th April last,* has pointed out that, before the decision of Sonatun Ghose's case, reported in Volume II, Weekly Reporter, page 91, resumption suits taking the form of suits under Regulation II of 1819 were usually brought by zemindars to establish their

* *Ante*, p. 440.

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right to assess rent upon invalid lakheraj land, whether such land was held under grants prior or subsequent to 1st December 1790. He says :—" I do not think that we " can hold all such decrees to be void, or " that we are bound to hold that the existence " of a decree under Regulation II of 1819 " establishes that the grant resumed was of " earlier date than 1st December 1790. " Granting that the Courts acted under a " mistaken view of the law, we cannot as- " sume, for the purpose of making those de- " crees technically good, a state of facts " which in many cases is contradicted by " the records."

I entirely concur with Mr. Justice Ainslie in thinking that the mere fact of a reference to Regulation II of 1819, or that the procedure under Regulation II of 1819 was adopted in part, does not show that the suit was a suit for lakheraj land held under a grant prior to the 1st December 1790.

In the present case, so far as I can see, there is nothing to lead to the inference that any grant prior to 1st December 1790 was ever set up by the defendant. If there is any doubt about it, I should be willing to remand the case to the lower Court in order that an issue on that point might be tried. But I think there can be no reasonable doubt that this was not lakheraj land falling within the meaning of Sections 6 and 9 of Regulation XIX of 1793. I entertain no doubt in my own mind, as a matter of fact, that in this case the grant set up must have been subsequent to December 1790 ; and therefore the defendant had no right to hold as a dependant talookdar and to have the revenue assessed under Regulation XIX of 1793.

The suit was properly brought under Act VIII of 1869, and ought to be remanded under that Act. The appellant will get the costs of this appeal.

Loch, J.—I propose to add a few words to the judgment of the Chief Justice, as I was one of the Judges who passed the judgment reported in Volume XI, Weekly Reporter, page 442.

The special appellant has pointed out to us that the case now before the Court is not on all fours with that judgment ; and I agree with him. We held in that case that where proceedings have been taken under the provisions of Section 30, Regulation II of 1819, all such proceedings were proceedings for resumption of lands admittedly held under invalid lakheraj titles prior to December 1790 ; and that lands which are resumed under that law should be assessed as provided for by the old Regulation of 1793. But in the present case, there can be no doubt, from the form of the plaint, that the plaintiff distinctly claims the land as part of his talook and that the defendant was holding under an invalid lakheraj title, and he prayed to be allowed to assess it as part of his talook, and obtained a decree to assess it as such. It is, therefore, clear that this was not a case which came under Section 30 of Regulation II of 1819 ; but was one which could be tried by a Civil Court, or under Section 28 Act X of 1859.

I think, therefore, there is no ground for saying in this case, as the lower Courts have done, that the suit for assessment is barred by anything that has been stated in the judgment reported in Volume XII, Weekly Reporter, page 442. And I concur in the order proposed by the Chief Justice that the case should go back for trial upon the merits.

Appellant will have his costs in the appeal.

The 3rd May 1871.

Present :

The Hon'ble H. V. Bayley and G. C. Paul, *Judges.*

Section 210 Act VIII. 1859—Execution—Certificate of administration.

Case No. 41 of 1871.

Miscellaneous Appeal from an order passed by the Officiating Judge of Purneah, dated the 21st December 1870.

Dunput Sing Bahadoor (Decree-holder)

Appellant,

versus

Ranee Rajessuree (Objector) *Respondent.*

Baboos Sreenath Doss and *Rash Behares Ghose* for Appellant.

Baboo Romesh Chunder Mitter for Respondent.

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A decree-holder is at liberty, under Section 210 Act VIII of 1859, to follow his deceased judgment-debtor's property in the hands of the parties in possession, notwithstanding a certificate under Act XXVII of 1860 has been obtained by a third party.

Bayley, J.—An application was made by the decree-holder that the widow and the daughter of the late Rajah Rajendur Narain Roy be made respondents in the case in execution of the decree held by him against the said Rajah.

The Judge remarks that there was a counter-contention on the part of the widow and the daughter that the property of the Rajah was not in their hands but in those of Kishore Narain, the alleged adopted son of the Rajah, and that a certificate was granted to the aforesaid Kishore Narain. The Judge adds that he does not consider it necessary to go into that question, inasmuch as the order for the certificate has disposed of it; and he considers that the order declaring Kishore Narain to be the legal representative is "*exclusive*," and virtually decides that the applicants are not the legal representatives.

Now, although we do not agree in what has been above stated by the Judge taking it as an abstract proposition, we think that the law has been sufficiently carried out in the other substantial parts of the Judge's judgment. The Judge says:—"If the late "Rajah's property or any portion of it is in "the hands of his wife and daughter, there "is no obstacle to the adoption of immedi-"ate proceedings against that property itself, "whatever it may be." We think that under the provisions of Section 210 Act VIII of 1859, the Judge is quite right in holding that if the widow and the daughter of the Rajah are in possession of the property left by the Rajah, the decree-holder may follow that property in their hands notwithstanding a certificate had been obtained by the adopted son. The words of the Section are:—"If "any person against whom a decree has "been made shall die before execution has "been fully had thereon, application for "execution thereof may be made against "the legal representative *or the estate of* "*the person so dying as aforesaid.*"

We are pressed with the plea that the decree-holder will be prejudiced by the adoption of such course because the person who represents the property under the certificate is a man of straw, but the question is not whether the decree-holder can have substantial guarantee for the realization of his money, but whether the Judge is correct in law; and as stated above, we think that he has carried out the provisions of Section 210 in holding that the estate of the deceased may be proceeded against if in the hands of the widow and daughter.

In this view, we dismiss the appeal with costs.

Paul, J.—I concur.

The 3rd May 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Section 55 Act XX of 1866—Jurisdiction—Section 243 Act VIII of 1859.

Case No. 82 of 1871.

Miscellaneous Appeal from an order passed by the Subordinate Judge of East Burdwan, dated the 16th February 1871.

Kishen Coomaree Bibee (Judgment-debtor) *Appellant,*

versus

Golab Coomaree Bibee (Decree-holder) *Respondent.*

Baboos Hem Chunder Banerjee and *Oopendro Chunder Bose* for Appellant.

Baboos Chunder Madhub Ghose and *Ashootosh Mookerjee* for Respondent.

Where the Lower Appellate Court passed a decree on a specially registered bond, setting aside an arrangement made by the first Court as to payment by instalments and its order about interest.

Held that Section 55 of the Registration Act applied to the case, and that the High Court was competent in subsequent execution proceedings to make an order under Section 243, Code of Civil Procedure, appointing a receiver or giving opportunity to the judgment-debtor to pay off the decree by mortgage of the estate.

Kemp, J.—This is a regular miscellaneous appeal from the decision of the Subordinate Judge of East Burdwan refusing to appoint a receiver under Section 243 of Act VIII of 1859. It appears that there are several decrees outstanding against the late Rash Beharry Baboo and Soorjya Coomaree. One of these decrees, or No. 285, was a

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decree on a specially registered bond against the aforesaid Rash Beharry and Soorjya Coomaree, his daughter. The estate of the late Rash Beharry Baboo has now devolved on his minor son Bhyrub Chunder Baboo, and his mother and guardian Kishen Coomaree applies to have a receiver appointed under the aforesaid Section. With her application she puts in a schedule of the properties belonging to her minor son, and on turning to that schedule we find that the bulk of the property consists of towjee recorded estates paying large sums of revenue to Government. The gross receipts are given, the sudder jummah and the munaffa or net profits are also given in each case, and every facility was given to the decree-holder to test the accuracy of this schedule. We do not find, however, that any objection as to the existence of these properties or as to their not belonging to the minor was raised in the Court below; nor does the Subordinate Judge, in his decision refusing to appoint a manager, say that these properties do not belong to the minor or that they do not yield the profits that they are said to yield. The Subordinate Judge only says that after paying for the maintenance and education of the minor the profits that would remain will not probably satisfy the judgment-creditor for a considerable time to come, and on that ground alone he refuses the appointment of a manager.

We think that this case is one in which the Subordinate Judge ought to exercise the discretion vested in him under Section 243, either by the appointment of a receiver or by giving the minor time to raise by mortgage of the land or of a portion of the land a sufficient sum to satisfy his creditors. From the schedule filed it appears that the minor is entitled as the heir of his father to estates yielding a profit of say 15,000 rupees, and in right of inheritance from his mother to estates yielding a profit of about 5,000 rupees. The debts do not appear to exceed 2,000 rupees, and certainly under ordinary circumstances this is an estate which, if properly managed, ought to pay off this debt in a very short time.

It has been said by the pleader who appears for Golab Coomaree, the wife of Khetro Mohun Baboo, that the decree obtained by his client was a decree on a specially registered bond and that this Court in appeal passed a decree setting aside the decree of the lower Court which ordered satisfaction of the debt to be made by instalments, and setting aside also the order of the lower Court about interest; this Court having awarded 12 per cent. and having set aside the arrangement as to the payment of the debt by instalments; and therefore it is said that if we were to pass an order under Section 243 we should be interfering with that decision. We think that this is not the case, and that the provisions of Section 55 of the Registration Act distinctly apply to a case of this description and that this Court is competent to make such an order even in a case in which the decree has been passed on a specially registered bond. The order which we pass is this, that the case be sent back to the Subordinate Judge. He will enquire whether the schedule filed on behalf of the minor is a correct one, and if the profits of the estate are such as they are stated to be in the schedule, he will, after making a proper allowance for the maintenance and education of the minor, which allowance must be made with reference to the profits as also with reference to the liabilities, and if he also finds on enquiry that the estates are not encumbered in any other way with the exception of these five decrees, namely, the decreees Nos. 208, 212, 228, 225, and 285, that he will pass either an order appointing a receiver under Section 243, or, if he is satisfied that there is ground to believe that the amount of these decrees may be raised by mortgage, he will give the minor's representatives or guardians a reasonable time within which to raise the money due under these decrees by mortgage.

It appears to us that to sell up the minor's estate without giving him an opportunity of liquidating his debts from these estates, the profits of which are more than ample to liquidate those debts within a very short period, would not be just or proper. We therefore reverse the order of the Subordinate Judge and remand the case to be disposed of with reference to the above remarks.

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The 3rd May 1871.

Present:

The Hon'ble A. G. Macpherson and Onoocool Chunder Mookerjee, *Judges.*

Goozashta tenures (Bhowlee or Mukdee)—Rights of occupancy—Rent in kind.

Case No. 2343 of 1870.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 3rd August 1870, reversing a decision of the Moonsiff of Arrah, dated the 31st December 1868.

Jutto Moar (Plaintiff) *Appellant,*

versus

Mussamut Basmuttee Kooer and others (Defendants) *Respondents.*

Baboo Kalee Kishen Sein for Appellant.

Moonshee Mahomed Yusoof for Respondents.

A bhowlee tenure may be a goozashta tenure; and a ryot who pays rent in kind and is in possession of, or cultivates, land for a period of 12 years, has a right of occupancy in the land so held or cultivated by him, so long as he pays the rent in kind for the same.

Mookerjee, J.—This case was once before the Court. It was remanded by Bayley and Kemp J. J. on the 5th April 1870 to the Judge of Shahabad, who was asked to take the case out of the file of the Subordinate Judge, Mr. DaCosta, who decided the appeal.

The Judge has now dismissed the suit and reversed the decision of the Moonsiff who had decreed the claim of the plaintiff.

The suit was instituted by plaintiff for possession of 4 beegahs of land out of 32 beegahs purchased by plaintiff's father as the goozashta tenure of one Tribhoobun Singh, sold in execution of a decree for rent obtained by the Collector against the said Tribhoobun Singh. It is alleged that plaintiff's father having purchased this jote of Tribhoobun on the 1st October 1860, held possession of the disputed 4 beegahs for several years until dispossessed by defendant No. 1 in 1278.

The main contention of the defendant was that the tenure is not a goozashta tenure, that it was a portion of a tenure held on a temporary lease, and that the tenure was abandoned on account of the poverty of the former tenant.

The Court of first instance gave a decree to the plaintiff. The Judge has now set aside this decree and dismissed the entire suit with costs.

It is contended in special appeal that the Judge is wrong in holding that a bhowlee tenure cannot be a goozashta tenure; secondly, that supposing goozashta means a tenure the rent of which is fixed, yet a bhowlee tenure may be a goozashta one;—thirdly, that a goozashta tenure is simply an ancient tenure the holder of which has a right of occupancy; and lastly, that according to the finding of the Judge which declares a right of occupancy, plaintiff is entitled to a decree.

On referring to the plaint and the contention of the plaintiff in the Courts below, we find that though the plaintiff uses the term goozashta, he seeks for an adjudication and declaration of no other right than a right of occupancy as a goozashta or old tenant. The first Court says that "the "witnesses examined by plaintiff as well as "those examined by defendant have proved "the cultivation and goozashta holding of "Tribhoobun Singh, and that the principal "defendant has adduced no oral or documentary evidence in proof of the temporary "and three years settlement with Tribhoobun Singh."

The learned Judge does not seem to differ with the Moonsiff as to his finding of the long and ancient possession of Tribhoobun. He says that the "defendant's witnesses "depose that the land in suit was Tribhoobun's jote and was held by his father, and "grand-father before him, that it is now two "years held partly by the defendant and "partly by others of the maliks. There is "no admission of goozashta right, though "there is an implication of a right of occupancy by the family of Tribhoobun." He likewise states "that plaintiff's oral "proof is that of three witnesses. They "all say the land purchased was Tribhoo-

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" bun's goczashta, and that it was a bhowlee " tenure. If a bhowlee tenure, how was " it goozashta,—a tenure which is a hold- " ing in perpetuity at a fixed rent ?

" It is argued for plaintiff that plaintiff's " meaning is a simple right of occupancy " at a fair rate, but such is not his plaint in " which he claims under goozashta right."

The Judge also concurs with the Moonsiff in his finding that the "defendants " have wholly failed to prove that a tempo- " rary settlement was made with the defen- " dant."

I think the Judge is wrong in his interpretation of the plaint. What the plaintiff asks is simply a declaration of a right of occupancy, and he calls that right a goozashta right, which ordinarily implies nothing more or less than a right of an old tenant whose tenancy could not be determined at the will or caprice of the zemindar.

I cannot understand what ground the Judge had to hold that a bhowlee tenure cannot be a goozashta tenure, or that a goozashta tenure must be a tenure at a fixed rent. If this finding had been based on any evidence in the case as to the meaning of the term goozashta in that part of the country, I would not have been inclined to hold that the Judge is wrong in his definition of that word. But it is admitted by the pleaders for the respondent that there is no such evidence adduced by either party, and that there is none to be found in the record.

Under these circumstances, I am of opinion that the Judge is wrong, and that a Goozashta tenure may or may not be a tenure at a fixed rent. The plaint does not state that the tenure, the possession of which the plaintiff claims in this case, is a tenure which has a rent fixed on it which cannot be altered, and the contention of the pleaders for the appellant both before the lower Courts and here is that they have no such right, but that point is not now before us.

I am also clearly of opinion that a bhowlee tenure can be a goozashta tenure. A ryot who has paid rent in kind but who had held or cultivated land for a period of 12 years, has a right of occupancy in the land so held or cultivated by him so long as he pays the rent (though it be in kind) for the same. I do not think that it makes the slightest difference in the right of occupancy of a ryot whether he paid rent in money or in kind.

The rent in money is a rent fixed on a certain proportion of the value of the actual produce of the land. But in cases where the zemindars could not come to any clear understanding as to the money value of the produce, they allow the rent to be paid by a division of the produce itself. In both cases the man who pays the rent is a ryot, and if he is allowed to hold and cultivate the land for twelve years he acquires a right of occupancy. Tribhoobun, therefore, according to the finding of the Judge, was a ryot who had acquired a right of occupancy. The plaintiff, therefore, would, on account of long and ancient possession be entitled to succeed in this case.

I am also not prepared to hold that a ryot who has since the permanent settlement paid a certain fixed proportion of the produce of the land to the zemindar, cannot say that his tenure is a "holding in perpetuity at a fixed rent." It is, however, contended here for the first time by the respondent that even if Tribhoobun had a jote with rights of occupancy, that the transfer of it to plaintiff's father was invalid inasmuch as it has not been proved that the jote was a transferable one. This objection was never raised in any of the Courts below, and consequently the plaintiff had no opportunity of adducing evidence to show that the jote in question is a transferable jote. It is not fair to raise the plea for the first time in a Court of law, especially as that plea cannot be disposed of by this Court without a remand and without giving a full opportunity to the plaintiff to prove that either by the custom of the country, the nature of the tenure, or by the consent of the then zemindar the transfer was valid. *Primâ facie*, we observe that the Collector had put up the tenure of Tribhoobun to sale and he could not have sold it if it was not transferable. I do not think that it would be proper for us to entertain this plea at this stage of the case, especially when the appeal was once before a Division Bench and the defendant did not ask that Bench to direct the lower Court to try this objection. It appears to me that this plea is purely an after-thought advanced now in the hope of getting a remand of the case. Both the Courts having decided that the pleas raised by the defendant and the allegations contained in his written statement are wholly unfounded and supported by no evidence

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whatever, the defendant raises the objection after the case has passed through no less than four Courts. As both the Courts are of opinion that the evidence of witnesses produced by plaintiff as well as by defendant prove that the jote is an old jote held by Tribhoobun and his ancestors, and the witnesses for the plaintiff call it a goozashta tenure, and as it is admitted by the pleader for the plaintiff that in this case he only asks for a declaration of his right of occupancy, I think the Judge was bound to give the plaintiff a decree.

These tenures are mostly found at Shahabad, where they are frequently held on payment of rent in kind (bhowlee). They are hereditary and transferable. The Judge appears to me to be entirely wrong when he lays it down that a "bhowlee tenure cannot be a goozashta tenure." I would reverse the order of the Judge and decree the appeal with all costs.

Macpherson, J.—I also am of opinion that the decree of the Lower Appellate Court should be reversed, and the decree of the Moonsiff restored and affirmed, and that the appellant should have his costs in all the Courts.

The Judge is clearly wrong in thinking that the tenure because bhowlee cannot be goozashta. As I understand it, goozashta tenures in Shahabad are as frequently bhowlee as nukdee. They are usually held at a fixed proportion of its crops, and are hereditary and transferable. They may be said to be holdings with right of occupancy at a fixed rate, although the fixity of the rate may in some cases be broken through practically by occasional conversion from bhowlee to nukdee and from nukdee to bhowlee or the like.

The 3rd May 1871.

Present:

The Hon'ble E. Jackson and W. Ainslie, *Judges.*

Auction-purchaser at a revenue sale—Putnee—Right of action—Under-tenures—Rights of under-tenants—Acquiescence.

Case No. 2467 of 1870.

Special Appeal from a decision passed by the Additional Subordinate Judge of Chittagong, dated the 29th June 1870, reversing a decision of the Moonsiff of Sathanea, dated the 10th December 1869.

Sreemunt Ram Dey (Plaintiff) *Appellant,*

versus

Kookoor Chand (Defendant) *Respondent.*

Baboo Aukhil Chunder Sein for Appellant.

Baboo Sreenath Banerjee for Respondent.

When an auction-purchaser at a sale for arrears of revenue creates a putnee, he cannot sue to annul an under-tenure within that putnee, as his whole power under Act XI of 1859 passes to the putneedar who alone can institute such a suit.

In such a case the putneedar's competency to sue is not affected by the fact of his being a tenant of only a portion of the estate, provided that portion contains the tenure which is sought to be resumed.

A putneedar under such circumstances, though he may recover rent, is not entitled to eject an under-tenant who had been allowed to dig a tank and remain in possession undisturbed by the former proprietor for a long period (say upwards of 30 years), and who must therefore be assumed to have held with the acquiescence of the former proprietor—such acquiescence being equivalent to a lease.

Ainslie, J.—THE dispute in this case is a certain tank measuring 2 kanees and 19 gundahs. The plaintiff claimed it as belonging to Turruf Radhasham purchased at a revenue sale by his zemindar, who gave him a putnee lease of a portion of the zemindaree on the 30th Assar 1230, M. S. The defendant contended that this tank was not in that turruf at all, but in turruf Joy Narain, and that it was dug by his ancestor Joy Narain.

The Moonsiff found that this tank was situated within the plaintiff's lessor's estate. The Subordinate Judge seems to have accepted that finding. He says—"it may be true that the pond is situated within the aforesaid turruf." But he goes on to show that it is not included within the putnee lease given to the plaintiff. In this it appears that the Subordinate Judge was wrong. On reading the lease, we find that the zemindar gave a putnee lease of 6 kanees 12 gundahs and 1 cowrie. Of this, 2 kanees 19 gundahs were stated to be waste, and the remainder, 3 kanees 13 gundahs 1 cowrie, was assessed at 5½ rupees per kanee; and there was a further stipulation that if the waste land should become fit for cultivation, rent at the same rate should be paid for that.

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There appears to be no dispute that the tank in dispute does represent 2 kanees 19 gundahs stated to be waste in the lease. Now it is quite clear that although no rent was fixed at the time the lease was executed, still the land was given to the present plaintiff under the lease, so that if at any time it should become of value he should enjoy the profits from it, paying rent as fixed in the lease.

It has been objected on the other side that the claim is barred by limitation; that the plaintiff is not an auction purchaser and that he has not the special authority given by Section 37 Act XI of 1859 to an auction purchaser, and therefore he is not entitled to maintain this suit; further, that if a putneedar of a whole estate can maintain the suit the putneedar of a portion cannot do so; and lastly, that under Clause 4, Section 37, Act XI of 1859, an auction purchaser has no power of ejecting a tenant from land on which a tank has been dug.

We think there is no doubt whatever that an auction-purchaser can sue within twelve years of the date of his purchase to recover any land that was originally included within the estate sold for arrears of revenue. When he created a putnee in favour of the present plaintiff, it is quite clear that he could not sue to annul an under-tenure within that putnee, and that no one but the putneedar could do so; and we see no reason to think that the whole power of the auction purchaser under Act XI of 1859 did not pass to the putneedar. As to the putneedar being only a tenant of a portion of the estate, that is perfectly immaterial: he is a tenant of that portion of the estate which contains the tenure which is sought to be resumed. But we think that the plaintiff is not entitled to take actual possession of the land in suit; that inasmuch as Joy Narain was allowed to dig this tank and to remain in possession undisturbed by the former proprietor for upwards of 30 years, if he is to be taken a tenant at all it must be assumed that he was holding with the acquiescence of the previous proprietor, and this acquiescence must be treated as equivalent to a lease. We, therefore, declare that the plaintiff is entitled to recover rent in respect of the tank, and not to eject the defendant.

Each party will bear his own costs of this appeal.

The 4th May 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble Onoocool Chunder Mookerjee, *Judge*.

Hindoo Law—Sapindas—Inheritance.

Case No. 5 of 1871.

Special Appeal from a decision passed by the Additional Judge of Nuddea, dated the 22nd September 1870, *affirming a decision of the Moonsiff of that District, dated the 31st January* 1870.

Khettur Gopal Chatterjee (Plaintiff) *Appellant*,

versus

Poorno Chunder Chatterjee and another (Defendants) *Respondents*.

Baboo Bipro Doss Mookerjee for Appellant.

Baboo Grish Chunder Mookerjee for Respondents.

Amongst sapindas, the nearest sapinda excludes those more remote.

Norman, C. J.—The plaintiff's claim is this. One Bissessur Roy died leaving a widow, a mother, and four nephews, three being the children of one sister and one of another. On the death of Bissessur, his widow Brohmo Moyee succeeded to the property. On the death of Brohmo Moyee, the mother Mussamut Bhugobutty succeeded to the property. On the death of Bhugobutty, Dino Nath and Huree Nath, two of the sister's sons being then dead, Leela Nath and Poorno Chunder as heirs according to Hindoo Law obtained possession. The plaintiff's claim is that he being the grandson of a sister of Bissessur had a right to succeed as a co-heir with the two surviving sister's sons. My learned colleague Mr. Justice Mookerjee has stated that which I have always understood to be the rule in such cases in a clear and concise form by saying that, amongst sapindas the nearest sapinda excludes those more remote. That being so, it is clear that the plaintiff had no title.

The appeal is dismissed with costs.

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The 4th May 1871.

Present:

The Hon'ble E. Jackson and W. Ainslie, *Judges.*

Lakheraj—Resumption—Decree—Assessment—Procedure—Reg. XIX of 1793—Section 30 Reg. II. 1819.

Case No. 2415 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Officiating Judge of Mymensingh, dated the 25th August 1870, *reversing a decision of the Deputy Collector of Kishoregunge, dated the* 31*st March* 1870.

W. G. N. Pogose and another (Plaintiffs) *Appellants,*

versus

Syud Ekram Hossein (Defendant) *Respondent.*

Mr. C. Gregory and *Baboo Kalee Mohun Doss* for Appellants.

Mr. H. E. Mendies and *Baboo Gopal Lall Mitter* for Respondent.

Unless the holder of a resumption-decree takes steps under Regulation XIX of 1793 to have the revenue fixed by the Collector, and the defendant consents to pay the revenue required of him, he has no *locus standi*, on holding the lands, to bring suits for rent.

The rule to be followed in determining in what manner and under what Regulation the assessment of resumed lakheraj land should be conducted is first to ascertain whether the existence of the lakhiraj prior to 1790 has been decided by the decree for resumption. It cannot be presumed that every case instituted under Section 30, Regulation II of 1819, dealt with an estate which was held lakheraj prior to 1790.

Jackson, J.—This was a suit under Act X of 1859 to assess rent on lands in the possession of the defendants. The plaintiff had previously brought a suit to resume the land which the defendant had been holding as rent-free, and had obtained a decree, and now sought to assess that land with rent. The Judge of Mymensingh has dismissed the plaintiff's suit, because the plaintiff has taken no further steps under the provisions of Section 9 Regulation XIX of 1793 to have the revenue fixed by the Collector. Until he proceeds under that Regulation, and the defendant consents to pay the revenue required of him, the plaintiff has no *locus standi* as holding the lands in question to bring suits for rent. The decision of the High Court, Weekly Reporter, Volume XII, page 426, appears to be exactly in point.

It is stated on special appeal that the suit for assessment was properly brought in the Collector's Court, inasmuch as the invalidity of the lakheraj title had been proved in the Civil Court and there was no evidence to prove that the lakheraj in question had arisen out of a grant previous to 1790.

It appears that in the Court of the Deputy Collector, before whom this case was originally tried, no objection was raised to the mode in which it was sought to assess the defendant's land; but the objection was raised for the first time before the Judge. It was a question as to jurisdiction, and was therefore properly considered by the Judge.

As I understand the law, there are two modes of assessment in the case of resumed lakheraj estates. The first is that which has been laid down for estates held lakheraj prior to the year 1790, which is to be found in Section 9 Regulation XIX of 1793. On such estates the revenue had not been assessed, and the Collector was accordingly enjoined to fix the revenue at which the lakherajdar should hold his estate. It seems to be immaterial whether such lakheraj estate was held under a known grant or not. Any resumed lakheraj estate which was a lakheraj estate prior to 1790 would come within the provisions of Section 9 Regulation XIX of 1793. The 10th Section of that Regulation deals with all lands held lakheraj under a grant subsequent to 1790, and it has been always considered that it presumably includes the case of all lands which are claimed as lakheraj but which are ascertained not to have been held as lakheraj prior to 1790. Upon these it was considered that the revenue had been assessed, and the zemindar was accordingly directed of his own accord to resume them and assess them with rents—a law which was subseqently modified by Section 28 Act X of 1859 which directed the zemindar not to resume of his own accord, but to apply to the Collector's Court for authority to resume and for the fixing of the assessment.

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The contention which was raised before the Judge by the defendant here was that the present case came within the former of the two above descriptions of lakheraj estates, whereas it was alleged for the plaintiff that it came within the the latter. No issue had been fixed upon the point. Consequently no evidence had been adduced to it. The resumption decree had been put in, but not the judgment, and the resumption record had not been sent for. The Judge decided the case upon the decree, following, as I understand him to have done, the reasoning of Mr. Justice Dwarkanath Mitter in the case in the 12th Volume, Weekly Reporter. It is, however, quite impossible to state whether the two cases are analogous. We do not know what was stated in the decree which was before Mr. Justice Mitter, and it is quite possible that from the facts which were before that learned Judge, he and his colleague were satisfied that the lakheraj estate they were dealing with was one which existed prior to 1790, notwithstanding some allusions contradicting the fact in the decree. It does not at all follow that such a construction must be put upon the decree in this case. I do not concur with Mr. Justice Mitter that it must be presumed that every case instituted under Section 30, Regulation II of 1819, dealt with an estate which was held lakheraj prior to 1790. As a fact I have no doubt whatever that resumption suits were brought under Section 30, Regulation II of 1819, with respect to estates held lakheraj both subsequent to 1790 and prior to that date. This was the course followed because in numerous cases the zemindars were not aware of the title which would be set up in support of the lakheraj; and though in cases where the zemindar knew that the estates had been held lakheraj subsequent to 1790 he had the power to resume and assess himself, still he also knew that his right would be contested and he preferred the more regular mode of establishing his rights in the Courts of law. It is true, it may not have been necessary in such cases to resort to Section 30, Regulation II of 1819, but as a matter of fact this was the procedure followed, and it was a procedure allowed even up to the Sudder Court. The zemindar cannot, therefore, I hold, by instituting his suit under Section 30, Regulation II of 1819, be held to have admitted that the lakheraj was in existence prior to 1790; nor could any such inference be drawn merely from the procedure being that laid down in that Regulation.

The rule which I think should be followed in determining in what manner and under what Regulation the assessment of resumed lakheraj estates should be conducted is first to ascertain whether the existence of the lakheraj prior to 1790 has been decided by the decree for resumption between the parties or not. If it has been so decided, there is an end of the question. The assessment must be conducted under Section 9, Regulation XIX of 1793. If the question has not been decided by the resumption decree, it is still an open question and must be decided before the assessment is commenced. In the case now before us the decree does not decide the question, and there is no evidence even to show that the suit was instituted under Section 30, Regulation II of 1819. Even if it was, I would hold that that fact was no conclusive evidence upon the issue. I would, then, remand this case to the Judge and direct him to lay down an issue on the point whether the lakheraj which it is sought to assess under Act X of 1859 was one within the provisions of Section 28 of that Act. I understand that this is a suit to assess under that Act. It is for the plaintiff to make out that the Court to which he applies has jurisdiction to entertain his suit. He may prove it by the judgment passed in the resumption suit, or if that is silent on the point, as I understand it is in this case from an unofficial copy of the judgment which has been read to us, the plaintiff must prove it by some other evidence.

Each party will pay his own costs of this appeal.

Ainslie, J.—I agree with Mr. Justice Jackson in holding that it cannot be presumed that every case instituted under Section 30, Regulation II of 1819 dealt with estates held as lakheraj prior to 1790. The contrary is notoriously the fact, as was distinctly stated in Khelat Chunder Ghose's case, II Weekly Reporter, page 259.

I also agree in thinking that the rule which should be followed in determining in what manner and under what Regulation the assessment of resumed lakheraj land should be conducted, is, first to ascertion whether the existence of the lakheraj prior to 1790 has been decided by the decree for resumption between the parties or not.

It was admitted by the pleader for the appellant that the resumption decree in this

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case was made under Section 30, Regulation II of 1819, though it is not so stated on the face of the decree and the decree does not show the nature of the tenure. Under these circumstances, it seems to me necessary to look at the judgment, and perhaps at the proceedings, to find out what the tenure was which was resumed. These papers are not with the record, and consequently we cannot dispose of the case at present, and a remand is necessary.

The 4th May 1871.

Present:

The Hon'ble F. A. Glover and Onoocool Chunder Mookerjee, *Judges.*

Sale of right of appeal—Status of purchaser.

Case No. 2438 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Tirhoot, dated the 28th May 1870, *reversing a decision of the Moonsiff of Mozuffurpore, dated the 24th January* 1870.

Gujadhur Pershad (Defendant) *Appellant,*

versus

Gunesh Tewaree and another (Plaintiffs) *Respondents.*

Baboo Gopal Lall Mitter for Appellant.

Baboo Chunder Madhub Ghose for Respondents.

The purchaser of a right of appeal is not competent to bring an appeal in his own name, and only obtains a status by making the party who had originally the right of appeal a party to the appeal.

Quære.—Can a right of making a special appeal be sold in execution?

Glover, J.—A PRELIMINARY objection is taken to the hearing of this special appeal, and I think it must be allowed.

The plaintiff, it appears, sued Shamrun Lall and others for khas possession of land. The defendants admitted plaintiff's right to get rent, but denied his right to manual possession. The plaintiff lost his case in the first Court, but gained it on appeal to the Subordinate Judge on the 28th of May 1870.

On the 30th of the month, the rights and interests of the defendants in the decree were sold at an execution sale and bought by Gujadhur Pershad who at once preferred this special appeal.

I am of opinion that he cannot maintain it. I am very doubtful, in the first place, whether a right of making a special appeal is a thing that can be sold in execution; but if it be, the purchaser could not bring the appeal alone. He ought at the least to have joined the original appellant's name to his own and have applied to the Court to have them so joined. There is no Section in the Civil Procedure Code that provides for the purchaser of a right of appeal bringing that appeal is his own name. He seems, on the contrary, only to obtain a status by joining himself on to the party in the suit who had originally the right of appealing, and the Court would decide under Section 73 of the Code whether such junction could properly take place. There ought to be some power of putting a stop to merely speculative litigation.

The case of Judooputty Chatterjee *versus* Chunder Kant Bhuttacharjee, IX Weekly Reporter, 309, though not exactly in point with the present case, is analogous, and seems to lay down the proper course of procedure.

I think that this special appeal should be rejected on the preliminary point taken by the special respondent's pleader, and with costs.

Mookerjee, J.—I am of the same opinion. The appellant is a purchaser of the rights of the defendant in an execution sale held after the decision of the Lower Appellate Court. I do not find any provision in Act VIII of 1859 authorizing or empowering a purchaser to prefer an appeal against a decision passed in the presence of plaintiff and defendant without joining the defendant as co-appellant or respondent in the appeal. The appellant does not appear in the record as a party to the suit. I do not think that he has any right to prefer this appeal without joining the defendant as a party.

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The 5th May 1871.

Present:

The Hon'ble G. Loch and Onoocool Chunder Mookerjee, *Judges.*

Judgment-creditor's lien—Execution.

In the matter of

Huree Mohun Paramanick, *Petitioner.*

Mr. J. S. Rochfort for Petitioner.

A mortgagee taking out a money decree is not bound to bring one suit for the whole of the property belonging to his judgment-debtor, if it has passed to different parties under separate title-deeds; but may follow the property upon which he has a lien into the hands first of one purchaser and then of another.

Loch, J.—We think that there are no grounds for admitting the special appeal.

It has been urged before us that the suit has been brought under the provisions of Section 7 Act VIII of 1859.

It appears that the plaintiff in this case has recovered a money decree against Doorga Pershad Chatterjee, who had mortgaged certain property to him. After obtaining this money decree, he appears to have found out that this property under mortgage was in the hands of the another person named Bipin Behary; and in 1864 he proceeded against that other person in order to enforce his lien upon the lands which that person had purchased, and obtained a decree against him, and in execution sold the property. He then brought a suit and got a decree against the present defendant, the petitioner before us, who is also purchaser of some of the lands mortgaged to the plaintiff; and it is here now pleaded that the plaintiff was bound, when he brought the former suit against Bipin Behary, to have included the whole of the property as it stood when it was mortgaged to him by Doorga Pershad Chatterjee.

We think that though such a suit might have been heard, and not been dismissed for multifariousness, yet the plaintiff, in the course he took in following the property belonging to his debtor upon which he had a lien into the hands first of one purchaser and then of another, acted in perfect conformity with law. He was not bound to bring one suit for the whole of that property which was held by different parties under separate title deeds. He had a right first to bring one property to sale, and if the proceeds of sale were sufficient to meet his debt further proceedings against the debtor's property in the hands of other parties would be unnecessary; but if the proceeds of that sale were not sufficient to liquidate his debt, he had a right to go against the rest of the mortgaged property in the hands of other purchasers from the vendor.

We think, therefore, that this objection raised before us against the judgment of the Lower Appellate is not good.

The second plea raised is as to the point of limitation; and here the petitioner fails to make good his case. He argues that the plaintiff is not entitled to a period of twelve years for preferring his suit, but only to six years.

As this, however, is a suit for enforcing an interest in land, we do not see why twelve years limitation should not apply, and we think that the petitioner's counsel is wrong in pleading that the plaintiff's cause of action should commence from the date of the plaintiff's obtaining his decree. The cause of action in this case should be reckoned from the date on which he met with opposition on the part of the person in possession and his bringing the property to sale for the liquidation of the remainder of his debt.

We think it unnecessary to refer to the question of fraud, to which the pleader for the petitioner has referred, as the Lower Appellate Court has stated that that plea was given up.

We reject the application.

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The 5th May 1870.

Present:

The Hon'ble G. Loch and Onoocool Chunder Mookerjee, *Judges.*

Registration—Section 84 Act XX of 1866—Evidence—Right of suit—Declaratory decree—Cause of action.

Case No. 30 of 1871.

Special Appeal from a decision passed by the Judge of Moorshedabad, dated the 21st December 1870, *affirming a decision of the Subordinate Judge of that District, dated the 3rd October* 1870.

Prosunno Coomar Sandyal (Plaintiff) *Appellant,*

versus

Mothoora Nath Banerjee (Defendant) *Respondent.*

Baboos Mohendro Nath Shome and *Taruck Nath Sein* for Appellant.

Baboos Rash Beharee Ghose and *Aubinash Chunder Banerjee* for Respondent.

In a case in which, on an application made under Section 84 Act XX of 1866, the party alleged to have executed the document presented for registration, did not deny execution but said that he had been compelled to execute it, and the Judge, not thinking the objection sufficient, directed that the deed should be registered, HELD that it was not necessary for the Judge to take evidence before directing registration.

The mere registration of a document does not prevent a party from bringing a suit to contest the fact of its execution.

The registration of an istemraree pottah limiting a landlord's rent, the execution of which he denied, was held to raise a cloud on his title sufficient to warrant a suit for its removal.

Loch, J.—In this case, the plaintiff sued to have an istemraree pottah put forward by the defendant declared a forgery; and he states that the never executed the deed.

The first Court which tried the case held that the document was proved to be genuine and dismissed the suit.

An appeal was preferred to the Judge who held that as the document had been duly registered under the provisions of Act XX of 1866, it was not open to a Civil Court to entertain a suit to question the fact of the execution of the deed.

A special appeal has been preferred; and the first ground taken before us was that as no evidence had been taken when the Judge directed the document to be registered under the provisions of Section 84, Act XX of 1866, the Court could enquire into the fact of execution; and it was urged that the Judge was wrong in considering that he could not take evidence under the provisions of that Section.

We think that this contention is of no consequence in the present case. It is very true that, under the provisions of Section 84 of Act XX of 1866, the Judge, as held by the High Court in the case of Sunkur Dobey*, was competent to take evidence where the execution of the deed was denied. But it is not necessary in all cases for a Judge to take evidence if he be satisfied, either from examination of the parties or from anything else that is before him, that the document was really executed.

Now, when this application under the provisions of Section 84 Act XX of 1866 came before the Judge, he found that though the plaintiff objected to the registration he did not deny that he had executed the document. He said that he had been compelled to execute it, but the Judge thinking this objection insufficient directed that the deed should be registered. Such being the case, we think it was not necessary for the Judge to take evidence before directing the registration of the deed.

Then it is urged that the Judge was wrong in considering that he had no authority to enquire into the execution of the deed. We think that this contention is good. A case has been cited to us, reported at pages 329-330 of Volume X, Weekly Reporter, as if what is said there laid down that the execution of a deed once registered under the provisions of Section 84 of Act XX of 1866 could not be enquired into by a Civil Court; when all that that judgment says is that as the deed of sale in that case had been registered after enquiry had been made by a competent Court under the provisions of Section 84 of Act XX of 1866, and as the deed had been ordered to be registered, the plaintiff had no ground for asking to have that kabalah declared fictitious and void, until by some wrongful act by which the plaintiff was injured he found it necessary to come into Court and ask for relief. And therefore in that case the Court declin-

* 12 W. R., pp. 385, 500.

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ed to give him a declaration with regard to the deed, holding that he had not up to that time been injured. But it is clear from the judgment in Sunkur Dobey's case that the order for registration does not determine the rights of the parties. The Chief Justice in that case says*—"But the object being that "the Judge should merely decide whether "the document should be put on the regis- "try or not, and not to determine the rights "of the parties, the Section directs that "the Court may, if it thinks proper, order "the Registrar or Registrar General to re- "gister the document." "The mere re- "gistration of a document does not affect "the title of the parties. It is still only a "document which has been registered; and "if the party wishes to enforce the docu- "ment by suit, the mere fact of registration "does not preclude the Civil Court from "trying whether the document was execu- "ted or not."

In the view taken by the Chief Justice, I quite concur; and it appears to me that there can be no doubt that the mere registration of a document does not prevent a party from bringing a case to contest the fact of its execution.

But it is said in this case that no cause of action has arisen; and that, under the judgment just quoted from page 330, Volume X, Weekly Reporter, the suit should be thrown out, because there is no cause of action to the plaintiff as he has suffered no injury.

Now, no doubt a cloud has been thrown upon the plaintiff's title. He says that these lands are held by the defendants; that they are merely ordinary tenants; that he obtained a decree for the rent of those lands at 66 rupees per annum, but that the defendants have now put forward and obtained an order for registration of an istemraree pottah which limits the rent to 33 rupees. I think this certainly injuriously affects the rights of the plaintiff.

I am of opinion, therefore, that the plaintiff is entitled to ask that the cloud thrown on his title to the property may be removed; and that the Lower Appellate Appellate Court should not have rejected his application on the ground that under the provisions of Section 84 of Act XX of 1866 it could not enquire into the fact of the execution of the deed, and I am not aware of any single judgment of this Court in which it has been ruled that in cases of this kind it is not open to a Civil Court to determine any question to the execution even of a registered deed.

I think the case should go back to the Lower Appellate Court, and the Judge should decide whether the document propounded by the defendant is a genuine document or not.

The costs will follow the result.

Mookerjee, J.—This was an action brought by the plaintiff in the Court of the Subordinate Judge of Moorshedabad to have a certain mokurruree istemrarree pottah alleged to have been granted by him to the defendant, bearing date the 9th Srabun 1275, declared an invalid document on the ground that he has never executed the same. The defence was that the plaintiff had executed the pottah; that he received a bonus of 25 rupees from defendant, and that he admitted the execution before the District Judge, where he, however, falsely alleged that the pottah had been extorted from him by duress. It appears that the defendant presented this pottah to the Sub-Registrar for registry. The Sub-Registrar, however, refused to register it, whereupon the defendant moved the District Judge under Section 84 of Act XX of 1866 who ordered the document to be registered.

Plaintiff has now instituted this suit for a declaration to the effect that the pottah is a forgery inasmuch as he has never executed it.

The first Court dismissed the suit of the plaintiff, being of opinion that the pottah had been really and actually executed by the plaintiff in defendant's favor and that it has not been extorted from plaintiff by duress or any sort of pressure or force. Dissatisfied with this decision, the plaintiff appealed to the Judge who dismissed the appeal on the pround "that neither the lower Court nor this Court can enter into the question of the fact of the execution of the instrument which plaintiff, appellant, now seeks to invalidate." He cites two decisions of this Court in support of his view. He states further on that "these rulings "appear to me to be conclusive. Appellant "urges that as no evidence was recorded by "this Court in the case under Section 84 "of the Registration Act, the order passed "under that Section cannot bar the present

* 12 W R. p. 503.

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suit." The Judge admits that no evidence was recorded by him in that case, but he is still of opinion that from the mere fact of the deed having been registered a Civil Court is precluded from entertaining the suit, which he holds to be "a suit to invalidate the instrument on the ground of non-registration."

I am of opinion that the learned Judge is clearly in error in his view of the law as well as in holding that this present suit is a suit to invalidate the pottah on the ground of non-registration. The plaintiff does not seek to invalidate the mokurruree pottah on the ground of it not having been registered, but distinctly on the ground that it is fabricated and false because he did not execute it. The precedents cited by the Judge are also not in point. The decision in Sunkur Dobey's case (XII Weekly Reporter, page 385,) merely decides that the District Judge has jurisdiction under Section 84, Act XX of 1866, to summon and examine witnesses, make an enquiry into the fact of execution, and order the Registrar to register a deed. The view of the law was upheld on appeal by a Bench of three Judges.* But this ruling does not support the Judge at all in holding that the Civil Court cannot try the fact of the genuineness of a deed merely because the instrument has been registered. It is difficult to make out what principle of law the Judge had applied or had in view. It is certainly not *res judicata;* for the Judge merely holds a summary inquiry in order to decide whether a deed ought to be registered for the purpose of registry alone; his decision or order cannot, I imagine, decide the title of the parties. The order of the Judge or of the Registrar General simply decides whether the document should be "put on the registry" and be admissible as evidence in future cases. It has not and cannot have the effect of a final and conclusive decision on the fact of the execution so as to preclude all inquiry by a Civil Court. The late Chief Justice in the decision on appeal quoted above distinctly holds that—"The mere "registration of a document does not affect "the title of the parties. It is still only a "document which has been registered, and "if the party wishes to enforce the document by suit, the mere fact of registration "does not preclude the Civil Court from "trying whether the document was executed or not." To hold otherwise, *i. e.*, to hold as the Judge has held in this case, that the mere fact of a deed having been registered is sufficient to oust the Civil Court of its jurisdiction, would be to lay down that the order of the Registrar General or of the Judge ordering registry by the Registrar of a deed is an order conclusive on the fact of its genuineness, and that no Court of Justice can try the question of the authenticity of a deed registered in the Registrar's office. I entirely agree with the view expressed by the late Chief Justice, and I have no hesitation in holding that it was perfectly in the power of the Judge to inquire whether the instrument sought to be invalidated is a document executed by the plaintiff or not. The Subordinate Judge was quite right in fixing an issue as to the genuineness of the deed and giving his opinion on that issue. The pleader for the respondent was unable to show us any precedent, or point out any provision in any law in support of the view taken by the Judge. He admits he cannot support the decision on this point, but he argued that the plaintiff's suit ought to be dismissed on another ground, namely, for the absence of any cause of action. His contention is that inasmuch as plaintiff has suffered no injury at all by this pottah having been registered, he has no cause of action and should not be allowed to obtain a simple declaratory decree. He cites a number of precedents of this Court showing that a party is not entitled to a declaratory decree when no consequential relief is sought by him or where none could be granted by the Court. I do not, however, dissent from the principle laid down in those rulings of this Court. I hold that where a party has suffered no injury whatever, where his rights have in no way been invaded upon nor any serious cloud cast on his title, and where no impediment has been thrown in the quiet and full possession of his rights, a plaintiff should not be allowed to rush into Court on some imaginary apprehension of future injury. It is difficult, nay impossible, to lay down a strict line and declare that such an amount of cloud on a man's title would constitute a valid cause of action, and such would not. Each case must be decided on its peculiar merits, and the Court will have to judge from the particular circumstances of a case whether the plaintiff had or had not a valid cause of action.

In the present case, I am of opinion that there was a good cause of action on which it was necessary that the plaintiff should

* 12 W. R., p. 500.

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resort to a Civil Court for a declaration of the nature sought for in this suit. It cannot be denied that a serious cloud was cast on the title of the plaintiff. A deed which he declares he has not executed has been publicly registered in the registry office of the district, purporting to have been executed and registered by him. He has obtained a decree for enhanced rent against this defendant fixing the rent of the tenure at rupees 66. If he goes to sue for this rent, the mokurruree pottah would be undoubtedly held up to his face as an arrangement subsequently entered into between him and the defendant. The value of his property is diminished from the fact of this deed remaining unchallenged. If he had occasion to deal with this property by mortgage or sale, no one who is aware of this mokurruree pottah would give him that value for the property which he would have paid if this pottah had not existed. I am, therefore, of opinion that with reference to the particular circumstances of this case the plaintiff had a valid cause of action, and that in suing to set aside the pottah he is removing a serious cloud to his title and a serious impediment in the way of a full enjoyment of his property. I have already held in another case, Special Appeal No. 2218 of 1870, decided by me and Mr. Justice Macpherson on the 20th April 1871,* that in cases where a serious cloud is cast upon the title of a party, he has a right to come to Court for the purpose of removing that cloud which is an impediment to the quiet and full enjoyment of his property.

I would remand this case to the Judge for a trial on the merits.

* *Ante*, p. 421.

The 5th May 1871.

Present:

The Hon'ble E. Jackson and W. Ainslie, *Judges.*

Admission of documents—Procedure—Certificate—Mis-description.

Case No. 2474 of 1870.

Special Appeal from a decision passed by the Judge of Mymensing, dated the 22nd August 1870, *reversing a decision of the Subordinate Judge of that District, dated the 18th December* 1868.

William Bruce Manson (Plaintiff) *Appellant,*

versus

Golam Kebria Moonshee (Defendant) *Respondent.*

Baboos Romesh Chunder Mitter and *Annund Chunder Ghossal* for Appellant.

Baboos Sreenath Dass and *Kalee Mohun Dass* for Respondent.

When a document is tendered, it is the first business of a Court to satisfy itself whether the document is admissible at all. If not evidence between the parties, it should be rejected at once.

If an admissible document comes under the class which requires proof, it should be distinctly noted that it is admitted on the record subject to proof, in order that if no proof be offered the opposite party may ask the Court to take it off the record.

In construing a sale certificate, the Court must not merely look to the words of the certificate, but must endeavour to ascertain what was intended to be sold: a mere mis-description would not defeat the purchaser's rights.

Ainslie, J.—The plaintiff is the purchaser at an execution sale of the rights and interests of Golam Ambia in a shikmee talook in mouzah Ispingiarpore. The defendant contends that there never was such a talook; that Golam Ambia only held certain *khamar* lands which were resumed by the zemindar, who held them *khas* for some years, and subsequently in 1274 granted defendant a mokurruree lease for them.

The defendant is the brother of Golam Ambia.

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Witnesses have been called by the plaintiff who prove that Golam Ambia held a mokururee, and this was admitted by the defendant in a written statement put in by him in 1271 in a suit brought against him by the zemindar for rent. In that statement he distinctly admitted that the tenure of Golam Ambia was mokururee, but added that he gave up occupation in 1268.

The Judge has rejected this written statement on the authority of a case to be found in VIII Weekly Reporter, page 468.

The facts in that case are very different indeed from the facts in this case. In that case, we find that the written statement bore the signature of a lady, who was a *purda-nusheen;* that it purported to be made jointly by her and her two brothers; that it tended greatly to the advantage of the brothers and was extremely adverse to the interests of the sister, so much so that if the facts set forth in that statement were true "her interest in the inheritance," as Mr. Justice Mitter puts it, "was cut down to a paltry allowance of 4 rupees per month." There was reason on the face of the statement to suspect its genuineness. Now, in this case the probabilities go the other way. The written statement was put in on behalf of the defendant in this case who was then defendant in a rent suit. It raised a good defence to that suit; and if we are to suppose that there was any fraud in the transaction then before the Court, we should rather be inclined to suspect collusion between defendant and his zemindar for the purpose of defeating the auction purchaser, than between the auction purchaser and the zemindar to make it appear that the former had purchased a mokurruree jote when Golam Ambia really had none. If there had been false personation by the auction purchaser independently of the zemindar, the latter would doubtless have exposed it. There really is no reason to doubt that this written statement was put in by the defendant; but on the contrary, there is every reason to believe that it really was so, and we must assume that all the proceedings in the case were in proper form until some reason to suspect the contrary is shown. The defendant, who pleads that a fraud did take place in that suit, ought to give some proof of it. There is absolutely no proof and there is no attempt to produce any. It does not appear when this written statement was first questioned. It was questioned in the Lower Appellate Court, but whether it was so in the first Court or not does not appear.

The pleader for the respondent attempted to show from the written statement of defendant that exception is taken to the authority of the person who represented the defendant. But it is quite clear that in the written statement defendant is alluding to other proceedings which took place subsequent to his obtaining his own lease in 1274, and not to the suit in 1271.

It has been frequently remarked that the Courts of first instance are very much in the habit of neglecting their duty in respect of the admission of documentary evidence. The first business of the Court is to satisfy itself whether a document tendered is admissible at all. If it is clearly no evidence between the parties, it should be rejected at once. The documentary evidence which is admissible may be divided into two classes; one class which requires no proof and another class which requires proof. If a document comes under the latter class it is very desirable that it should be distinctly noted that it is admitted on the record subject to proof, in order that if no proof be offered the opposite party may ask the Court to have it taken off the record. Much trouble might be saved, if, on the tender in evidence of a document requiring proof, the opposite party were called upon to state whether he would admit it. He must be made to understand of course that the admission sought is merely for the purpose of bringing the document on to the record without formal proof. If this were done, we should know exactly whether an objection taken that documentary evidence had been used without being properly proved, ought to be listened to or not.

In the present case, there is nothing to show that the written statement relied on by the plaintiff was objected to in the first Court. There is no reason to doubt its genuineness and no attempt has been made to show that it is not genuine, and I think that it was properly relied on by the first Court as evidence of the strongest description that there had been a mokurruree jote belonging to Golam Ambia.

Then it is said that supposing Golam Ambia had a mokurruree jote, it did not pass to the plaintiff under the sale certificate, and that the plaintiff who has sued for a shikmee talook cannot change his ground of action and ask the Court to award him a

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mokurruree jote. The Lower Appellate Court has held that there has been a change in the cause of action in this suit, and has attempted to show that such a change is fatal to the plaintiff's case. But it appears to me that there really has been no change in the cause of action. The plaintiff came into Court with the sale certificate to establish the rights given to him by that certificate, whatever they are. If the plaintiff succeeds in shewing that any part of the property in dispute is covered by the sale certificate, he is entitled to recover it.

The question in this suit is simply whether under the sale certificate purporting to pass a shikmee talook, Golam Ambia, a mokurruree jote held by Golam Ambia could pass to the auction purchaser. I think that in looking to the sale certificate, we must not merely look to the words of it, but we must endeavor to ascertain what was intended to be sold: a mere mis-description would not defeat the purchaser's right. No distinction has been pointed out between the position of a shikmee talookdar such as Golam Ambia would have been if the proper description of the tenure sold was a shikmee talook, and a mokurruree jotedar such as Golam Ambia was according to the admission of the defendant. Apparently Golam Ambia's position in either case and his rights and liabilities would have been identical. Under these circumstances, and looking to the facts that have been established, I have no doubt whatever that what was attached and sold was the tenure of Golam Ambia as existing at that time; and that whether that tenure be called shikmee talook or mokurruree jote, his rights and interests were the same and passed by the sale.

Objection has also been taken as to the extent of the land claimed in this suit. But there appears to be no doubt that the whole of the land now sued for was really in the occupation of Golam Ambia.

I would, therefore, reverse the decree of the Lower Appellate Court, restore and affirm the decree of the first Court, and declare the plaintiff entitled under his sale certificate to take possession of the lands in the suit, with all costs.

Jackson, J.—I quite concur with Mr. Justice Ainslie that the suit should be decreed in favor of the plaintiff and that the Appellate Court's decision should be reversed. We have heard the case argued at some length, and I think there can be no doubt whatever, looking to the facts of the case, that there has been fraud on the part of the defendant, who is the brother of Golam Ambia, the judgment-debtor, whose rights and interests were sold and were purchased by the plaintiff. I think also there can be very little doubt that the zemindar is acting in collusion with the brother. Just about the time when the rights and interests were being put up for sale, the brother went into Court evidently with the intention of defeating the creditors of Golam Ambia, and said that Golam Ambia had had only a mokurruree jote in the village but that he had given it up a very long time previously. I think it is most probable that even that story is not true; that even then he put Golam Ambia's interests far below what they really were. His present statement is that Golam Ambia did manage by some cheat and fraud to get possession of certain land on which he had no right whatever, and that he has since been turned out of that. It is evident that from time to time when he alludes to what the rights of Golam Ambia in this jote were, he gives a different account of them and the rights decrease each time he mentions them. My own impression from all this is that Golam Ambia had a shikmee talook. However that may be, and whether Golam Ambia had a shikmee talook or not, and whether the fact has been proved or not in this case, I think the plaintiff is entitled, under the *bynamah* which he has obtained, to take the lands which Golam Ambia then possessed. The zemindar, it is clear, was fully aware that these proceedings were being carried on, and he does not attempt to raise any contention. He might have appeared as a defendant. If it is the case that the plaintiff's story is true, his interest is being damaged. He does not in any way appear and contest the claim. After Golam Ambia's rights were sold to a third party, the zemindar along with the present defendant, Golam Ambia's brother, went to re-measure the lands and gave a fresh lease to the defendant. The zemindar's sheristah must contain without doubt the evidence upon which it was ascertained whether Golam Ambia had a shikmee talook or not, and if not, what was the nature of the original tenure. He has not attempted to produce the papers which must have been in his possession. Whether, therefore, it has been actually proved or not that there was a shikmee talook, I am quite satisfied that Golam Ambia

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had the lands in dispute, and I think the probabilities are very much in favor of the fact that he had a shikmee talook of them. The plaintiff is, therefore, entitled to recover these lands, and I concur with Mr. Justice Ainslie in decreeing the plaintiff's suit with all costs.

The 5th May 1871.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Appeals—Certificate—Section 21 Act XL of 1858.

Case No. 84 of 1871.

Miscellaneous Appeal from an order passed by the Judge of Hooghly, dated the 20th January 1871.

Mohendro Nath Mookerjee (Petitioner) *Appellant,*

versus

Bama Soonduree Dabea (Opposite Party) *Respondent.*

Baboo Umbika Churn Banerjee for Appellant.

Baboo Annund Chunder Ghossal for Respondents.

The order of a Judge under Section 21 Act XL of 1858, whether it withdraws or not a certificate granted under that law, is appealable under Section 28.

Glover, J.—THIS was an application to have a certificate of administration granted under Act XL of 1858 to one Bama Soonduree, widow of Jogessur Banerjee and stepmother and guardian of his minor children, withdrawn on the ground of mismanagement of the family estate, waste, neglect to provide the minors with proper means of education or with proper food and dress.

A preliminary objection was taken to the hearing of the appeal by the pleader for the respondent on the ground that as the Judge's order did not direct the withdrawal of the certificate, it was not appealable. We think that this objection is altogether untenable. The Judge has tried this case under Section 21 of Act XL of 1858, which Section gave him the power, if satisfied that the manager had been improperly fulfilling her trust, to withdraw the certificate ; but whether he withdrew it or not, the action which he took was clearly under that Section, and therefore by Section 28, which lays down that all orders passed by the Civil Court or by any Subordinate Court under this Act shall be open to appeal, this order of the Judge is appealable.

On the merits of the appeal, after hearing the argument * * * * * * * * * * * * * * * *

We dismiss the appeal with costs.

The 5th May 1871.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Pottah—Evidence of genuineness—Construction—Perpetual holdings—Putneedar and lessee—Liability—Enhancement of rent.

Case No. 2698 of 1870 under Act X of 1859.

Special Appeal from a decision passsd by the Officiating Judge of East Burdwan, dated the 15th September 1870, *affirming a decision of the Deputy Collector of that District, dated the 20th June* 1870.

Binode Beharee Roy (Plaintiff) *Appellant,*

versus

Mr. C. B. Masseyk (Defendant) *Respondent.*

Baboos Romesh Chunder Mitter and *Chunder Madhub Ghose* for Appellant.

Baboos Sreenath Doss and *Gopeenath Mookerjee* for Respondent.

Where a pottah had no attesting witnesses and was not capable of direct proof, it was held to have been established by the fact of having come from proper cus-

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tody, corroborated by the exact identity of the grantor's signature with his admitted signature on other documents.

A pottah which gave land for building purposes and recited that no abatement of rent was to be granted at any time or for any cause, and that no increase of jumma should ever be demanded, was held distinctly to provide that the land was granted at the rate then fixed for ever even though no such words were used as "Istemraree," "Ba-furzundan," &c., &c.

Where such a pottah had been granted by a putneedar whose putnee had been created while the mehal was under temporary settlement and who had to pay a higher rent to the zemindar when the latter obtained a permanent settlement from Government at a higher jumma, it was held that the fact of the putneedar having to pay a higher rent to the superior holder did not, under the circumstances, warrant his raising his lessee's rent.

Where a putneedar sued for enhancement of rent on the foregoing ground, he was held not to be entitled to a decree for enhancement of excess land in defendant's possession or to treat him as a trespasser in respect of such excess.

Glover, J.—THIS was a suit to recover rent at enhanced rates on a holding consisting of 18 beegahs 16 cottahs 7 chittacks in the possession of the defendant.

The plaintiff is the putneedar of the Rajah of Burdwan. When the putnee was created the mehal was held by the Rajah on a temporary settlement from Government, and it was agreed between the parties that if on the Rajah's getting a permanent settlement a higher rent was fixed for the mehal, the putneedar should pay the Rajah a sum proportionate to the excess. It is not denied that the Rajah's rent was increased by Government and that the putneedar had to pay in his turn.

Whilst the estate was still under temporary settlement, the plaintiff, or rather the person through whom he claims, gave a pottah to a Mr. Atkinson, the vendor of the defendant, for 18 beegahs 16 cottahs 7 chittacks of land at an annual rent of rupees 24.

He now claims rupees 114 for some land on the ground that as he has been made to pay enhanced rent to his superior holder, the Rajah of Burdwan, he is equitably entitled to recover from his tenant, and that the rate he demands is what the last settlement fixed on the lands in defendant's possession.

The defence is that the pottah given by the plaintiff's predecessor to Atkinson bars enhancement, and that the defendant on the faith of the pottah built valuable and expensive works on the land for the manufacture of indigo.

On the first trial, the Deputy Collector decreed for the plaintiff. The Judge, however, on appeal, remanded the case for the production of the original pottah from the Burdwan Rajah's serishta. The pottah was produced accordingly, and both Courts have held that it bars the plaintiff from enhancing the rent paid by the defendant.

It appears to us very doubtful whether this suit ought to have been entertained at all in the Revenue Court, inasmuch as the land on which enhancement is sought appears to have been given for building and not for agricultural purposes. 18 beegahs odd, would not, after the necessary space for factory, vats drying rooms, offices, &c., was provided, leave anything for agricultural purposes even if the proprietor desired so to use them. As, however, the question was not raised in the Courts below, we do not think that it should stop the hearing of the appeal.

The first objection taken by Baboo Romesh Chunder Mitter for the special appellant is that the Judge was wrong in law in relying on the pottah without evidence, inasmuch as it was not of an age to prove itself and was not proved to have come from proper custody.

The first portion only of this objection is taken in the petition of special appeal, namely, that the pottah ought to have been proved by evidence, and that it is not so proved.

With reference to this, the Judge has found that the document has been in the Rajah's serishta for the last 16 years, and that it got there by being filed by the defendant's vendor, Atkinson, as security for the payment of rent due on other lands. The mohurrir who filed it is shewn in the judgment of the first Court to be dead, and it is not denied that Atkinson has left the country. The pottah itself has no attesting witnesses, and it is difficult to see how the defendant, who is a stranger, purchaser, could give direct proof of the execution of the document.

What he does prove is that the pottah was filed in the Rajah's serishta for the purpose above noted, and that it was produced from thence by the Rajah himself. It is contended that the mohurrir witness has only been employed in the serishta for 10 years, and cannot therefore depose to a fact which is said to have occurred 16 years

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ago. We think, however, that on the whole evidence and circumstances of the case, the Courts below were fully justified in holding that the pottah was not capable of direct proof, but that as it came from proper custody and was corroborated by the exact identity of the grantor's signature with his admitted signature on other documents, and that it might therefore be taken as established. We may remark, moreover, that no objection in this form was taken in the Courts below.

Then as to whether the terms of the pottah bar enhancement, which forms the second objection taken in special appeal.

We have read the document: it gives certain land for building purposes, enumerating the various descriptions of buildings to be erected, and recites that no abatement of rent is to be granted at any time or for any cause, and that no increase of jumma shall ever be demanded. The wording of the pottah does, we think, distinctly provide that the jumma then fixed was to remain the same for ever. We have been reminded of the decisions passed on the subject of perpetual holdings, and it is contended that as there are no such words as "istemraree" —"ba furzundân," &c., &c., there is no proof that the grant was made in perpetuity or for any longer term than the life of the grantee. It might be sufficient to observe that this was never the plaintiff's case in the Courts below, nor does he take the objection in his petition of special appeal; but we are prepared to say that the only fair and reasonable meaning of the words used in the pottah is that the land was granted at the rate then fixed for ever. In any case, however, the plaintiff would fail, for there is no proof nor even allegation that the original grantee is dead.

We have been much pressed with the equitable consideration of this case, and it has been argued that as the lease was granted at a time when the estate was under a temporary settlement and liable to pay excess rent, which rent it did subsequently have to pay, the lessee is bound to contribute his share and reimburse his lessor the amount which he has been obliged to pay to his zemindar, the Rajah of Burdwan.

It does not appear to us that such considerations should be allowed any weight in the present case. The plaintiff has had to pay the Rajah because he specially covenanted to do so in the event of the Government demand being increased, but in the contract between the plaintiff and defendant (we use the words to avoid long repetitions —the proper term would of course be plaintiff and defendant's representatives) there was no such stipulation. On the contrary, there was an express proviso that no more rent should be demanded at any time or for any reason. It is only reasonable to suppose that as this contract was entered into at a time when the plaintiff was under an agreement of a precisely opposite character with the Rajah, there was a reason for the difference; and this may, we think, be found in the fact, that the land was taken for an indigo factory, and that very great expense would be incurred in erecting the necessary buildings and that the land would be unproductive.

The last objection taken in special appeal is that, under any circumstances, the plaintiff is entitled to recover rent on the excess of 8 cottahs found in the defendant's possession.

We are of opinion that he is not so entitled; at least, not in this suit. We are not prepared to acquiesce in the special respondent's contention that for the excess land, the plaintiff is only entitled to treat the defendant as a trespasser (Roshun Bibee *versus* Bishonath Sircar, VI Weekly Reporter, 57) for if that were so, any person holding excess land without his landlord's knowledge for a period of 12 years would have held it adversely to his landlord and be entitled to plead limitation against him.

But as the plaintiff in this case sued for a lump sum of enhanced rent in the entire holding, he cannot get rent which never having been paid before, could not be termed "enhanced" on the small excess of land in the defendant's possession. It may be a question whether the plaintiff could recover rent even on this excess, even were he to bring his suit in a proper form for the purpose; but he cannot get it in this suit.

We think, therefore, that the decision of the Court below should stand and that the special appeal should be dismissed with costs.

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The 8th May 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice.*

Court Fees' Act—Stamps—Probate.

Reference to the Chief Justice under Section 5 of the Court Fees' Act, 1870, by Mr. R. Belchambers, Taxing Officer of the High Court.

In the goods of Bibee Ameerun, *deceased.*

No stamp duty is payable under the Court Fees' Act, 1870, on probate granted to a second executor, to whom leave was reserved to take out probate when the first probate was granted.

Reference by the Taxing Officer.—On the 2nd of September last, probate of the will of the deceased abovenamed was granted by this Court to one of the two executors, with reservation to the other.

The other executor has now also obtained probate.

The stamp fee payable under the Court Fees' Act 1870, Schedule 1, Clause 11, was paid when the first probate was granted. Is it payable in respect of the second probate?

In the case of W. P. Masson, deceased, in which the first letters of administration (with will annexed) were cancelled, and fresh letters (with will annexed, together with a document which formed part of the will, but which had not been annexed to the first letters) were granted,—it was determined that the stamp fee was not payable a second time.

In that case the second letters were granted to the same party in substitution of the first letters. In the present case a double probate has been granted, *i. e.*, a probate to each of the two executors.

Decision of the Chief Justice.

The first probate enures for the benefit of all the executors. I think that no stamp duty is payable on the double probate which recites and in fact proceeds upon the first.

The 8th May 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge.*

Right of way.

Case No. 66 of 1871.

Special Appeal from a decision passed by the Judge of 24-Pergunnahs, dated the 27th October 1870, *affirming a decision of the Sudder Moonsiff of that District, dated the 31st April* 1870.

Syud Hamid Hossein and others (Plaintiffs) *Appellants,*

versus

Mr. C. Gervain (Defendant) Respondent.

Baboo Oomesh Chunder Banerjee for Appellants.

Mr. W. W. Linton for Respondent.

If a person has a right of way from one place to another over a particular line, he cannot be compelled to use a different and substituted way. But where the right is simply to pass from one point to another, the party desiring to exercise the right cannot claim to pass in a particular tortuous and indirect course between the two points.

Norman, C. J.—The plaintiff has a right of way from the public road on the north to a road on the south over certain lands of the defendant which adjoin his own. The road runs north and south, and it is shewn in a survey map of 1851 which is in evidence, as being a straight road.

In a suit in 1854, the plaintiff claimed this road as a straight road from north to south and obtained a decree accordingly. However, in consequence of some ambiguity in the terms of the decree, when the decree in a subsequent suit came to be executed at some time in 1864 the road was set out as running from the road on the north by a burial ground and along the plaintiff's garden towards the public road on the south, with a slight deviation, about 3 cubits, to the west round a certain pit belonging to one Panchoo Dutt.

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In execution of that decree, it appears that certain pilpas or low pillars were fixed in the earth which would show that the plaintiff had a right to deviate from the straight line slightly to the west from a point about 15 cubits from the public road on the south.

The defendant says that even that divergence is a trespass, no doubt the plaintiff had no right to plant pilpas on the defendant's land over which he had a mere right of passage. The plaintiff in his present suit claims a right of way over a piece of ground 172½ cubits in length and from 5 to 2½ cubits in breadth forming an area of two cottahs. The line of road now claimed deviates at a right angle for about 15 cubits towards the west as far as the south-east angle of a hut belonging to one Heerun Beebee, and from thence turns at a right angle and proceeds for about 15 cubits south till it meets the public road passing round and cutting off an irregularly shaped piece of land belonging to the defendant, which would probably be rendered wholly useless to the defendant.

The Moonsiff dismissed the plaintiff's suit. The Judge, in affirming the Moonsiff's decision which was passed after a very full and careful inquiry, makes certain observations which have been commented on by the appellants' vakeel.

He says:—"There is nothing to show "at what point the lane is to turn to the "west. In the next place there is no evi- "dence to show that it ever did take the "alleged turnings; and in the third place "if it ever did take those turnings, the "defendant is obviously entitled to divert "it and carry it on in a direct line to the "road on the south, if in so doing he does "not encroach on the land of his neigh- "bour."

There is no reliable evidence that the path formerly diverged to the west at the point indicated in the plaint. The evidence does show that the road is a straight road, with possibly some slight deflection of some 3 cubits or so where it passes round what is or was formerly Panchoo Dutt's pit.

As to the third point adverted to by the Judge, we think it is clear that if any person has a right of way from one place to another over a particular line, if he and his ancestors have been accustomed to use that way from a long time past, he has a right to go over it and cannot be compelled to use a *different* and *substituted* way. The plaintiff has a clear right to pass over the defendant's land from a certain point on the road to the north to a place on the road to the south, in other words, he has a right of way between these two points. But it is another thing to say that when a man has been accustomed to pass over a certain pathway, the owner of the land through which the path runs cannot interfere at all with the path by turning it a little to the right or a little to the left so as to alter its direction slightly.

In an English case on the subject, Staple *vs.* Heydon, 6 Modern Reports, page 3, it was resolved that "a man cannot claim a "right of way over my ground from one "part to another, but from one part of his "own ground to another he may claim a "right of way over my ground".

In Rouse *versus* Bardin, 2 Henry Blackstone, 355, Mr. Justice Gould pointed out that in justifying an alleged trespass in exercise of a right of way it is sufficient to state the places from which and to which the road leads. He says it would be productive of infinite uncertainty to require an exact description of the line of the way; to say it went so many yards to the north, then turned to the west, and then to the east. He says I have always understood that the "intermediate spaces are disregarded."

In James *vs.* Dods, 2 Crompton and Meeson's Reports, 272, Lord Lyndhurst, in discussing the right of a person to use roads for the purpose of carrying away tithes, says:—"It is not pretended that the former might not make a slight deviation."

In a case like the present, we think that the right is not a right to pass in a particular indirect line over the plaintiff's land, going for so many yards west, or so many yards to the east, or so many yards to the south of a particular straight line. The right is simply to pass from a point A on the north to point B on the south, and if the right is established the pathway between these two points must be kept open; but the party desiring to exercise his right cannot claim to pass in a particular tortuous and indirect course between the two points.

The present suit is simply vexatious. We can see no other reason why it was ever

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instituted. The appeal is of the same character. The Moonsiff's decision is quite correct. The Judge's decision is also substantially right, and we dismiss the appeal with costs, allowing 2 gold mohurs as pleader's fees.

The 8th May 1871.

Present:

The Hon'ble H. V. Bayley and G. C. Paul, *Judges.*

Hindoo law—Grandson—Maintenance.

Case No. 2442 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of 24-Pergunnahs, dated the 23rd August 1870, reversing a decision of the Moonsiff of Diamond Harbour, dated the 29th December 1869.

Mon Mohinee Dossee (Plaintiff) *Appellant,*

versus

Baluck Chunder Pundit (Defendant) *Respondent.*

Baboo Sham Lall Mitter for Appellant.

Baboo Rajendro Nath Bose for Respondent.

Under the Hindoo Law, a grandson is not entitled to maintenance.

Bayley, J.—In this case, plaintiff, the wife of a son of the defendant, sued the defendant for maintenance of herself and her infant son aged about 3 or 4 years.

The first Court allowed the maintenance.

The Lower Appellate Court has disallowed it.

The facts found by the Lower Appellate Court are that the plaintiff with her son twice left her father-in-law's house; that she sold her daughter in marriage to a low caste Brahmin, and did not return to the house of the defendant, her father-in-law.

It has been held by a Full Bench of this Court* that a father-in-law is not *legally* bound to maintain his son's widow. The only question that then remains is whether in this case the widow's son, that is, the grandson is entitled to maintenance.

A case has been cited from the Madras High Court Reports, Volume II, page 12, as in support of this contention, but that decision merely rules that "in a family governed by the Marumakkatayam rule an Anandravan's right to maintenance is merely a right to be maintained in the family house."

The above law is quoted as a law locally prevalent in Malabar. We are shewn no authority against the view taken by the Lower Appellate Court, and we therefore dismiss this special appeal with costs.

Paul, J.—I concur.

* 10 W. R., F. B., p. 89.

The 9th May 1871.

Present:

The Hon'ble H. V. Bayley and G. C. Paul, *Judges.*

Collector's jurisdiction — Sub-divisional Officers—Section 20 Act VI of 1862.

Case No. 1774 of 1870.

Special Appeal from a decision passed by the Additional Judge of Nuddea, dated the 18th June 1870, reversing a decision of the Moonsiff of Santipore, dated the 30th January 1869.

Rakhal Chunder Roy and others (Plaintiffs) *Appellants,*

versus

Guggun Chunder Dutt and others (Defendants) *Respondents.*

Baboo Bhowanee Churn Dutt for Appellants.

Baboos Kalee Mohun Doss and *Ashootosh Dhur* for Respondents.

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The Collector's jurisdiction obtains where no Sub-divisional Officer exists, the terms of Section 20 Act VI of 1862 being inapplicable where there are no presiding officers.

Bayley, J.—THE two grounds of special appeal urged in this case are, *firstly*, that there was no jurisdiction in the Collector to try the original suit which resulted in a decree which eventually led to the sale of the tenure, for possession of which the present suit is brought; and *secondly*, that the right of the plaintiffs as co-sharers has not been duly considered as they were not made defendants in the decree in execution of which the tenure was sold, and therefore they are not bound by the sale.

On the *first* point, *viz.*, the question of jurisdiction, we remark that the Collector had jurisdiction in the case as there was no Sub-divisional Officer at Santipore at the time. The Judge below has found as a fact that there was no such officer, and there is nothing shewn to us to contradict this on the face of the record. There can be no doubt whatever that where no Sub-divisional Officer exists, the Collector's jurisdiction ranges over that portion of the district. The terms of Section 20, Act VI of 1862, that suits should be instituted in their respective divisions only apply to places where there are officers to preside over those divisions, and cannot apply to places where there are no such officers. The law does not contemplate impossibilities. The Judge below was therefore right in holding that the Collector had jurisdiction under such circumstances, for otherwise it would follow that where a Deputy Collector in charge of a Sub-division is absent, if the Collector be not able to take jurisdiction, in such a case no suits could be instituted or tried.

On the *second* plea, we observe that the tenure was sold in execution of a decree passed against the holder for its own arrears. It has been repeatedly held that a zemindar selling a tenure for its own arrears of rent is bound to look only to the tenants registered in his serishta. That the plaintiffs were so registered is not proved in this suit, and therefore the objection taken is untenable. Again, a tenure, irrespective of the question of registration, is liable to be sold for its own arrears, and this is a case where arrears were due from the tenure itself. Both the grounds of the appeal therefore fail, and this appeal must be dismissed with costs.

The 9th May 1871.

Present:

The Hon'ble H. V. Bayley and G. C. Paul
Judges.

Moveable property—Thatch of a house—Small Cause Courts—Jurisdiction.

Case No. 2302 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Nuddea, dated the 29th July 1870, *reversing a decision of the Moonsiff of Bongong, dated the 21st December* 1869.

Raj Coomar Mookerjee (Plaintiff) *Appellant*

versus

Pran Nath Mookerjee (Defendant)
Respondent.

Baboo Mohendro Lall Mitter for Appellant.
No one for Respondent.

The thatch of a house is moveable property, and a suit to recover its price, if not exceeding Rs. 500, must be brought in a Small Cause Court.

Paul, J.—IN this case, the Subordinate Judge has, it seems to us, rightly held that the suit was cognizable by the Small Cause Court, and he has, therefore, dismissed the plaintiff's suit on the ground that the Moonsiff had no jurisdiction.

The suit was brought to recover the price of a thatched ijmalee (joint) house laid at rupees 5. Now, the thatch of a house is moveable property, more especially when such thatch as in the present case was severed from the house. A suit, therefore, brought to recover the price of such thatch not exceeding rupees 500 must be brought in the Small Cause Court. The decision of the Subordinate Judge is, therefore, quite right, and this appeal must be dismissed.

The pleader for the appellant, however, informs us that he originally brought his suit in the Small Cause Court, but that the Judge of the Small Cause Court declined to entertain the suit on the ground that he could not adjudicate upon a question of title to the land and referred him to the Civil Court. Now, it has been held by the late Chief Justice that matters incidental to the determination of a suit of this description, although involving a question of title to land, may be brought and tried in the Small Cause Court to enable it to adjudicate such

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subject-matters as may be within its jurisdiction. The plaintiff in the present case seems to be unfortunate in being thrown out in both the Courts. It is quite clear that his suit was originally rightly brought in the Small Cause Court, and we hope that after this expression of our opinion the Judge of the Small Cause Court will put matters right by allowing the plaintiff to bring a fresh suit in his Court. In determining that suit, the Small Cause Court Judge will be entitled to adjudicate upon a question of title incidental thereto; and as to the question whether limitation will bar such suit or not, we think that the course which the plaintiff has taken owing to the original order of the Small Cause Court Judge will probably give him a good and sufficient cause to claim exemption.

The 9th May 1871.

Present:

The Hon'ble H. V. Bayley and G. C. Paul, *Judges.*

Cause of action—Foreign judgments—Jurisdiction.

Case No. 2344 of 1870.

Special Appeal from a decision passed by the Additional Judge of Nuddea, dated the 27th July 1870, *affirming a decision of the Subordinate Judge of that District, dated the 20th December* 1869.

Sreehuree Bukshee and others (some of the Defendants) *Appellants,*

versus

Gopal Chunder Samunt and others (Plaintiffs) *Respondents.*

Baboo Bhowanee Churn Dutt for Appellants.

Baboos Sreenath Dass and *Kishen Succa Mookerjee* for Respondents.

If the cause of action is the taking of money, it arises at the place where the money is taken.

The *rule* in the case of foreign judgments sought to be executed in our Courts, is that such judgments must finally determine the points in dispute and must be adjudications upon the actual merits, and that they are open to impeachment on the ground of want of jurisdiction, whether over the cause, the subject matter, or the parties, or that the defendants was not summoned or had no opportunity of defence or that the judgment was fraudulently obtained.

Bayley, J.—I AM of opinion that in this special appeal the judgment of the Lower Appellate Court should be reversed with costs.

The grounds urged in special appeal are two; *firstly*, that the French Court whose decree is sought to be executed had no jurisdiction; and *secondly*, that the special appellant had no notice to appear and defend the case.

Now, the question of jurisdiction is to be determined with reference to the terms of Section 5 Act VIII of 1859. That Section says—"The Civil Courts of each grade "shall receive, try and determine all suits "hereby declared to be cognizable by those "Courts, if the cause of action shall have "arisen, or the defendant at the time of the "commencement of the suit shall dwell or "personally work for gain, within such li-"mits."

Now, the cause of action in this case is the taking of certain money in a certain place. The money is admitted to have been taken at Calcutta. The witnesses called for the plaintiff contradict his own case by stating that the money was taken at Chandernagore; and after hearing and considering the testimony of these witnesses, it seems to us quite unreliable. Thus, the money having admittedly been taken at Calcutta, the cause of action arises in Calcutta. But further there is actually no trustworthy evidence on the record that the defendant either dwelt or personally worked for gain in Chandernagore at the time of the institution of the suit. I think, therefore, that on all these grounds the plaintiffs' suit must fail.

I would add that in the case of a foreign judgment sought to be executed in our Courts, the rule as to the necessity of service of notice, &c., upon the opposite party has been laid down by Mr. Justice Story on the Conflict of Laws, and quoted by Mr. William Macpherson at page 189 of the last edition of his Civil Procedure Code almost the same words:—"Foreign judg-"ments must, in order to be received, finally "determine the points in dispute, and must "be adjudications upon the actual merits; "and they are open to be impeached upon "ground that the foreign Court had no juris-"diction, whether over the cause, over the "subject matter, or over the parties, or that "the defendant never was summoned to an-"swer or had no opportunity of making his

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"defence, or that the judgment was fraud-"ulently obtained." I do not say that the judgment in this case was fraudulently obtained, because there is no legal proof of fraud; but it is clear that the parties were not subject to the jurisdiction of the Chandernagore Court because the subject matter of suit and cause of action really were in Calcutta.

Besides as to the summonses, there is nothing to show that summonses were actually served on the defendants, or that they had a fair opportunity of making their defence. We think that the judgments of both the Courts are erroneous in law. The Subordinate Judge in the first Court says that because the question of jurisdiction was not taken at the Chandernagore Court, therefore he could not entertain that objection,—an objection which, if true, would go to the very existence of the power to try the case, and therefore ought to be allowed to be raised at any time. The Judge, on appeal, appears to have erred doubly, *first*, because he adopts the above reasoning of the first Court, and *secondly*, because he says that the local enquiry had proved that the money had been *spent* in joint *kurbar*, business transactions, at Chandernagore. Now, the question as to how or where the money was *spent* has nothing whatever to do with the determination of the question of jurisdiction. It may have been spent at Chandernagore, Calcutta, or at any place in the world. It may have been spent in joint business or thrown into the river. The real question here is as to where the money was taken, and it is shewn to have been taken at Calcutta.

As to the question of service of summons, we are told that we should presume all acts to have been rightly done, but on the contrary we find positive evidence that they were not rightly done.

Lastly, we are pressed to remand the case in order that further evidence may be taken; but in the first place, we are unwilling to remand a case of this complexion with evidence so false and tutored; and secondly, because every party has a right of asking any Court of justice to fix the proper issues. To stand by, allow a wrong issue to be raised, and then to take exception to that issue, is a prevalent practice which this Court will not encourage.

In this view, we reverse the judgments of the lower Courts and dismiss the plaintiff's suit with costs.

Paul, J.—I am also of opinion that the plaintiff's suit should be dismissed with costs.

The 9th May 1871.

Present:

The Hon'ble H. V. Bayley and G. C. Paul, *Judges.*

Hoondees—Custom.

Case No. 2554 of 1870.

Special Appeal from a decision passed by the Officiating Judge of Moorshedabad, dated the 23rd September 1870. *affirming a decision of the Subordinate Judge of that District, dated the 31st May* 1870.

Indur Chunder Doogur (one of the Defendants) *Appellant,*

versus

Luchmee Bibee and another (Plaintiffs) *Respondents.*

Baboos Hem Chunder Banerjee and *Debender Chunder Ghose* for Appellant.

Baboo Kulee Mohun Doss for Respondents.

Plaintiff obtained a hoondee from defendant drawn upon his firm at *C.* On a representation that that hoondee was lost, defendant granted plaintiff a second hoondee on the same firm. When this duplicate was presented to the firm, the original had already been accepted on its presentation by defendant No. 2; and the duplicate was declined in accordance with its own terms. On due date the original hoondee was paid by the acceptors. Plaintiff then sued either for the non-acceptance of the duplicate hoondee or to recover money had and received on the ground that the original consideration had failed.

HELD that the non-acceptance of the duplicate hoondee could not give plaintiff any cause of action, and that the consideration had not failed.

Per Paul, J.—That no custom could over-ride the terms of the contract as set forth in the second hoondee, nor could such custom, being irrational, absurd, and contrary to equity and good conscience, be sustained in a Court of justice.

Paul, J.—IN this case, the facts are very few and very simple. It appears that the plaintiff, on the 6th day of the dark side of the moon in Jyst 1926 Sumbut, obtained a hoondee for rupees 1,000 from the defendant's firm at Baloochur drawn upon his firm at Calcutta.

The plaintiff alleged that that hoondee was lost, and on representation of that fact

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to the defendant he granted plaintiff a second hoondee drawn by his said firm at Baloochur upon his said firm at Calcutta; and in the body of this duplicate it was stated that if the original be found accepted the duplicate shall become null and void. It appears on the evidence that when the duplicate hoondee was presented to the defendant's firm at Calcutta the original had already been accepted, and the result was that the Calcutta firm declined to accept the duplicate stating at the top of it that they had already accepted the original hoondee presented by one Huranund Roy Doulut Ram, the defendant No. 2 in the case. In doing this, they allege that they followed the terms of the duplicate hoondee. Thus, the plaintiff brings this action in one of two ways either for the non-acceptance of the duplicate hoondee or to recover money had and received on the ground that the original consideration failed.

It is quite clear that the non-acceptance of the second hoondee was in accordance with the strict terms of that hoondee, and the circumstance of refusal cannot give the plaintiff any cause of action.

As to the plaintiff's seeking to recover the amount of the original hoondee on the ground that the consideration failed, it appears to me that the plaintiff must lose her suit also. I think the consideration had not failed, for it is admitted by the plaintiff herself that the original hoondee had been accepted by the defendant's firm at Calcutta before the duplicate was presented, and that on due date of the original hoondee the amount thereof was paid by the acceptors. Under these circumstances, it cannot be said that the consideration failed.

But an element of confusion has been imported into the case by the evidence of some witnesses as to custom. That alleged custom cannot possibly over-ride the plain terms of the contract as is evident from the clear language of the second hoondee; but besides that, the evidence in this case seems only to go to the extent of shewing that in the event of both the original and the duplicate being presented for payment by persons of equal respectability, some further proceedings should be taken by the production of a triplicate and the payment stopped until the dispute is settled. That custom, therefore, does not affect the present case before us. If the custom, however, does not amount to that, but amounts to what the plaintiff contends for, *viz.*, that notwithstanding the payment of the original hoondee the duplicate must also be paid for on presentation, all that I can say is that such custom is irrational, absurd, and contrary to the principles of equity and good sense, and cannot be sustained as a custom in a Court of justice. If the plaintiff had only been guided by the ordinary principles of honesty and justice, she would have refrained from bringing the suit in this case. The suit, in fact, seems to be a sort of oppression attempted to be committed on the defendant, for nothing but a pure act of grace and courtesy could have rendered it obligatory on the defendant to grant the duplicate hoondee to the plaintiff on the bare allegation of the loss of the original. The defendant was not bound to grant her the duplicate until she fully guaranteed him against any future demand. The result is that the honesty of the motive by which the defendant was actuated has been very ill-recompensed by the proceedings which the plaintiff has taken against him in the present suit. I think that the suit against defendant No. 1 must fail for all these reasons, and that the suit against defendant No. 2 must equally fail, for there is no evidence that the original hoondee was really lost and had not passed into the hands of this defendant *bonâ fide* by sale and purchase.

The result is that this appeal must be allowed and the plaintiff's suit dismissed with all costs.

Bayley, J.—I think it is not necessary in this case to go into the question of custom, for the duplicate hoondée and the endorsement upon it shew, the one a distinct condition that no acceptance of the duplicate should be made if the original were once accepted, and the other that the original hoondee *had* been accepted. The payment of the duplicate therefore, by the very terms of that document is not due on the duplicate. The first hoondee once accepted was an acceptance of all liability to the total amount of the bill, *viz.*, rupees 1,000, and this suit by the plaintiff is only an attempt to make the defendant twice liable for one and the same amount. The duplicate was given by the defendant on the mere representation of the loss of the original as an act of grace.

I agree in reversing the judgments of the lower Courts with costs.

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The 10th May 1871.

Present :

The Hon'ble H. V. Bayley and G. C. Paul, *Judges.*

Ex-parte decision—Prima facie case—Procedure.

Case No. 14 of 1871.

Regular Appeal from a decision passed by the Subordinate Judge of Purneah, dated the 21st September 1870.

Amrit Nath Jha (Defendant) *Appellant,*

versus

Roy Dhunput Singh (Plaintiff) *Respondent.*

Baboos Unnoda Pershad Banerjee and *Taruck Nath Sein* for Appellant.

Baboos Sreenath Doss and *Bhugobutty Churn Ghose* for Respondent.

In dealing with a suit *ex-parte*, a Court is bound to see that the plaintiff's case is at least *primâ facie* proved; the mere absence of the defendant does not of itself justify the presumption that the plaintiff's case is true.

Where a case was decided *ex-parte*, notwithstanding repeated applications of the defendant's pleader for further and reasonable time to produce witnesses who, on account of their place of abode being in distant and different districts, could not be produced within the limited time allowed, the High Court remanded the case for re-trial.

Bayley, J.—On this appeal coming on for hearing, Baboo Sreenath Dass for the respondent took a preliminary objection that no appeal lies against the decision of the lower Court as it was an *ex-parte* decision under the provisions of Section 119 Act VIII of 1859. Baboo Sreenath Dass quotes a case from page 206 of the Bombay High Court Reports, Appellate Civil Jurisdiction, in support of his contention.

I take up the preliminary objection first as it stands. The Bombay case is not at all a case similar to the one before us. It was there ruled "that the hearing of a suit "in which a pleader was duly appointed on "behalf of the defendant but not instructed "to answer, or instructed not to answer at "all, was an '*ex-parte* hearing' and that no "appeal lay from a judgment passed in such "suit."

No other authority has been advanced. Now we would have paid the highest respect to the authority cited were it at all in point, but as it stands it is entirely different from the case now before us.

The facts of this case appear to be these :—

There was a petition given by Mr. DeSouza, the pleader for the defendant, on the 9th September 1870. The order on the petition was "Let the defendant's pleader take notice that if he intends to have any witnesses called up, he must pray for the same by filing a petition in Court to-day ; otherwise he must appear on the date fixed, along with his witnesses."

On the 13th September, Mr. DeSouza put in an issumnuvisee of witnesses on behalf of the defendant. The lower Court held that as the order of the 9th September was that the defendant should file his issumnuvisee, names of witnesses, on that very day, he should have done so, but that as then there was no time to serve the summonses, the defendant should himself try to bring the witnesses in Court on the day fixed for the hearing of the case, *viz.*, the 21st.

On the 21st September, Mr. DeSouza again presented a petition to the effect that as the witnesses from the other district (Dinagepore) whom the defendant was directed to produce in Court on that day had not yet appeared, summonses might be issued in their names, and that as the witnesses in Purneah had also failed to appear although summonses had been issued in their names,—a *dustuk* might issue against them.

Upon this petition the Court says that it was clear that the defendant's intention was to gain time, and as the Court could not postpone the case again having once before granted a postponement without reason, the petition must be rejected. The petition was accordingly rejected, and the case was heard and disposed of on that very day, *viz.*, the 21st September. So that it is clear that this suit involving a claim of no less than rupees 1,08,445 was instituted on the 9th August and disposed of on the 21st September, notwithstanding all those petitions on the part of the pleader of defendant to allow him a further and *reasonable* period to produce his witnesses. This fact in itself indicates an improper haste with which the case has been disposed of, without a due regard to the interests of justice.

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Reverting to the preliminary objection raised by the pleader for the respondent, I have to remark that this case is altogether different from the Bombay case cited. Here the pleader was not one who was "not instructed to answer or was instructed not to answer," or who stood by and let the judgment go against him, but who, according to the Subordinate Judge himself and to record, was present in Court, and from time to time trying by reasonable requests, and under the above circumstances without any injury to justice to the parties, to obtain further time for his client in order to produce withnesses who, on account of the distance of their place of abode in different districts, Purneah and Dinajepore, and the difficulty of enforcing their attendance in Court, could not be produced within the very limited time given. Irrespective, however, of this consideration, every Judge in dealing with an *ex-parte* case should take good care to see that the plaintiff's case is at least *primâ facie* proved. Now what have we in this case before us? The allegation of the plaintiff in the plaint was that under the conditions of the bond, if the mortgaged property were likely to be sold or if four successive instalments remained unpaid, the plaintiff would be entitled to sue without waiting for the expiration of the remaining dates fixed for the instalments, and that accordingly as there had been default in the payment of four successive instalments the property was likely to be brought to sale, the defendant having allowed the rent for two years to remain unpaid. Besides that there was a stipulation for the payment of interest on certain dates specified in the schedule which had not been paid.

Instead, however, of enquiring into any of the above points, the whole judgment of the lower Court seems to be directed to the determination of one point only, *viz.*, the factum of the execution of the bond. No determination as to the non-payment of the putnee rents or to the breach in the payment of instalments has been come to or attempted. Indeed, the whole judgment on the merits of the case is contained in these few words. "The genuineness of the bond im-"pleaded is proved by the evidence on the "record, the conclusion drawn from which "of the justness of the demand is further "justified by the presumption arising "from the default of the defendant (though "present by pleader) to enter a defence." So that out of the very judgment from which Baboo Sreenath Dass takes his preliminary objection owing to the case being decided *ex-parte*, that is, in the defendant's absence, we find that the defendant was present and through his pleader, who asked for postponement often times by petitions.

It is needless to observe that the facts found by the lower Court in the passage quoted are quite insufficient to justify a decree in the plaintiff's favor. It might well be that the bond had deen really executed, and yet the putnee rent or the several instalments might not have remained unpaid so as to give the plaintiff a cause of action. Besides, the presumption drawn by the Subordinate Judge as to the justness of the plaintiff's claim from the default of the defendant in entering a defence is as illogical as it is wrong in law. Some illness, accident, want of a friend to look into his affairs, and a variety of other circumstances might have combined to prevent the defendant from being present in Court, so that it cannot be laid down as a safe or a sound rule that the mere absence of the defendant of itself justifies the presumption that the plaintiff's case is true. The real fact in the case seems to be that simply with a view to get the case disposed of before the holidays, 21st September being the last day before the vacation, this unseemly haste has been made in the decision of the case, and the unavoidable result has been a total denial of justice.

Under all the above circumstances, we think that the case must go back to the lower Court to be re-tried with reference to the above remarks, each party being willing that it should be taken up and disposed of out of its turn.

The Deputy Registrar will certify before Friday evening that the records of this case have been despatched to the Post Office and the 1st July next is hereby fixed as the date for the decision of this case by the lower Court, after which period no further time should be allowed to either party.

Paul, J.—I am entirely of the same opinion. I consider the request made by the defendant for a postponement of the hearing of the case was perfectly reasonable and well grounded, and the Subordinate Judge has acted most indiscreetly and unreasonably in refusing it.

I quite concur with Mr. Justice Bayley in thinking that the whole proceeding in this case is marked by a degree of precipitation which the circumstances hardly justify

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or at all render necessary, and that therefore, on that ground the case must be sent back for re-trial.

If I were to yield to the objection taken by Baboo Sreenath Dass that this is an *ex-parte* proceeding and no appeal lies, then I must say that inasmuch as this decision of the Subordinate Judge has been some way or other brought to our notice and we have read it and we think that it is a most hasty, incomplete, and erroneous judgment, we ought, by virtue of the large powers which we have, to interfere for the ends of justice. In fact, when a challenge was thrown out by the Court to Baboo Sreenath Dass if he could maintain the judgment of the lower Court upon the facts found, he most candidly and honorably admitted that he could not. Such being the case, I think that the case must be sent back for a fresh trial.

The costs will follow the result.

The 10th May 1871.

Present:

The Hon'ble H. V. Bayley and G. C. Paul, *Judges.*

Tacit consent—User—Rights of public.

Case No. 2527 of 1870.

Special Appeal from a decision passed by the Additional Judge of Nuddea, dated the 30*th August* 1870, *reversing a decision of the Sudder Moonsiff of that District, dated the* 31*st March* 1870.

Sufroo Shaikh Durjee and another (Plaintiffs) *Appellants,*

versus

Futteh Shaikh Durjee and others (Defendants) *Respondents.*

Baboo Khetter Mohun Mookerjee for Appellants.

Baboo Grish Chunder Mookerjee for Respondents.

A thatched house, which had been used by the proprietor of the land whereon it stood, as a house of prayer for himself, family, neighbours and the public, having been blown down, a brick built one was erected in its stead by public subscription and maintained for the same purpose. After the proprietor's demise, his heirs claimed the right and title to the house.

HELD that the consent of the proprietor, added to the long use of the house by the public, entitled the public by way of implied grant to the occupation of the same as a house for prayer, and the plaintiffs could not succeed.

Bayley, J.—IN this case, it is quite clear that the special appeal is entirely groundless. A special appellant should look to the facts found by the Lower Appellate Court, and then if the facts found justify an appeal on account of any error in law or defect in the investigation affecting the decision on the merits, in that case and to that extent only can a special appeal be properly preferred. And I think the facts found in this case by the Lower Appellate Court do not at all justify the grounds taken in appeal.

The Judge has found that the house in dispute was erected by and stood on the land of one Kadir who used it as a house of prayer for himself, family, and neighbours, and those who liked to resort to it; that no objection whatever was ever taken to such use of the house; that the house had been blown down, and that Kadir having no means to re-build and restore the house, the parties by a public subscription did then build the house and maintained it for the purpose for which it was originally used.

The present suit is brought by plaintiff to establish a title to and to recover possession and to eject the defendants from the new *puckha* house built.

The Judge below is of opinion that the original proprietor, by his tacit consent to the resort of the public to the house and to the land on which it stood for the purpose of prayer, has resigned to them any right or title that he himself may have had in the land and in the house. I may observe that both the parties in this suit derive their title from Kadir as the original holder. The Judge says that Kadir "from "the time he allowed the public to build "and to repair and maintain the edifice and "use it for a public purpose without re-"quiring them to pay any rent or without "raising any objection, resigned to the "public any right or title that he himself "had in the land and house." The Judge then finds that this right and title to the house is disputed by Kadir's heirs, but that they have failed to prove any title. The Judge, therefore, thinks that the consent of the proprietor added to the long use of the house by the public entitles

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them by way of an implied grant to the occupation of the same as a house for prayer.

I think that there are grounds to justify this finding. But 10 grounds of special appeal have been taken to this judgment of the Lower Appellate Court; and yet the point that has been argued before us is not involved in any of those 10 grounds. We are told that the point argued is in the 8th grounds of appeal, and that ground is in the following words:—"That simply "because Kadir did not demand any rent "from his neighbours for the religious obser- "vances they performed in his khouka, and "that admittedly with his permission and "did not object to it, and therefore he has "lost all claim and right to the building, "is a conclusion which is opposed to all "law and equity;" but the real objection pressed upon us here now is that because a brick building was substituted in lieu of the thatched house that previously existed, the original title by permission no longer remained, and it is also urged that private rights of occupation co-exists with the use of the house as a house of prayer. This is the only argument now pressed upon us, but we see no force in it. The mere substitution of some bricks for thatch makes no difference in fact. The new building is simply a substitute for the house which has been found by the Court below to have vested in the public by implied grant, tacit consent and user, for the purposes of resort for public prayer and to have been blown down. I think that under the facts found in this case, equity and good conscience do not justify our interference in special appeal; and I would therefore dismiss this appeal with costs.

Paul, J.—The contention of the special appellant in this case can only succeed if we are to divest our mind of all rules and principles of equity and good conscience, which under the law we are bound to administer. The grounds of special appeal seem to have been filed without any proper attention to the decision of the Court below or to the facts found therein and the reasonable inferences drawn therefrom. The grounds of special appeal, moreover, on their very face are many of them irrational.

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* * * * * * * *

I agree in dismissing this appeal with costs.

The 11th May 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge.*

Mistake by Judicial Officer—Section 270, Criminal Procedure Code.

Reference to the High Court by the Judge of the Small Cause Court at Dacca, dated the 22nd February 1871.

(Anonymous.)

Where a Judicial Officer from over anxiety for the due administration of justice in his Court makes a mistake in taking steps against parties whose conduct appears to obstruct the course of justice, somewhat too hastily and without due circumspection, it is not to be presumed that he has acted vexatiously in the sense of Section 270 of the Criminal Procedure Code, or otherwise than in perfect good faith.

Case.—ONE Rajoo Shikdar of Attee, a village very close to Dacca, was cited on behalf of plaintiff in case No. 1271 of 1870 of the Dacca Small Cause Court file, to appear before me as a witness on 22nd November 1870, the day fixed for hearing. On the Nazir's report that the witness was keeping out of the way "for the purpose of avoiding the service of the summons," a proclamation under Section 159 of the Civil Procedure Code was affixed in a conspicuous place of his house on the 27th December 1870. But when the case came on for hearing on the 29th of that month, I found that the witness was not present in Court, nor was any petition filed on his behalf to show cause why he could not come. As such things do very frequently occur here, I handed him over to the Magistrate on a charge of disobedience of summons. But the then Joint Magistrate of Dacca who tried the case, and copies of whose decision and vernacular proceeding I take the liberty of enclosing for the Honorable Court's inspection, considered the witness not guilty, and awarded in his favor a compensation of Rupees 3-8 annas, which he desires me in his roobakary of the 14th ultimo to send to him for payment to the aforesaid Rajoo Shikdar.

May I now be permitted to ask the Honorable Court's instructions as to the fund from which the demand should be met. The commitment, I beg leave to say, was a *bonâ fide* one, and could not, from the very nature

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of things, be one of a frivolous kind. The Magistrate, in ordering a compensation, has held out a premium in such cases of disobedience, and this I fear may go a great way towards lowering the status of the Civil Courts in the estimation of the public here.

The judgment of the High Court was delivered as follows by

Norman, C. J.—Baboo Russick Lall Bose, Small Cause Court Judge of Dacca, finding that a witness who had been summoned to attend in a case before him, notwithstanding such summons and a subsequent proclamation which had been issued under Section 159 of the Code of Civil Procedure, was absent on the day of hearing, directed that a complaint should be preferred before the Joint Magistrate by a peada of his Court that the witness had absconded in order to avoid being served with a summons, and had thereby committed an offence punishable under Section 172 of the Penal Code.

The peada in his information, after stating that he had endeavoured to serve the summons on the witness but could not find him, said "no doubt he kept out of the way."

A summons having been issued by the Magistrate, the accused showed clearly that he had been absent at the house of an uncle in Mymensingh and remained there till after the proclamation. The Joint Magistrate dismissed the case. He says:—"The charge "was brought without any grounds for be-"lieving that the defendant had intention-"ally absconded, and, considering it to be "frivolous, I award the defendant rupees 3-8 "as compensation."

The Joint Magistrate does not say who is to pay the compensation, but sent a roobacary to the Small Cause Court Judge requesting that the amount might be paid.

On the report of the Small Cause Court Judge, we have sent for the papers.

We think that there is no evidence in the proceedings to warrant the Joint Magistrate in finding that the complaint of the Subordinate Judge was frivolous and vexatious so as to justify him in making an order under 270 of the Code of Criminal Procedure, awarding the payment of compensation by the Small Cause Court Judge to the witness.

We quash the Joint Magistrate's order as illegal, and at the same time we desire to express our strong disapprobation of the conduct of the Joint Magistrate in causelessly making such an imputation on a Judicial Officer acting in the execution of his duty.

The Small Cause Court Judge would have done well to have observed the direction of Section 159 of the Code of Civil Procedure, and to have required some proof, which the Nazir's report was not, that the witness was absconding to avoid service of process before issuing the proclamation, and again to have satisfied himself by some enquiry whether the witness was absconding, before making a charge against him under Section 172 of the Penal Code. But it is not because a Judicial Officer from over anxiety for the due administration of justice in his Court makes a mistake in taking steps against parties whose conduct appears to obstruct the course of justice, somewhat too hastily and without due circumspection, that it is to be presumed that he has acted vexatiously or otherwise than in perfect good faith.

The 11th May 1871.

Present:

The Hon'ble H. V. Bayley and G. C. Paul, *Judges.*

Fraud—Prima facie case—Onus probandi—Section 355 Act VIII of 1859.

Case No. 241 of 1870.

Regular Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 20th August 1870.

Gowhur Ali Khan (Plaintiff) *Appellant,*

versus

Mussamut Sakheena Khanum and others (Defendants) *Respondents.*

Mr. C. Gregory and *Baboo Debender Narain Bose* for Appellant.

Messrs. R. T. Allan and *R. E. Twidale* and *Moonshee Mahomed Yusoof* for Respondents.

In a suit by a judgment-creditor to recover the amount of certain decrees by attachment and sale, and to have a certain deed of *bye-mokasa* which was set

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up by the judgment-debtor's wife, set aside as executed in fraud of creditors; where plaintiff shewed the existence in the mind of the judgment-debtor of a sufficient motive for the fraud, and also that the said debtor was in the management of the estate claimed and in the receipt of its rents, it was held that plaintiff had started a *primâ facie* case which shifted the *onus* on the defendant to prove the *bona fides* of the deed.

The true interpretation of Section 355 Act VIII of 1859 is that, when a Court sees that by some inadvertence or mistake a party has not produced some evidence which he was capable of adducing, and that he is likely to be prejudiced by that omission or mistake, which was simply unintentional, undesigned, and accidental, the Court will allow such further evidence to be taken.

Bayley, J.—I AM of opinion that the judgment of the Lower Court in this case must be reversed with costs.

The plaintiff, Gowhur Ali Khan, sued to recover the principal and interest of certain decrees for costs by the attachment and sale of certain landed property, *viz.*, mouzah Rowee, mouzah Jalsookh Deeh, and mouzah Jeen Deeh, and to have a certain deed of bye-mokasa dated the 19th May 1864, and a deed of sale dated the 9th November 1868, and certain proceedings of the Judge dated the 3rd May 1869 allowing the claim of the defendant Sakheena Begum under Section 246 Act VIII of 1859, set aside.

The parties sued are Sakheena Begum, the wife of Habeeboollah Khan, the judgment-debtor, Shea Pershad Sing, the purchaser of Jalsookh Deeh, Nujeeb Khan, the purchaser of Jeen Deeh, and Wajed Hossein and Wahid Hossein.

I may here state that in regard to the defendant Sheo Pershad Sing, it is admitted that the deed of sale to him was signed by Hubeeboollah Khan, the vendor's husband himself, as a witness thereto, and therefore this purchaser cannot be said to have purchased the property without due precaution and in such fraudulent manner as would give the plaintiff any cause of action against him. This is now admitted before us by plaintiff, and Sheo Pershad is discharged from all liability.

The plaintiff's case shortly is that the deed of mokasa and the subsequent deeds of sale under it were all fraudulent and collusive transactions got up in fraud of creditors.

The defendant Sakheena Begum's case was that the deed of mokasa was a *bonâ fide* instrument and the sales to the other defendants were also *bonâ fide*.

The Lower Court has held that the plaintiff has failed to establish the fraudulent character of the deed of mokasa or of the purchaser by the other defendants, and has therefore dismissed the plaintiff's suit.

The plaintiff appeals before us upon the whole merits of the case.

Mr. Gregory for the plaintiff, appellant, has very properly, as above remarked, admitted that as against the defendant Sheo Pershad, he does not wish to prosecute the suit any further.

The main question, therefore, before us is, whether the deed of mokasa in favour of the defendant Sakheena Begum is a *bonâ fide* instrument or not? If it is not, plaintiff could still proceed for the realization of his debts, which amounts to rupees 9,000, against the property of Nujeeb Khan alone.

Now a deed of mokasa is a deed in liquidation of dower, and therefore it must be shown that there was a dower. It is urged, however, that as the questions of marriage and dower were not in issue before the Lower Court, the defendant did not deem it necessary to adduce any evidence on those points. This is an unsubstantial excuse. But the very deed of dower itself pleaded here is not produced.

Now, it was essential for defendant's case in this suit to adduce the best evidence to prove that deed, especially as this was the deed which formed the very basis of the right of the vendor defendant Sakheena and of the subsequent alienations by her to the other defendants. It is said that the deed is of a date anterior to the decree against the debtors, and therefore there was and could be no fraud in the matter; but I need hardly observe, as a matter of Indian judicial experience, that persons in the habit of perpetrating such frauds have recourse to their preparation not only at the time when suits have been actually instituted or are pending against them, but also *before* that period, and this last as a precautionary step lest any future litigation would result in decrees against the parties thus acting.

It is then urged that dower is an ordinary concomitant of all marriages; but if so, what could be easier for the defendant than produce one or two witnesses to these two, as is pleaded, inseparable transactions, marriage and dower. The lady, the father of the lady, and the vakeel who represented her at the marriage, the Cazee, would be the best evidence of both and of each of two matters. However, neither the deed of dower

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or registry of marriage by the Cazee, nor other evidence of these facts has been produced in the case. Again, a dower must be either "*prompt*" or "*deferred.*" The Mahomedan law does not contemplate any other kind. But it is said before us that this was a case of *prompt* dower with the exceptional arrangement that it should *not* be prompt, that is to say, that time was given to the husband to enable him to pay the money. Now, of this arrangement there is no satisfactory evidence. Besides, if any such peculiar arrangement as to the dower had been made at all, it would have been done at the time of the marriage, whereas we have now the lady at her 30th year, and the deed dated the 19th May 1864, so that neither prompt dower nor payment as arranged are shewn.

There is also great discrepancy in the evidence of the witnesses, especially as to the persons who were present at the time of the bye-mokasa. The witnesses 2 and 4 contradict the witnesses 1 and 3. They say that Ahmed Khan and Russool Khan were present at the time, whereas the other two say that Russool Khan alone was present and not Ahmed Khan. It is said that Russool Khan and Ashruf Ali Khan were not only present at the transaction but took an important part in it, but neither the one nor the other has been called in this case.

We are requested, however, to call those witnesses whose evidence we consider material before this Court and examine them here for the better ends of justice, but we think that by adopting such a course we would be on the contrary only lending our aid to the respondent in amending and making up more successfully a fraudulent case.

Looking to the several dates and the jeopardy which Hubeeboollah was in owing to the litigation that was going on against him, it is not unreasonable to suppose that in order to provide against the chance of his ultimate failure in the litigation he should have taken the precaution of entering into the collusive transaction as that above referred to. The witnesses are mostly servants and dependants of the defendants, and their evidence in my opinion has neither that precision as to the details nor clear bearing as to the *bonâ fide* character of the transaction as to lead me to believe in its truthfulness. Naturally, Hubeeboollah, the husband, would be the manager of the estates and the recipient of the rents and would have the command and control of all. The papers might be in the mutated name of Sakheena Begum, and still the possession be really Hubeeboollah's, her husband.

Taking, therefore, the whole facts, circumstances, and evidence in the case into consideration, I think that the respondent has failed to rebut the case started by the plaintiff, and in this view I would reverse the judgment of the Lower Court, and decree the plaintiff's suit as against all the defendants except Sheo Pershad Singh with all costs of this litigation.

Paul, J.—I wish to make a few remarks. It appears that from the year 1854 down even to the present time litigation has been going on between Hubeeboollah on the one side and Gowhur Ali on the other. At the time of the execution of the bye-moknsa of the 19th May 1864 which is in dispute in this case, the fortunes of Hubeeboollah Khan in the suit had met with reversal in the Privy Council, and the case had been sent back for further trial. We also have it admitted on all sides that Hubeeboollah has sold away all his mouzahs except the three which it is said he made over to his wife Sakheena Khanum under the bye-mokasa in dispute in satisfaction of her dower. Under these circumstances, it is not too much to presume in the absence of any strong and convincing evidence adduced in support of the bye-mokasa that there was a sufficient motive existing in the mind of Hubeeboollah to enter into a colorable transaction in order to defeat his adversary in the suit going on, in the event of the ultimate result being against him. The existence of this motive is also clear from the evidence of the witnesses—that of Alhad Singh in particular—that after the execution of the bye-mokasa, Hubeeboollah has been as much in the management of the zemindaree cutcherry and other matters relating to land as he was previous to the execution of the said deed. In fact, it is admitted on all sides that notwithstanding the mere change of name in the papers, the important part that the Hubeeboollah takes in the management of the estates is precisely the same as it was before the execution of the bye-mokasa. It is true that in matters of this description the husband may and does manage for the wife, and consequently it is not easy to say definitively who is the party in possession; but so far as the plaintiff in this case is concerned, we think he has started a *primâ facie* case, firstly, by showing the existence of a

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motive in the mind of Hubeeboollah with a view to defeating his adversary in the event of his success, and secondly, by showing that Hubeeboollah was *de facto* in the management of the estates and the receipt of the rents. These matters being proved by the plaintiff, the onus shifts on the defendant to prove that the deed of bye-mokasa was executed *bonâ fide*. In order to support the deed of bye-mokasa, the defendant is obliged to prove two things ; *firstly*, that the dower was exigible ; and *secondly*, the reason which prompted the person entitled to the dower not to insist upon its being paid at the time that the bye-mokasa was said to have been executed. Now, the evidence as to the dower is the most imperfect imaginable, and as to the reason which induced the wife to put a pressure upon the husband we should have expected to have before us the best evidence that the subject was capable of. That best evidence would consist of the evidence of the lady herself, her father, and Ahmed Khan, her relative, but not one of the three has been examined in this case ; and in lieu of their evidence attempt has been made to call half a dozen dependants and servants whose evidence on their very face is vague, wanting in precision, and certainly not exhibiting even the appearance of truthfulness. It is admitted by the witnesses of the defendant that the governing spirit over these alleged transactions was Russool Khan ; that he was the person to whom accounts would be delivered by the servants : and one witness has the assurance of stating that he actually filed papers for the approval of Russool Khan. Now, if that were so, one would expect to find on the face of the papers some marks of Russool Khan's approval, but there is no mark whatever nor any indication that the papers were ever laid before Russool Khan.

From all that has been said, it is quite clear that in a case like this brought with so much suspicion it was the bounden duty of the defendant to call the best evidence available, and as she has not chosen to do so the Court is justified in saying that she has failed to prove matters which lay within her knowledge, and which she had ample opportunity to prove, if the facts were true, by calling respectable witnesses.

It is stated, however, that the omission in calling the best witnesses ought to be rectified by this Court under the provisions of Section 355 Act VIII of 1859, which enable the Court when it considers necessary to allow further evidence to be adduced. The Privy Council, however, have judicially remarked in the case of Sreeman Chunder Dey *versus* Gopal Chunder Chuckerbutty and others,* reported at page 28, Volume XI, Moore's Indian Appeal Cases, that this power should be sparingly exercised, and I consider that the true interpretation that we should give to the terms of that Section is that when a Court sees that by some inadvertence or mistake a party has not produced some evidence which he was capable of adducing, and that he is likely to be prejudiced by that omission or mistake, which was simply unintentional, undesigned and accidental, the Court should allow such further evidence to be taken ; but it was certainly not intended by that Section that when a party has had the fullest notice, as the lady in this case had in May, 1869, six months before the present suit, that her, title was challenged, and she does not call all the respectable witnesses, that she has now a right to say in the agonies of despair at losing this suit that she should be allowed a fresh opportunity of producing further evidence. I would further remark that in this case we have not the slightest indication that Russool Khan himself was aware of the transactions, for I cannot help thinking that if the interests of the wife and the husband were adverse, Russool Khan would have had the management of the affairs of this lady. Had I any reason to believe that the omission to examime Russool Khan and others was simply an accidental omission, I would have certainly exercised the power that has been given us under Section 355 ; but as I said before, there is not the slightest evidence on the record that it was so, and certainly we should not exercise that power for the protection and assistance of people who do not, as directed by numbers of decisions of this Court, call the best evidence by which their case is capable of being supported.

In this view, I think that this appeal should be decreed, the deed of bye-mokasa should be set aside, and Mr. Gregory's client should be entitled to execute his decree exempting the property of Mr. Allan's client.

* 7 W. R., P. C., p. 10.

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The 11th May 1871.

Present:

The Hon'ble H. V. Bayley and G. C. Paul, *Judges.*

Attestation—Proof—Possession (joint or several)—Alteration of form of decree—Section 16, Court Fees' Act.

Case No. 2559 of 1870.

Special Appeal from a decision passed by the Second Subordinate Judge of 24-*Pergunnahs, dated the* 22*nd August* 1870, *modifying a decision of the Moonsiff of Baraset, dated the* 30*th December* 1869.

Bissonath Chatterjee (one of the Defendants) *Appellant,*

versus

Madhubmonee Dabee (Plaintiff) *Respondent.*

Baboo Khetter Mohun Mookerjee for Appellant.

Baboos Kalee Kishen Sein and *Opendro Chunder Bose* for Respondent.

Where plaintiff prayed for a separation into two equal shares of the whole property to which she and the defendant were jointly entitled, and the Lower Court decreed to her joint and undivided possession of her half share, and she also succeeded in the whole of her claim as before the High Court in special appeal:

HELD that as the separate possession by partition is a form of decree at the option of the plaintiff, the Court was in justice bound to grant her request that the decree should be re-framed in such a manner as to award possession to her in severalty without regard to any stamp fee.

HELD that Section 16 of the Court Fees' Act relates, not to such a case as this, but to that class of cases in which a party losing substantially a portion of his claim is precluded from re-agitating and re-asserting that portion of his claim before the Appellate Court without paying the proper stamp fee.

The phrases "attesting a document" and "proving a document" severally defined and distinguished.

Paul, J.—IN this case, the special appeal merely relates to a portion of the subject matter in suit, namely, as to that portion of the decision of the Lower Appellate Court which holds that with regard to the mâl land sued for, the defendant's mokurureee pottah is not proved. The finding is simply one of fact, and could only be disturbed in special appeal if the party appealing could show either that the Court below had committed an error in law or had so misconceived or misconstrued the evidence as to render the investigation a mis-trial.

The pleader for the appellant endeavours to show that the Lower Court has not come to a clear finding upon the evidence of the witnesses, inasmuch as that Court says that "the defendant's witnesses cannot be believed when they say that it (meaning the pottah) was executed by the plaintiff in her husband's house where the defendant now puts up;" and his argument is that the Lower Court disbelieving the witnesses as to the place where the document was alleged to have been executed did not clearly say that he disbelieved the witnesses wholly.

Now, in my experience, of special appeals, I have hardly seen a ground more finely drawn up than this. It is quite clear that if the locality in which it was alleged the plaintiff had executed the document was not proved as the place in which she had executed it, I apprehend that the evidence of those witnesses who speak to the execution of the document may be rightly disbelieved. Consequently, this ground of appeal entirely fails.

It has been further urged that the Lower Court made a mistake in saying that the pottah is not attested by any witness. It appears to me that the pleader has wholly misconceived the meaning of the word "attested." The Judge was quite right in what he said, namely, that the pottah is not attested by any witness; for on looking at the pottah, it is to be observed that the pottah is not attested. But the pleader has fallen into an error in supposing that the Judge has used the word "attested" for the word "proved." *Attesting a document* is simply writing the signature of a witness by himself in the document in proof of the fact that the document was executed by the party executing in his presence. *Proving a document* is proving it upon the oath of witnesses in Court. But the error into which the pleader has fallen is not one for which he is altogether personally chargeable; because I have frequently observed this erroneous meaning attempted to be put upon the word "*attested.*"

Thirdly, the pleader for the defendant urges that the plaintiff and her brother admitted that the defendant came to their house in 1271 and verbally undertook to

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pay the plaintiff 6 arees of paddy for the mâl, and 3 annas for the lakheraj lands, as a temporary arrangement, that is to say, until a better offer should be made by any other person ; and that he was entitled to hold by his temporary arrangement. Had the plaintiff admitted a temporary arrangement subsisting at the time of the institution of her suit, the pleader would have been quite right. But inasmuch as the plaintiff on the one side alleged that this temporary arrangement had fallen through, and the defendant equally urges it was gone by reason of a mokururee pottah being substituted in its place, it is quite clear that the defendant cannot now seek to hold possession of the land on that ground. Therefore, on the whole, this special appeal must be dismissed with costs.

Then, the plaintiff respondent raises an objection to the form of the decree granted to her by the Lower Court. The pleader for the respondent says that the plaintiff prayed for a separation into two equal shares of the whole of the property, to which she and the defendant were jointly entitled ; but the Lower Court, instead of giving her the decree she prayed for, has decreed to her joint and undivided possession of her half share.

The pleader for the appellant being called upon to resist this contention, raises a preliminary objection which I shall presently notice ; but concedes to the plaintiff that the contention on her part is perfectly correct. If then the preliminary objection taken by the defendant appellant fails, the decree which the plaintiff asks being a proper decree, should be made.

The preliminary objection raised as before mentioned is taken under Section 16 of the Court Fees' Act ; and the words of that Section are :—"When any appeal is presented "to a Civil Court, not against the whole of "a decision, but only against so much there- "of as relates to a portion of the subject- "matter of the suit, and the respondent takes, "under Section 348 of the Code of Civil Pro- "cedure, an objection to any part of the said "decision other than the part appealed "against, the Court shall not hear such ob- "jection until the respondent shall have "paid the additional fee which would have "been payable had the appeal comprised "the part of the decision so objected to."

It is contended under that Section that as the appeal in this case was presented only against a portion of the subject-matter in suit, namely, the decision relating to the mâl land, the plaintiff is not entitled to have the decree re-framed with reference to the mâl land altogether with the other lands, without paying the difference between the amount of the appeal payable for the whole suit and the difference paid by the special appellant and the sum of two rupees paid by the plaintiff.

There are two distinct answers to this preliminary objection with reference to the circumstances of this case. *First*, it is quite clear that so far as the mâl land the subject-matter of the suit is concerned, the decree can be re-framed or properly framed by this Court ; and as the decree must be re-framed with regard to the mâl lands, I apprehend that it is not possible to do so without re-framing it as to the other lands recovered in this suit in some form or other; and as the separate possession by partition is a form of decree at the option of the plaintiff, there can be no reason whatever against re-framing the decree as to the lands other than the mâl lands in such a manner as to award possession in severalty to the plaintiff.

Secondly, I hold that the Section of the Court Fees' Act cited relates only to that class of cases in which a party losing substantially a portion of his claim is precluded from re-agitating and re-asserting that portion of his claim before the Appellate Court without paying the proper stamp fee. In the present case, however, the plaintiff has succeeded in the whole of her claim as before us in this appeal ; and she merely asks this Court, as the decree is before us, to frame it properly, not to alter it substantially nor to grant her anything more than she has obtained a decree for. This we think we are in justice bound to do without regard to any stamp fee, for the express purpose of terminating this litigation, which it is admitted must further proceed unless the decree be re-framed as asked for by the plaintiff.

The special appeal, therefore, must be dismissed with costs, and the decree made in favor of the respondent must be re-formed ; and we direct that the plaintiff be declared entitled to recover possession of the lands decreed to her, and that she be put into possession of the same in severalty by partition between the plaintiff and defendant.

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Bayley, J.—I merely wish to add a few words with regard to what has been said by the pleader for the appellant as to the Court Fees' Act.

It is urged upon us that Government Revenue will suffer if we hear the cross-appeal on the part of the respondent, which is put in on a stamp of two rupees.

The fact is that the object of the Legislature in the Court Fees' Act is to levy stamp duty proportionately on certain forms of cross-appeal under the Civil Procedure Code, *where* increase of land or money will be the result. But in this case the stamps to be given cannot affect the revenue, for no increase of land or money will be the result of the cross-appeal. This cross-appeal is simply to alter the form of decree for the same land, but in severalty and no more. It would be, therefore, unjust, and opposed to the Court Fees' Act not to admit the cross-appeal.

The 12th May 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Contracts (joint and several)—Suit against co-contractor—Jurisdiction.

Case No. 19 of 1871.

Special Appeal from a decision passed by the 1st Subordinate Judge of Midnapore, dated the 3rd November 1870, *reversing a decision of the Moonsiff of that District, dated the 24th June* 1870.

Coomar Narain Doss (Plaintiff) *Appellant,*

versus

Ram Coomar Mytee (Defendant) *Respondent.*

Baboo Bykunt Nath Paul for Appellant.

Moulvie Murhumut Hossein for Respondent.

Plaintiff, defendant, and another party had jointly and severally contracted with Government to do certain work, depositing security and stipulating that a percentage upon the worth of the work done should be retained in the hands of Government to meet the contingency of the Government incurring expense in case of failure on the part of the contractors. The contract was completed by one of the contractors, who received the amount which had been deducted as above, and gave a joint receipt for the same.

HELD that there was nothing in law to prevent plaintiff from recovering as from defendant his share of the said amount.

Such a suit was not one for money due on a contract and was not cognizable by a Small Cause Court.

Kemp, J.—A PRELIMINARY objection was taken by the pleader for the respondent that this being a suit of a nature cognizable by the Small Cause Court, no special appeal lies to this Court. We think that there is no ground for this contention. This is not a suit for money due on a contract. There is no contract as between the plaintiff and the defendant, Ram Coomar Mytee, and therefore this not a suit which is cognizable by the Small Cause Courts. We, therefore, overrule the preliminary objection.

The plaintiff, and the defendant Ram Coomar Mytee, and another party, entered into a contract with the Executive Engineer, Mr. Kimber, whereby the plaintiff, and the defendant Ram Coomar Mytee, Sreemonto Lal and Bykunt Nath, jointly and severally contracted to erect certain embankments for the Irrigation Department in the district of Midnapore. Three thousand rupees Government promissory notes were deposited as security, and it was also stipulated that for every 100 rupees worth of work done a sum of 10 rupees or 10 per cent. was to be kept in the hands of the Executive Engineer to meet the contingency of the Government incurring any expenses in completing the work owing to the failure of the contractors to perform their contract. We may mention here that although 10 per cent. was originally agreed upon, it was subsequently arranged between the parties that 5 per cent only was to be kept in the hands of the Executive Engineer for the above-mentioned purpose.

The plaintiff says that for work done by him and the defendant Ram Coomar Mytee from January to March, and for work done from April to August 1865 by the plaintiff, the defendant Ram Coomar, and Sreemonto, a total sum of rupees 324 on account of the first period and of 766 rupees on account of the second period, was kept in the hands of the Executive Engineer under the terms of the contract. The plaintiff, therefore, sues, alleging that as the contract was completed, he is entitled to one-half of the sum of rupees 324 on the work done by

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him and Ram Coomar, and for one-third of the sum of rupees 766 on the work done by him and by Ram Coomar and Sreemonto; or to a total of rupees 417-5-4.

The Court of first instance gave the plaintiff a decree against Ram Coomar in the first instance, and directed that if Ram Coomar did not pay the amount decreed, the plaintiff would be entitled to recover the amount from Mr. Kimber. On appeal, the Subordinate Judge has reversed the decision of the first Court and dismissed the plaintiff's suit. The Subordinate Judge's decision seems to proceed on the supposition that because Ram Coomar had completed the work, therefore the plaintiff was not entitled to recover the sum claimed. There is nothing in the Subordinate Judge's decision beyond this which requires particular notice.

We think in this case that the decision of the Court of first instance is right and that of the Subordinate Judge is wrong in law, and that it must be set aside and the decision of the first Court restored.

It is admitted that the plaintiff did work from January to March 1865 and from April to August 1865. It is also not shown that the Government were put to any extra expense in completing the contract which the defendants had entered into jointly and severally owing to the failure of the contractors to perform their contract, and therefore that the Government through their Engineer were not called upon to incur any expenses in completing the contract, which were to be met by the amount deposited as security in Government promissory notes as well as by the percentage of 5 per cent. deducted upon the work done. Such being the case, we think the first Court was right in holding that when the contract was completed by one of the contractors, there was nothing in law to prevent the plaintiff, who is admittedly one of the parties who contracted with the Government through their Executive Engineer, from recovering his share of the amount deducted as aforesaid. We have also been shown in the course of the argument that the defendant Ram Coomar did receive and give a joint receipt for the amount which is now claimed as the amount which Mr. Kimber had deducted and kept in lieu of security in case the Government should be put to any expense owing to the non-fulfilment of the contract entered into by the defendants. Such being the case, it seems to us clear that the plaintiff is entitled to recover as from Ram Coomar, who has admittedly received these sums from Mr. Kimber, his share of the money retained for the work done by him with Ram Coomar and the other contractor. We, therefore, decree the special appeal and reverse the decision of the Subordinate Judge with costs.

As Mr. Kimber has not been made a party to this appeal, the decree of the Court is as against Ram Coomar alone, and not against Mr. Kimber.

The 12th May 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Decree—Solehnamah—Proceeding to keep decree alive.

Case No. 43 of 1871.

Miscellaneous Appeal from an order passed by the Second Subordinate Judge of Hooghly, dated the 19th November 1870.

Preo Madhub Sircar (Decree-holder) *Appellant,*

versus

Bissumbhur Sircar and others (Judgment-debtors) *Respondents.*

Baboo Umbika Churn Bose for Appellant.

Baboos Chunder Madhub Ghose and *Hem Chunder Banerjee* for Respondents.

Where parties to a suit which had been decreed entered after remand into a compromise and filed a solehnamah in accordance with which the case was decided:

HELD that an application to execute the solehnamah was not a proceeding taken on the basis of the decree, and being, therefore, illegal, could not keep the decree alive.

Kemp, J.—THE decree-holder, Preo Madhub Sircar, is the appellant. The second Subordinate Judge of Hooghly observes that the decree was passed on the 15th of July 1864. Subsequently, on appeal, the suit was remanded and both parties filed a solehnamah in accordance with which the suit was decided, and the decree-holder took out execution of the said solehnamah on the 20th of March 1868. The Subordinate Judge found that that proceeding to

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execute the solehnamah was not a proceeding taken on the basis of the decree, and therefore it being illegal and no proceeding to keep the decree alive having been taken between July 1864 and the present application on the 27th of September 1869, he held that the application was barred.

It is necessary in this case to trace the history of it with a view to ascertain whether the decree has been kept alive or not by the proceedings taken by the decree-holder. The case has been argued at great length and with much ability. It appears to us clear that the decision of the Subordinate Judge is correct and that this appeal must be dismissed. The decree was passed on the 15th of July 1864 against the respondents. They appealed to this Court, and this Court remanded the case to take further evidence under the provisions of Section 355.

In the meantime, the parties compromised the case and executed a razeenamah and suffeenamah, and the appeal being withdrawn was struck off the file. Subsequently, or in March 1868, the appellant applied not to execute the decree but to execute the solehnamah. Under Section 212, he was bound to state the mode in which the assistance of the Court was required to enforce the decree. On turning to the petition applying for execution, we find that the prayer was for execution with reference to the terms of the solehnamah upon which the High Court's decree was based. It was further stated that the applicant had obtained a certificate under Act XXVII of 1860; that the opposite party had not acted up to the terms of the solehnamah, and therefore the prayer was to execute the solehnamah and to obtain possession with wassilat. Now, it is admitted by the pleader for the appellant that that petition did not apply for execution of the decree, and that the lower Court was not competent to enforce the solehnamah in the execution stage but only by regular suit; but it is contended by him that under Section 15, Act XXIII of 1861, it was the duty of the Court either to return the application for correction to the person making it, or with the consent of such person to cause the necessary correction to be made; that the Court not having done so and having received that application as an application to execute the decree, and having kept it for some time on its file, that he is entitled to deduct the period during which the application was on the file of the lower Court.

In support of this view, a decision published in Volume VI, Weekly Reporter, page 15, has been relied upon by the pleader. That decision contemplates a case where a party put in an application to execute a decree. That application when it was put in was in time, and therefore the learned Judges held that the Judge, if the application was incorrect or irregular, ought to have returned the application for correction as soon as it was put in, instead of keeping it for six months when it became barred under the statute of limitation. But that case does not in any way apply to the case before the Court. In this case, there was no application to execute the original decree; the application was made most distinctly to execute the solehnamah. Now, the terms of the solehnamah altogether differ from the original decree. Baboo Hem Chunder Banerjee, for the special respondent, pointed out several instances in which the solehnamah varied the original decree. It will be sufficient to point out that the claim for wassilat which had been decreed was given up; that each party was to pay their own costs; that the consideration money of certain properties was given up; that certain properties were exclusively made over to the other side which had been claimed and had been decreed, and that land was given in exchange; and there is also a clear alteration of the terms of the decree as to the extent of the shares of the parties. In short, we think it sufficient to say that the razeenamah and suffeenamah altogether did away with the decree and varied it. Subsequently, after the decree-holder found out his mistake, he appears to have made an application to this Court on the 1st of September 1869, or very shortly before he made his last application to execute the decree. That application was not made in the presence of the opposite party nor were they present when the order was passed. The order of the learned Judge, Mr. Justice Macpherson, who sat alone, is to this effect,—that he does not see that he can interfere in the case now; that the appeal to this Court having been simply withdrawn and struck off, the original decree of the Court of first instance stands unreversed; that the proceedings which took place in that Court have not the effect of setting aside or altering that decree; and that it appeared to him that the applicants must move under that decree, and

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not in this Court in the manner proposed by him. Acting upon this suggestion, the appellant, on the 27th of September 1869, sought to execute the original decree; but on that date, either taking as the starting point the date of the decree, namely, 15th July 1864, or the date of the order of the High Court of the 30th of January 1866, he is clearly beyond time. The application which he made in March 1868 not being an application to enforce the decree, there has been no application under Section 20, Act XIV of 1859, to enforce or keep the original decree alive within three years from the last application, which was made on the 27th of September 1869.

We, therefore, think that the Subordinate Judge was right in holding that the application was barred, and we dismiss the appeal with costs.

The 12th May 1871.

The Hon'ble A. G. Macpherson and Onoocool Chunder Mookerjee, *Judges.*

Embankments—Rights — User— Onus probandi.

Case No. 1647 of 1870.

Special Appeal from a decision passed by the Judge of Patna, dated the 18th May 1870, reversing a decision of the Moonsiff of Behar, dated the 7th January 1870.

Heeranund Sahoo (Plaintiff) *Appellant,*

versus

Mussamut Khubeeroonissa (Defendant) *Respondent.*

Mr. R. E. Twidale for Appellant.

Moonshee Mahomed Yusoof for Respondent.

A party claiming to erect a bund in a natural flowing river so as entirely to cut off the water from another party, is bound to prove that he has acquired the legal right to do so by user.

Macpherson, J.—We have some hesitation in interfering with the judgment of the Lower Appellate Court in this instance, because the case has evidently been very carefully tried and considered.

The point in which we think that the judgment of the Court below is defective (and upon which we think it is necessary that the case should be remanded) is that there is no clear finding as to the right of the defendant to erect the bund complained of. The bund is erected in a natural flowing river; and it is alleged by the plaintiff and admitted by the defendant that it entirely cuts off the water from the plaintiff. That being so, it appears to us that it lies upon the defendant to prove his right to erect the bund.

It is not perfectly clear in what light the Judge of the Court below viewed the question of *onus;* and it is not quite clear whether he did or did not mean to find as a fact that the defendant had proved a legal right of user to this bund. We have no doubt, however, that the defendant cannot erect this bund as against the plaintiffs, unless he proves that he has acquired the legal right to do so by user.

The Court must now decide distinctly and expressly for what length of time the defendant has been in the habit of erecting this bund, and whether he has been in the habit of erecting it for such a length of time as gives him a legal right to maintain it as against the plaintiff.

It appears to us that the question as to whether there is or is not water in the old bed of the river has very little to do with the matter which is now in dispute between the parties. We think, also, that the question whether the present bed of the river runs through the defendant's old reservoir, has also very little to do with the present matter. There is no doubt upon the case, as stated by both parties, that the river has for very many years run in the channel in which it is at present; and, that being so, the plaintiff is entitled to have the reasonable and ordinary use of its water, unless the defendant, by having gained the right to erect the bund, is entitled to divert the water from its natural course.

This case, therefore, is remanded in order that the precise nature of the defendant's right in respect of that bund may be inquired into and decided. The parties respectively will bear their own costs of this appeal.

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The 12th May 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge.*

Mortgagor—Putnees — Intermediate holders—Under-tenure.

Case No. 1816 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Jessore, dated the 31st May 1870, *reversing a decision of the Moonsiff of that District, dated the 26th January* 1870.

Moulvie Ahmed Ali and another (Plaintiffs) *Appellants,*

versus

Bhoobun Mohun Dass (Defendant) *Respondent.*

Mr. R. E. Twidale and *Baboo Hem Chunder Banerjee* for Appellants.

Baboo Issur Chunder Chuckerbutty for Respondent.

The mortgagors of a talook, having succeeded in a suit for redemption against the mortgagees and persons to whom the latter had given a portion of the estate in putnee, were put in possession under the decree. They then brought a suit for a declaration of their right to receive rent from two under-tenants (F and M), who had given them a kubooleut, but against whom defendant had obtained a decree for rent in the Collector's Court. Defendant's case was that within the talook was a jumma formerly held by one B who had sold it to him, and that he (defendant) had been paying rent to the mortgagee's putneedar and had settled the under-tenants F and M in B's dwelling house at a certain rent.

HELD that the real question was whether the jote jumma gave defendant a right to possession as against mortgagors re-entering after redemption, *i. e.*, what was its nature, whether mowrosee mokururee, or otherwise.

Norman, C. J.—MOULVIE AHMED ALI and Moulvie Abdool Jubbar, the plaintiffs, brought this suit for possession of 1 pakee and 4 kanees of land included within talook No. 28.

The plaintiff's case is that this talook No. 28 called Mookeem Khan was mortgaged in the year 1202 by the predecessor in title of the present plaintiffs to one Kazee Tureek-oollah; that the plaintiffs brought a suit for redemption against the mortgagees and certain other persons to whom the mortgagees had granted a portion of the estate in putnee, and obtained a decree for possession on the 30th May 1866, and that under this decree they were put in possession in August 1867. The plaintiffs further allege that Futeek Karigur and Mookeem Karigur gave a kubooleut for 5 pakees 15 kanees of land on the 14th Kartick 1274, or 30th October 1867. The defendant alleging that these two persons Futeek Karigur and Mokeem Karigur were his tenants, had sued them for rent in the Collector's Court under the provisions of Act X of 1859. The plaintiffs intervened and the Deputy Collector made a decree in favor of the defendant in the present suit; upon which the plaintiffs in the present suit, Ahmed Ali and Abdool Jubbar, brought their suit to have their right to receive rent from the land in dispute declared.

The defendant's case is that within the plaintiff's talook No. 28 there was a jumma formerly held by one Bissonath Manjee at 20 rupees sicca, or co.s' rupees 21-6 annas; that Bissonath Manjee sold this jumma to the defendant on the 15th of Assar 1262; that after this purchase of Bissonath's interests, the defendant settled Futeek and Mokeem Karigur in the dwelling house which had formerly belonged to Bissonath Manjee paying a rent of 1-4 annas. The defendant says that he has been paying rent to the proprietor of the Meergunge Factory to whom the mortgagees granted a portion of the talook in putnee.

The first Court made a decree in favor of the plaintiffs on grounds into which it is not necessary that we should enter here. But amongst other things, Baboo Grish Chunder Chowdhry, the Moonsiff, held that the defendant could not show that the jumma of 20 rupees had been created by the talookdars before the date of the mortgage; that the defendant could not show what was the nature of the jote jumma, whether it was mowrosee, mokururee, or otherwise.

From that decision, there was an appeal to the Subordinate Judge who laid down two issues. He appears to have wholly misunderstood the nature of the questions which he had to try.

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He first supposes that the plaintiffs had not proved that they ever got a kubooleut from Futeek Karigur and Mokeem Karigur; that the plaintiffs have not proved that the land in dispute was included in talook No. 28; and then he raised a question whether the defendant actually purchased the jumma rights of the land. He dismisses the plaintiffs' case on the ground that they had failed to prove the affirmative of the issues which he had raised.

Now it appears that there is really no doubt whatever, in fact it is admitted by both sides, that the lands in dispute were included in talook No. 28. There is on the record a kubooleut, which appears to have been registered, given by Futeek Karigur and Mokeem Karigur to the plaintiffs. There is very little evidence as to whether that kubooleut was given or not, but apparently it was a matter not disputed. No doubt, when the plaintiffs as mortgagors got possession of the property under their decree, the under-tenants would naturally attorn to them. The real question which the Subordinate Judge had to try and should have tried, but which he did not try, was whether the jote jumma formerly held by Bissonath Manjee and his predecessor Okeel Manjee, which has since passed into the hands of the defendant by purchase, was a jumma which gave to the defendant a right to possession of the land as against the plaintiffs, the representatives of the mortgagors, who have re-entered after the decree for redemption.

There appears to be the evidence of certain witnesses, in particular of two of them, Bukhtar Khan and Mahomed Lall, which shows that the Manjees were in possession from, or from before, the commencement of the present century. If Bukhtar Khan's evidence is to be taken literally and if his estimate of his own age be correct, he proves conclusively that Okheel Manjee was in possession prior to the mortgage in 1202. He may possibly be mistaken as to his age, but certainly his evidence goes to show that the tenure was a permanent and transferable tenure; that it had been held by the Manjees from father to son, and that it was sold to the defendant.

The tenure was sold to the defendant. Of that there is no doubt. If the tenure had not been a permanent and transferable tenure, it was open to the putneedars to have questioned the right of the defendants, and no doubt they would have done so and enhanced the rents. There is strong evidence on the record on which the Subordinate Judge will probably feel himself justified in coming to the conclusion that the tenure was a permanent and transferable tenure.

One question is,—has it been held since the time of the settlement? If not, it appears to us that there is no reason whatever why the Subordinate Judge should not come to the conclusion that it was created subsequent to the settlement and prior to the mortgage.

We have distinct traces of the tenure at the commencement of the present century. The inference is not that it was created at the instant at which the evidence shows that it was an existing tenure, but that it existed then and for some indefinite period antecedently to that time.

There is certainly evidence to justify the inference that this was a mowrosee mokururee tenure, valid not only as against the mortgagees, but as against the whole world.

The case will be remanded for re-trial. Costs of the former hearing and of this appeal will abide the result.

The 15th May 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Section 35 Act XXIII of 1861—Application—Limitation.

In the matter of

Russick Lall Chatterjee and another, *Petitioners*.

Baboo Umbica Churn Banerjee for Petitioners.

An application to the High Court, under Section 35 of Act XXIII of 1861, to order a subordinate Court to receive an appeal, which in ordinary course ought to have been received within 15 days of the original

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decision, ought to be made either immediately upon the quashing of the order of the subordinate Appellate Court, or promptly and without any avoidable delay.

Norman, C. J.—RUSSICK LALL CHATTERJEE and Shaikh Jubboo were convicted under Section 145 of Act X of 1859, of resisting a distraint of property belonging to one Kadir Buksh. They were ordered by the Deputy Collector to make good to the distrainer the sum of 688 rupees, being the value of certain attached crops which had been cut and carried away by them. They were also sentenced to a fine of 25 rupees, and in default of payment to imprisonment for 15 days in the Civil Jail.

From that decision, Russick Lall and Shaikh Jubboo presented an appeal to the Judge, who, on the 17th February 1870, reversed the order of the Deputy Collector so far as it directed the petitioners to pay 688 rupees as damages to the distrainer.

Amanutoollah, as agent on account of Nusserutoonnissa Bibee, the distrainor, applied to this Court under Section 15 of the 24 and 25 Victoria, C. 104, to set aside the order of the Judge upon the ground that the Judge had no jurisdiction to entertain the appeal. This Court, on the 28th January 1871, quashed the Judge's order as having been made without jurisdiction.

On the 10th of March 1871, the petitioners Russick Lall and Shaikh Jubboo presented an appeal to the Collector under the provisions of Sections 155 and 156 of Act X of 1859. On the 13th March, the Collector rejected the appeal upon the ground that it was out of time; that he had no discretion under Section 156 of Act X of 1859 to extend the time for presenting a petition of appeal, and that he was therefore bound to reject it.

On the 24th March, the petitioners obtained a copy of the Collector's order; and now on this 15th of May, they apply to this Court for an order that the Collector should receive their petition of appeal under the 155th Section. The vakeel for the petitioners refers to the 35th Section of Act XXIII of 1861, contending that in any case where it appears to this Court that in hearing an appeal a subordinate Court has exercised a jurisdiction not vested in him by law, this Court may pass such order in the case as to the Court may seem right, and contends that this Court may now make an order that the Collector's Court may receive the appeal. And in support of that contention, he refers to the case of Kristo Indur Roy Chowdhry against Roopinee Bibee, reported in VI Weekly Reporter, Act X Rulings, page 57.

We are of opinion that if the Court is to exercise the jurisdiction of sending to some other Court an appeal which has been presented to and dealt with by a subordinate Appellate Court which had no jurisdiction to entertain it, that the application should be made promptly, at any rate within a reasonable time, after the order of such subordinate Appellate Court has been quashed by this Court as made without jurisdiction. The appeal which the petitioners now seek to present is one which ought to have been presented to the Collector within *fifteen* days after the decision of the Deputy Collector.

It would appear probable that the time for appealing to the Collector had passed when the appeal was presented to the Judge. However that may be, after this Court had set aside the order of the Judge as made without jurisdiction, the petitioners waited *one month and twenty days* before they applied to the Collector to receive their appeal; and after that appeal was rejected by the Collector on the 13th March, they waited for *two months and two days* before making the present application to this Court.

We think that where under Section 35 of Act XXIII of 1861, an application is made to this Court to order a subordinate Court to receive an appeal, which in ordinary course ought to have been received within fifteen days of the original decision, such application ought to be made either immediately upon the quashing of the order of the subordinate Appellate Court, or at any rate promptly and without any avoidable delay.

In the present case, the time which the applicant has allowed to elapse is wholly unreasonable with reference to the time ordinarily allowed for an appeal.

We therefore think we ought not to interfere, and must leave the parties to their rights under the Deputy Collector's order as it stands.

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The 15th May 1871.

Present :

The Hon'ble F. A. Glover and G. C. Paul, *Judges.*

Arrears of rent—Jurisdiction.

Case No. 20 of 1871 under Act X of 1859.

Special Appeal from a decision passed by the Officiating Judge of Rungpore, dated the 27th December 1870, *reversing a decision of the Deputy Collector of that District, dated the 13th May* 1870.

Sharoda Pershad Mookerjee (Plaintiff) *Appellanl,*

versus

Sreenath Mookerjee (Defendant) *Respondent.*

Baboos Sreenath Doss and *Mohinee Mohun Roy* for Appellant.

Baboo Kallee Prosunno Dutt for Respondent.

A suit by a lessor for arrears of rent is triable by a Revenue Court under Act X of 1859, if the principal matter demised under the lease is land and if indigo factories on such land are merely the adjuncts or appurtenances.

Paul, J.—In this case, the plaintiff sued the defendant for arrears of rent due under an ijarah lease in respect of certain zemindaries containing, among other things, 3 or 4 indigo factories.

The Lower Appellate Court has held that the Revenue Court in which the suit was tried had no jurisdiction under the provisions of Act X of 1859 to entertain such a suit, it being in the opinion of the Lower Appellate Court a suit rather for the rents of the buildings and houses, &c., which formed the indigo factory than of lands which were let out for the cultivation of indigo.

It is quite clear, however, that in this case the principal matter demised under the lease was the land of the zemindaries, the two or three indigo factories being merely adjuncts or appurtenances thereto. That being so, the suit was for the arrears of the rent of land, and was therefore triable by the Revenue Court under Act X of 1859.

We do not think it necessary to discuss the cases cited. No one case cited by the Court below goes the length of holding that when the principal subject matter of a lease consists not of buildings or houses but of land, the suit will not lie in the Revenue Court. Here the principal matter demised was land and the three or four indigo factories formed merely the adjuncts or appurtenances thereto.

We, therefore, think that the Revenue Court had jurisdiction to try the present case, and we accordingly remand it to the Lower Appellate Court to be tried on the merits.

The 15th May 1871.

Present :

The Hon'ble J. P. Norman, *Officiating Chief Justice,* and the Hon'ble G. C. Paul, *Judge.*

Enhancement—Notice—Landlord and tenant.

Case No. 1655 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Nuddea, dated the 1st June 1870, *affirming a decision of the Deputy Collector of Kooshteah, dated the 28th November* 1868.

Sree Gopal Mullick (Defendant) *Appellant,*

versus

Dwarkanath Sein (Plaintiff) *Respondent.*

Baboo Sreenath Doss for Appellant.

Baboos Kalee Mohun Doss and *Bunshee Dhur Sein* for Respondent.

In the case of a tenant who has no right of occupancy, a landlord's notice of enhancement under Section 13 Act X of 1859 is valid if it specifies the rent to which the tenant will be subject for the ensuing year and the ground on which enhancement is claimed, even if, among the reasons assigned, are some which will not bear examination. The only limit to the landlord's power of enhancement after notice is the fairness and reasonableness of the rent.

If the notice is sufficient to enable the tenant to meet and contest the landlord's demand in the original suit and on regular appeal, its insufficiency cannot be objected to in special appeal.

When a person in possession of land without paying rent is served by the landlord, under whom he previously held, with notice that he must either quit or pay a reasonable rent, and such person chooses to remain in possession, he must be taken to have assented to become a tenant and is liable to the payment of rent.

Norman, C. J.—This was a suit for rent at an enhanced rate after notice.

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The defendant, the purchaser of the tenure of Mr. Thomas Kenny, holds 782 biggahs, 7 cottahs of land, of which Mr. Kenny held 11 annas as tenant to the plaintiff. The lower Court finds that he held as a ryot.

The notice of enhancement, which bears date the 21st of Choitro 1272, was in the following form :—

"You are in the occupation of the lands" (describing them) "without any settlement "or title ; you have no right of occupancy "under Section 6 of Act X of 1859. You "are an intermediate holder between the "zemindar and the cultivator. Notice is, "therefore, given to you that 15 days after "the receipt of this notice you do present "yourself before me and enter into a settle- "ment of the lands aforesaid at rates of "rent to be fixed upon, so that you may "take a pottah for a few years and give me "a kubooleut. Should you not think it "proper, you are to surrender the land "within the said time. Should you con- "tinue in occupation of the lands in ques- "tion after the expiry of the said time, then, "as the rent paid by you at present is far "below the pergunnah rates and the pre- "vailing rates as well as the rates prevailing "in the surrounding lands, and as at present "the productive powers of the lands and "the value of the produce have increased "without your industry, fair and equitable "rates are fixed for these lands below, and "you shall be bound to pay the rents in "accordance therewith, or khas possession "of the lands shall be taken, and no objec- "tions on your part to the same shall be "admitted."

Then follows a schedule giving a detail of the lands with their measurement and quality and the rates for each sort of land, on the footing of which a claim is made for rupees 1,596, annas 11, pie 8 as rent for biggahs 537, cottahs 7, chittack 1, the amount of the plaintiff's 11 annas share in the land.

The parties went to trial and the case was once remanded, when, after an elaborate inquiry before the second Deputy Collector, the rates were fixed for the different descriptions of land.

On the hearing of the appeal before the Judge from the decision on remand, the objection was for the first time urged orally—for it was not in the written grounds of appeal —that the notice of enhancement was insufficient. The Judge overruled the objection, and the point has again been raised on special appeal from his decision before us. One of the objections which was also urged before us, is that defendant was a middleman and that the Deputy Collector did not go into evidence of the rates paid by middlemen. The defendant does not pretend to be a ryot having a right of occupancy. That being so, the position of the tenant independently of any legislative enactment would be simply this :—he is in possession of land as a tenant whose tenancy is determinable.

The landlord serves him with notice which informs him that he may continue to occupy the land if he pleases at a certain rent, and that if he does not choose to pay such rent he must quit the land. Section 13 of Act X of 1859 says that the notice to enable a landlord to claim enhanced rent *must specify the rent to which the tenant will be subject for the ensuing year, and the ground on which enhancement of rent is claimed.*

The notice served in the present case clearly gives the required information. It informs him with reference to what circumstances the landlord thinks himself entitled to a larger rent than has been hitherto paid.

In the case of a tenant circumstanced as the defendant is, who has no right of occupancy, the only limit to the landlord's power of enhancement would seem to be that the tenant, if he holds over after notice, will not be compelled to pay more than a fair and reasonable rent. The Act requires that the landlord should inform the tenant of the ground on which enhancement is sought, not only that the tenant may be enabled to judge of the reasonableness of the demand and of the prudence of complying with it or otherwise, but that he may be prepared to meet any case which may be made against him if the matter should be litigated.

I may observe that if the notice fairly meets these requirements, I think it matters little that amongst the reasons assigned for claiming rent at the enhanced rate there are some which will not bear examination.

Again, if the notice is sufficient to enable the tenant to meet and contest the landlord's demand without the risk of being taken by surprise ; if he contests the case in the original suit and on regular appeal in the

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Court below without objection to the form of the notice, it appears to me to be too late to take the objection by way of special appeal.

To allow such objections—to dismiss a suit for enhanced rent because some technical objection can be taken to the form of the notice—would be to introduce into rent-suits the intolerable evils of the exploded system of special demurrers which were put an end to for ever in England by the Common Law Procedure Acts of 1852 and 1854.

I confess that I am unable to understand the case of Kaleenath Chowdhry *versus* Humee Bibee, XII Weekly Reporter, 506. It is clear, however, that the notice in that case was very different from that which we have now to consider.

In Buroda Kant Roy *versus* Radha Churn Roy, XIII Weekly Reporter, 163, I understand from the language of the decision, though it is not clearly so stated, that the suit was not a suit *for enhanced rent* after service of notice but a suit for a kubooleut, which is a very different matter. If the learned Judges meant to say that when a person in possession of land without paying rent is served by the zemindar, under whom he has previously held, with notice that he must either quit the land or pay a reasonable rent for it, and after such notice chooses to remain in possession, coming to no settlement with the zemindar, he cannot be adjudged liable to pay rent at a reasonable rate on the footing of the notice, I say, with all respect for their opinion, that I cannot agree with them.

I think that in such a case the person remaining in possession must be taken to have assented to become tenant and to have become liable to the payment of rent, as was held by Lord Wynford in the English case of Roberts *versus* Hayward, 3 Carrington and Payne, 432. The obligation would arise out of the application of a well-known principle of law.

Thus in the Roman Law it was held that an unwritten covenant was made either by the interposition of words or in some other way which signifies or pre-supposes the consent. The illustration given is :—He that receives a deposit though he do not speak obliges himself to the engagements of depositaries.

Neither of the cases cited touches the point we have to consider in the present case.

We have only to say that in the case now before us the notice appears to be sufficient to satisfy the requirements of Section 13 of Act X of 1859.

We, therefore, dismiss the appeal with costs.

Paul, J.—I concur.

The 15th May 1871.

Present:

The Hon'ble E. Jackson and W. Ainslie, *Judges.*

Measurement—Section 10 Act VI (B. C.) of 1862—Procedure—Jurisdiction.

Case No. 2482 of 1870 under Act. X of 1859.

Special Appeal from a decision passed by the Officiating Judge of Mymensingh, dated the 30th August 1870, *affirming a decision of the Deputy Collector of that District, dated the 31st May* 1870.

Mahomed Bahadoor Mojoomdar and another (Defendants) *Appellants,*

versus

Rajah Raj Kishen Singh (Plaintiff) *Respondent.*

Baboos Romesh Chunder Mitter and *Hem Chunder Banerjee* for Appellants.

Mr. R. T. Allan and *Baboos Unnoda Pershad Banerjee* and *Shoshee Bhoosun Sein* for Respondent.

An applicant under Section 10 Act VI (B. C.) of 1862 must first prove what steps he has taken to obtain the knowledge of the tenures in his estate and that he is unable to measure because he is unable to ascertain them. If his averments are objected to, and the Collector proceeds without enquiry, the proceedings are invalid and without jurisdiction.

An applicant under the above Section must be the proprietor of the estate, and not a share-holder only in the proprietory body.

Jackson, J.—I do not agree with the Judge in the view he has taken of the law, Section 10 Act VI of 1862, B. L. C. In the first place, I think it is most important that the applicant to the Collector under this Section should prove that he "cannot "ascertain who are the persons liable to

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"pay rent in respect of the lands or any "portion of the lands comprised in his "estate, and that on that account he is "liable to measure the lands comprised in "his estate." These are the words of the law, and they show the state of facts upon which alone there can be an application to the Collector, and upon which alone the Collector can assist the applicant. The Judge admits that there was no enquiry made to ascertain whether any such state of facts existed. One of the tenants of the estate who objected to the application appeared and alleged that there was no truth in the averments made in the application, and that the applicant had long been in possession and could not be in ignorance of the lands or tenures comprised in the estate, and that the application was only made to harass the tenants. But still no issue was fixed upon the point and no enquiry made regarding it. The result is that the Collector had not jurisdiction to act in the matter, and that all the proceedings must be set aside as invalid. It is worthy of remark that some of the Clauses of the Section are penal, and deprive the ryot of his tenure. It is, therefore, the more important that no proceedings should be taken under this Section except in instances where the interference of the Collector is absolutely necessary, and in such exceptional circumstances as are laid down in the Section. The applicant must first prove what steps he has taken to obtain the knowledge of the tenures in his estate, and that he is unable to measure because he cannot ascertain them. The applicant in this case makes general assertions, but does not state what steps he took to ascertain the tenures, and how he failed.

I think also that the applicant under this Section must be "the proprietor of the estate," not a share-holder only in the proprietory body. It is not right that such share-holders should have separate measurements. Such proceedings would be productive of great annoyance and harassment to the tenants in the estate. The law does not say that any share-holder of an estate may apply to the Collector; and looking to the remarkable provisions of this Section, it seems to me that it should not be extended beyond its plain terms.

I would set aside the Judge's order and dismiss the plaintiff's application with all costs.

Ainslie, J.—I concur.

The 15th May 1871.

Present:

The Hon'ble F. A. Glover and G. C. Paul, *Judges.*

Suit for rent—Limitation—Section 32 Act X. 1859.

Case No. 2531 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Officiating Judge of Backergunge, dated the 29th August 1870, *affirming a decision of the Deputy Collector of that District, dated the 4th June* 1870.

Bykunt Ram Roy (one of the Defendants) *Appellant,*

versus

Mussamut Shurfoonissa Begum and others (Plaintiffs) *Respondents.*

Baboo Sreenath Banerjee for Appellant.

Baboos Rash Beharee Ghose and *Doorga Mohun Dass* for Respondents.

Under Section 32 Act X of 1859 the rent of *any* portion of one year (1273) is recoverable at any time up to the last day of the third year (1276) after its close.

Glover, J.—THERE is no ground for this special appeal. The Judge has found as a fact upon the evidence that the rents were payable, as claimed by the plaintiff, in 10 yearly kists. It is contended that there is no evidence directly to that point, but that is a question which we cannot consider in special appeal. The Judge has found generally upon the whole evidence in the case.

The question of interest has been repeatedly held by this Court to be a matter of discretion with which this Court should not ordinarily interfere.

Another objection, not taken however in either of the Courts below, has been now taken, *viz.*, that according to the plaintiff's own statement his claim as to the rent of 1273 is barred by limitation. But this is not so. Section 32 Act X of 1859 allows a suit for recovery of rent to be instituted within three years from the last day of the year in which thearrear claimed shall have

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recome due. The rent of 1273, therefore, no matter for what portion of the year such bent was due, would be recoverable at any time up to the last day of the year 1276, and on this calculation the plaintiff is clearly in time.

Th special appeal is dismissed with costs.

Paul, J.—I concur.

The 16th May 1871.

Present :

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge.*

Sharer of undivided estate—Rent suit by sharer—Section 108 Act VIII of 1859—Section 4 Act VIII (B. C.) of 1865.

Case No. 32 of 1871.

Special Appeal from a decision passed by the Judge of 24-*Pergunnahs, dated the* 27*th October* 1870, *reversing a decision of the Moonsiff of Sathkhirah, dated the* 26*th February* 1870.

Dwarkanath Chuckerbutty (Plaintiff) *Appellant,*

versus

Dhun Monee Chowdhrain and others (Defendants) *Respondents.*

Baboo Anund Chunder Ghossal for Appellant.

Baboo Tarucknath Dutt for Respondents.

A suit by a sharer in a joint undivided estate for money due to him on account of his share of the rent of an under-tenure situate in such undivided estate, falls within the provisions of Section 108 Act X of 1859.

Where the owner of an undivided estate lets his share to a tenant by giving a pottah and taking a kubooleut, a suit for the rent of such undivided share, treated as a separate and distinct under-tenure, may come under the provisions of Section 4 Act VIII (B. C.) of 1865.

Norman, C. J.—THE plaintiff sues for the declaration of his title and for confirmation of his possession in a half share of mouzah Ramnuggur, and for the reversal of the sale of that estate by the Collector under Act X of 1859. He alleges that in Falgoon 1274, *i. e.*, February 1868, the former holders of the tenure sold it to him for 400 rupees; and that after this sale the defendants under a decree for arrears of rent, which they had obtained against the plaintiff's vendors in 1866, fraudulently put up the tenure to sale and purchased it for 11 rupees.

The first Court found that the sale was fraudulent and illegal, declared that the sale to the defendants be invalid, and decreed that the plaintiff's title be confirmed. On appeal, the Judge finds that the Revenue Court erroneously proceeded in the execution case under the Bengal Act VIII of 1865, and sold the tenure instead of selling merely the right title and interest of the judgment-debtors. He also finds that the Revenue Court exceeded its power and that the sale must be held ineffectual to pass more than the right title and interest of the judgment-debtors, "*that is to say, the interest of the plaintiff to whom it had previously passed.*" The learned Judge then makes a decree declaring that the defendants purchased at the sale the one half share of the interest held by the plaintiff in the under-tenure.

From that decision there has been a special appeal, and it has been admitted on the part of the respondent's vakeel that if the Judge is correct in saying that the sale passed only the right title and interest of the judgment-debtors, such sale does not in any way affect the interest of the plaintiff who had acquired his title by purchase from the judgment-debtors 6 months before the sale under Act X of 1859 under which the defendants have acquired their supposed rights. But it has been contended by the respondent's vakeel that the decision of the Judge is capable of being supported upon another ground, namely, that the sale in the Collector's Court really took place under the provisions of Section 4 Act VIII of 1865, B. C.

Now, in considering this question, it is necessary to look carefully to the facts of the case. The property of which the defendants, as zemindars, held an eight annas share was ijmalee. In 1225, the separate proprietors of the several 8 annas share in Ramnuggur executed separate pottahs, each granting 8 annas of Ramnuggur to the plaintiff's vendors at separate rents. The land was then jungle, and the cultivated portion of it was described in each of these pottahs as 151 beegahs. In pursuance of a provision contained in each of these pottahs, the land was subsequently measured. The measurement took place in the year 1246, and

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upon that measurement jummabundees were drawn up showing the total rental on account of 166 beegahs 15 cottahs and 4 gundahs of land to be 44 rupees and 8 annas, of which the share of the defendants in the present case was 22 rupees and 4 annas. There were three jummabundees; one showing the share in the entire rent payable to the eight annas shareholder, and the other two, each showing the sum of 11 rupees and 2 annas as payable to each of the two other 4 annas shareholders. The defendants sued and got a decree in 1866 for rent on the footing of that jummabundee; and I think it is impossible to doubt that the decree for such rent is rightly and correctly described as a decree given in favor of a sharer in a joint undivided estate for money due to him on account of his share of the rent of an under-tenure situate in such undivided estate. If that be so, the case falls within the provisions of Section 108 Act X of 1859, and the learned Judge Mr. Beaufort was quite right in saying that the sale took place under the provisions of that Section.

I have no doubt that the owner of an undivided estate may, by giving a pottah and taking a kubooleut, let his share of the property to a tenant and agree to receive rent from such tenant in respect of a tenure which may consist of his undivided share; and if that be the case, it may well be that a suit for rent of such undivided share, treated as a separate and distinct under-tenure, may come under the provisions of Section 4 of the Bengal Act VIII of 1865.

In the present case, it is clear that the fresh engagement under the jummabundees was for an entire rent of which the shares were separately allotted, and in respect of such shares the parties entered into such separate engagements as to render them liable to suits for such separate shares of the rent. I think, therefore, that after that engagement evidenced by those jummabundees, it cannot be said that the separate share-holders in the undivided estate created several, distinct and separate undertenures in respect of their undivided shares. The judgment-debtors at the time of the sale under Section 108 had already sold every thing which they possessed in the tenure to the now plaintiff, and therefore the defendants zemindars by that remarkable purchase of property, which had recently fetched 400 rupees, for 11 rupees got nothing. I cannot say that I regret that I am able to reverse the decision of the Judge and declare the plaintiff entitled to the declaration prayed for.

The plaintiff will get his costs in all the Courts.

Loch, J.—I concur.

The 17th May 1871.

Present:

The Hon'ble F. A. Glover and G. C. Paul, *Judges.*

Hid treasure—Rights of finder—Section 8 Regulation V of 1817.

Case No. 98 of 1871.

Miscellaneous Appeal from an order passed by the Judge of Hooghly, dated the 29th December 1870.

Oma Churn Banerjee (*Petitioner*) *Appellant,*

versus

The Collector of Hooghly on behalf of Government (*Opposite Party*) *Respondent.*

Baboo Tarucknath Dutt for Appellant.

Baboo Unnoda Pershad Banerjee for Respondent.

Under Section 8 Regulation V of 1817, the finder of hidden treasure loses his right to the same, if he does not notify his discovery to the Zillah Judge within one month.

Any custom which there might have been in respect to the ownership of discovered treasure was done away with by the enactment of Regulation V of 1817.

Glover, J.—THE appellant in this case objected to the order passed by the Judge of Hooghly in respect of the ownership of certain treasure found in a field within the appellant's zemindaree. It appears that certain persons in the course of digging a field within the appellant's estate came upon an earthen pot containing some 348 rupees. There was a quarrel amongst themselves regarding the appropriation of the money, which the zemindar heard of, and so came in and took it on his own account. The zemindar claims this property in the first place, alleging that he was the person who found it, inasmuch as it was found by his servants while carrying out his orders in digging a field.

If this be so, and if he be entitled to call himself the finder of this hidden treasure, it is quite clear that under Section 8 of

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Regulation V of 1817, he has lost his right, inasmuch as he did not notify the fact of the money being found to the Zillah Judge within one month as required by the Regulation. He then states that supposing that he is not entitled to claim as finder, he is entitled to get the money under the general custom of the country which gives property of this description to the owner of the estate in which it is found.

Now, in the first place, whatever custom there might have been at one time with regard to such matters was done away with by the enactment of Regulation V of 1817, the preamble of which states expressly the reason why that law was enacted, namely, because of the doubt which had arisen as to the disposal of such property on account of the conflicting provisions of the Hindoo and Mahomedan Law; and even were we to suppose, for the sake of argument, that there was such a custom still existing, it is quite clear that the appellant could not be called, in the sense which he seeks, the owner of the soil, inasmuch as the ownership of the soil for such purposes would be the ruling power of the country, that is, the Government.

The appeal is dismissed with costs.

The 17th May 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge.*

Right of way—Purchaser.

Case No. 1835 of 1870.

Special Appeal from a decision passed by the Judge of 24-*Pergunnahs, dated the* 26*th May* 1870, *modifying a decision of the Additional Moonsiff of that District, dated the* 31*st December* 1869.

Nubeen Chunder Bullub (Plaintiff) *Appellant,*

versus

Bhoobun Chunder Mundul and another (Defendants) *Respondents.*

Baboos Kalee Mohun Doss and *Ashootosh Dhur* for Appellant.

Baboos Sreenath Doss and *Hem Chunder Banerjee* for Respondents.

The purchaser of a house acquires the right to the use of a way to a road which had been enjoyed with the house by the vendor if it is not merely a right to a way of necessity, but a particular right over a defined path.

Norman, C. J.—THIS is an appeal from the decision of the Judge of 24-Pergunnahs. The plaintiff claims a right of way by a narrow path-way leading from a house occupied by him along the front of four different houses, or portions of houses, belonging to the defendant Bhoobun Mohun Mundul, northwards to a public road. The evidence proves that the house, of a portion of which the plaintiff has become possessed by purchase from Nobongo Dassee, the widow of Puran Chunder Mundul, was formerly enjoyed by four share-holders, Bhoobun Mohun, Bycunt Nath, Ryechurn, and Puran Chunder, and that a partition took place,—it does not appear when, but probably a very long time ago,—between these four several brothers and co-sharers, by which the portion of the house on the south was allotted to Puran Chunder. Puran Chunder died about 12 years ago, and it is in evidence that during the lifetime of Puran Chunder and subseqnent to the partition, he enjoyed a right of way from the house now in the possession of the plaintiff from a point at the north-western extremity of that house running northwards to the public road. It is also clear that a right of way over that specific path was enjoyed by Puran Chunder in his lifetime, by his widow after his death, and by the plaintiff after his purchase for a period which, we have no doubt upon the evidence, very considerably exceeds 12 years before the commencement of the suit. The result of that evidence is to establish that the plaintiff, who is the purchaser of the house in question from Nobongo Dassee, is now entitled to a right of way over the path in question to the public road. In purchasing the house from Nobongo—assuming as we do for the purpose of the present argument that Nobongo had a right to sell the house—the plaintiff acquired the right to the use of the way which had been enjoyed with the house by the person who sold to him.

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The Judge appears to have taken a mistaken view of the right of the plaintiff. He says :—"I think that the plaintiff cannot "insist on the re-opening of this particular "line of way. All that he can claim is an "easy and uninterrupted means of communi-"cation between his house and the road. "He can claim a right of way to the road, "but not the particular line of way across "the land of the defendant which he has "hitherto used." If the right which was vested in the plaintiff was a mere right to what is called a way of necessity the Judge's view might have been correct, but what the plaintiff in the present case establishes by the evidence, not only of his own witnesses, but of those of the defendant, is a specific property,—a particular right of way over a defined path. One of the defendant's own witnesses says that in the latter part of Puran's life, he never knew him to go through the house now occupied by the defendant or to use any other way except the path in question.

Several objections have been taken on the part of the respondent to the maintenance of the present action. Now, we propose to consider one or two of the objections to the maintenance of the suit in detail. The first point which it is material to consider is, whether the defendant having built over the path in question and obstructed the plaintiff's right of way, the plaintiff has precluded himself by acquiescence from coming to the Court to ask for the removal of the obstruction.

The defendant first obstructed the way on the 31st Jyest 1276, and the plaintiff, on the 9th Assar, that is, 9 days afterwards, instituted this suit in the Moonsiff's Court praying for the removal of the obstruction. It is clear, therefore, that the plaintiff instantly resorted to the Court to ask for relief from the obstruction.

The next objection was that the plaintiff, in praying for the removal of the obstruction in the road, is not acting in good faith. It was contended that the plaintiff is not merely seeking to enforce his legal right, but is doing so for the purpose of harassing and vexing the defendant. But unfortunately for the defendant it is in evidence that the defendant, at the time when he commenced the obstruction, heard that the plaintiff objected to it, upon which he threatened the plaintiff and said that "he would see "how the plaintiff liked *eating* his own house," clearly showing that he meant to give the plaintiff, who is a comparatively poor man, a *taste* of the costs and expenses of litigation. We think after that it does not lie in the mouth of the defendant to complain that the plaintiff insists on his legal rights.

The next point is that the suit having been instituted on the 9th Assar 1276, on the 18th Assar, that is 9 days afterwards, the plaintiff sold his property to one Koonj Behary Pâl for 600 rupees with a number of stipulations as to the payment of costs, which shew pretty clearly that this suit, as now brought, is the suit of Koonj Behary Pâl who has some grudge or other against the present defendant. One of these stipulations was that "if the plaintiff "is successful, Koonj Behary Pâl is to get all the costs." Certainly, that is not an agreement which the Court ought to favor, and we should not be doing justice if we allowed Koonj Behary to reap any benefit from it. Therefore, we think that while ordering the defendant to remove the obstruction and re-open the way which existed before the commencement of this suit within 6 weeks after the service on him of this decree, we ought not to give costs in this suit, but leave each party to bear his own costs.

The 18th May 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Estoppel—Res-adjudicata.

Case No. 63 of 1871 under Act X of 1859.

Special Appeal from a decision passed by the Judge of 24-Pergunnahs, dated the 27th October 1870, *modifying a decision of the Deputy Collector of Diamond Harbour, dated the 31st March* 1870.

Aukhil Chunder Mookerjee and others (Plaintiffs) *Appellants*,

versus

Shib Narain Ghose (Defendant) *Respondent*.

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Baboos Chunder Madhub Ghose and *Hem Chunder Banerjee* for Appellants.

Baboo Bama Churn Banerjee for Respondent.

Such matters only as are decided between the parties by the decree in the suit, ought to be treated as binding against them in subsequent litigation. No part of the reasoning on the findings of fact which have induced the Court to come to its decision is binding as between the parties further than for the purposes of the particular decision.

Norman, C. J.—THIS is a suit for the rents of certain lands within the plaintiff's zemindaree at an enhanced rate after notice; to which the defendant made answer that his tenure was not liable to enhancement, because the land had been held at a rent which had not been changed from the date of the permanent settlement.

The zemindaree is held in two shares, of one of which—the 7 annas share—the plaintiffs became the purchasers at a sale in 1861. The plaintiffs in 1863 brought a suit against the present defendants praying for a kubooleut at an enhanced rate of rent.

After a remand by this Court on special appeal from the decision of the Judge, the Deputy Collector of Diamond Harbour, Mr. Pratt, by a decision dated the 31st May 1865, *seems* to have held—for we cannot say that he distinctly and in direct terms decided—that the tenure was not protected from enhancement, because he thought that the evidence produced by the defendant as to uniform payment of rent for 20 years was suspicious and unsatisfactory. But he went on to try the issue as to whether the defendant was liable to enhancement, and ultimately he held that on account of the then recent cyclone the tenant could not afford to pay higher rent; and he therefore dismissed the suit.

The present suit was brought on the 8th July 1868. The Judge finds that the receipts of rent which have been produced by the defendant are genuine, and that certain *tokas* or accounts of collections made during the years 1265, 1267 and 1268, during which time the 7 annas share was in the possession of the 9 annas share-holder, are also genuine, and that these dakhilahs and *tokas* prove that the rent was not varied for a period of something like 40 years. On these grounds, the Judge dismisses the suit and declares the defendant's tenure is not liable to enhancement.

It is objected before us on special appeal that the finding of the Deputy Collector in his decision of May 1865 that the tenure was not one protected from enhancement ought to have been treated by the Judge as conclusive in the present suit.

The Judge says:—"The judgment (of the "Deputy Collector of May 1865) was not "final in regard to the issue of a fixed "rental, because it did not rest on the Court's "finding on that issue. It proceeded on "other grounds; and as the suit was dis-"missed the defendant had no opportunity "of appealing or of contesting the point in "the Appellate Court since the plaintiff does "not prefer an appeal."

We think that the Judge is right in holding that the finding of the Deputy Collector in 1865 was not a decision binding on the defendant, or which can be treated as having bound the defendant by way of estoppel or otherwise in the present suit. It was open to the defendant, notwithstanding that finding, again to contest the question of the liability of his tenure to enhancement.

According to the English rule, the finding on an issue between the same parties in a former suit is only conclusive by way of estoppel in those cases where that which is called the *judgment* in England, and which is equivalent to what is called the *decree* here, proceeds on the very point decided by the verdict or finding of fact on the issue. A judgment is not conclusive as to any matter which came collaterally in question;—see The Duchess of Kingston's case—Per Sir William DeGrey, Lord Chief Justice of the Common Pleas, delivering the unanimous opinion of the Judges in the House of Lords, Smith's Leading Cases, 424. Lord Ellenborough in Outram *versus* Moorwood, III East, 346, has rightly treated the question as being whether the defendant was estopped by a *former verdict* and *judgment* on the same point in the action on trespass.

In Barrs *versus* Jackson (1 Yo. and Co. C. C., p. 585) Vice-Chancellor Knight Bruce stated the rule against re-agitating matter adjudicated to be subject to this restriction: "that however essential the establishment of "particular facts may be to the soundness "of a judicial decision; however it may "proceed on them as established; and how-"ever binding and conclusive the decision "may, as to its immediate and direct object, "be, those facts are not all necessarily

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"established conclusively between the par-"ties, and either may again litigate them "for any other purpose as to which they "may come in question ; provided the im-"mediate subject of the decision be not at-"tempted to be withdrawn from its operation "so as to defeat its direct object."

These decisions show that such matters only as are decided between the parties by the decree in the suit ought to be treated as binding against them in subsequent litigation. No part of the reasoning on the findings of fact which have induced the Court to come to its decision, are binding as between the parties further than for the purposes of the particular decision.

In Taylor on Evidence—Section 1528,—it is pointed out that if for any cause "no final judgment of the Court has been pronounced upon the matter in issue, the proceedings are not conclusive."

Now in the case before us the final decision of the Court, that is, the final decree of the Collector, did not proceed on his decision, such as it was, that the tenure was not liable to enhancement. The decree was a decree dismissing the suit for a kubooleut at an enhanced rate. The reason which immediately induced the Collector to pronounce that decision was the absence of proof that the rate demanded was reasonable under all the circumstances. Incidentally, and not as a matter on which his decision proceeded, the Collector expressed an opinion—I can scarcely put it any higher, but assuming that he *decided* the matter, the Collector decided—that he was not precluded from proceeding to enhance by any proof which the defendant was then able to give before him of the fact that he held from the time of the permanent settlement at a fixed rate.

The special appellant has failed to establish the soundness of the view of law which he has put before the Court, and we see no reason for disturbing the judgment of the Judge on that point.

The other point urged before us is one purely of fact. The Judge, on the evidence, has come to the conclusion that the tenure was not liable to enhancement. Whether that decision is right or wrong, it is not open to question on special appeal.

We dismiss this appeal with costs.

The 18th May 1871.

Present :

The Hon'ble L. S. Jackson and A. G. Macpherson, *Judges.*

Jurisdiction—Act XL of 1858—Manager's powers.

Case No. 24 of 1871.

Miscellaneous Appeal from an order passed by the Judge of Sarun, dated the 1st November 1870.

Sheo Prosunno Chobey (Petitioner) *Appellant,*

versus

Gopal Surn (Opposite Party) *Respondent.*

Baboo Omurnath Bose for Appellant.

No one for Respondent.

Per Jackson, J.—Where a manager is appointed under Act XL of 1858, the Civil Court has no authority to restrict or limit by description or otherwise the nature or extent of the minor's property.

Jackson, J.—In the order made by the Judge in this matter which the appellant complains of, the Judge appears to have gone beyond his strict authority.

Act XL of 1858 empowers the Civil Court, under certain circumstances, to appoint managers to the property of minors. Those managers, when so appointed, are vested with authority to take and manage the property of minors, and are bound to do so to the best of their judgment and ability. The Court has no authority to restrict or limit by description or otherwise the nature or extent of the minor's property ; and if any question should afterwards arise of the manager having improperly given up or mis-managed the property belonging to the minor, the order of the Judge made on this occasion will certainly be no protection to him. The Judge's order, therefore, in this respect, appears to be incorrect ; but it does not appear that the appellant before us has any *locus standi* upon which he is entitled to come in and complain of the order. The appeal, therefore, so far as he is concerned, must be dismissed, but the Judge should consider the observations which I have made and regulate himself accordingly.

Macpherson, J.—Without saying that the Judge's order is right, I agree in thinking that this appeal must be dismissed.

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The 18th May 1871.

Present:

The Hon'ble L. S. Jackson and A. G. Macpherson, *Judges.*

Decree—Judgment—Execution.

Case No. 58 of 1871.

Special Appeal from an order passed by the Officiating Judge of Tirhoot, dated the 8th December 1870, *reversing an order of the Sudder Moonsiff of that District, dated the 24th June* 1870.

Mirza Mehdee Beg (Judgment-debtor, Objector) *Appellant,*

versus

Zellal Thakoor and others (Decree-holders) *Respondents.*

Mr. R. E. Twidale for Appellant.
No one for Respondents.

Where a decree of the Sudder Court was in general terms, *viz.*, "that the appeal be decreed with costs," though the judgment indicated a different intention:

HELD, that the decree ought not to have been used to obtain execution for the whole of the claim, but restricted to that which it was the manifest intention of the Court to grant.

Jackson, J.—IT certainly does appear, as alleged by the special appellant, that the Judge has put an erroneous construction on the order of the late Sudder Court made in December 1860. The decree of that Court being in extremely vague and general terms, namely, "that the appeal be decreed with costs," resort should have been had to the judgment which accompanied it,—in the first place to the Oordoo judgment which was filed with the decree, and if that did not clear up the matter, then to the original judgment itself in English, a copy of which could have been easily obtained. It appears clear enough, even from the Oordoo,—at all events from the English judgment,—what relief the Sudder Court intended to give; and that was, that the plaintiff having succeeded in obtaining a decree in respect of the share owned by one Meher Ali out of the property which he, the plaintiff, claimed, ought not to have been made to pay the costs of the defendants as to the whole of the property, but that he ought himself to have recovered a decree with costs as to the share of Meher Ali. It seems singular that a decree should have been made without specification of that share, and that the plaintiff should have been satisfied with such a decree; but certainly the plaintiff ought not to be allowed to make use of such a decree as he obtained, for the purpose of obtaining, as he appears to have obtained, execution in respect of the whole of his original claim, but ought to be restricted to that which alone it was the manifest intention of the Sudder Court to give him.

The order of the Judge, therefore, in so far as it allows the plaintiff to execute the decree for the entire two annas of the property in dispute, with costs, must be reversed, and he will pass a fresh order in accordance with the decree of the Sudder Court as explained.

Macpherson, J.—I am of the same opinion.

The 18th May 1871.

Present:

The Hon'ble L. S. Jackson and A. G. Macpherson, *Judges.*

Proceedings in execution.

Case No. 78 of 1871.

Miscellaneous Appeal from an order passed by the Officiating Judge of Gya, dated the 23rd December 1870, *affirming an order of the Subordinate Judge of that District, dated the 7th May* 1870.

Moonshee Syud Ameer Ali (Decree-holder) *Appellant,*

versus

Saheb Singh (Judgment-debtor) *Respondent.*

Mr. R. E. Twidale for Appellant.

Mr. R. T. Allan and *Baboo Unnoda Pershad Banerjee* for Respondent.

Where an applicant for execution did nothing beyond depositing tullubana without indicating the mode in which execution was to be obtained, his proceeding was held not to be a *bonâ fide* proceeding keeping his decree alive.

Jackson, J.—IT appears to us that the order of the Judge in this case is supported by the Full Bench Ruling* to which he

* 10 W. R., F. B., p. 8.

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refers. The Judge finds, and apparently, he had ground for finding, that in point of fact there had been no proceeding taken by the judgment-creditor to enforce his decree within three years next before the 8th June 1864; and in point of fact, the order of the Court executing the decree dated in November 1861 may be taken as affording some evidence, coupled with the previous order which the Court had made, that the decree-holder in fact was not taking the proceedings that he might and ought to have taken if he intended to execute his decree.

It seems that having applied generally for execution, he was desired to put in a list of the property of the judgment-debtor which he desired to attach, but he never put in any such list; in short, never went beyond merely depositing tullubana for the service of notice.

The case of the Maharajah of Burdwan, which is to be found in XIV Weekly Reporter, page 21, Privy Council Rulings, is quite distinguishable from the present case. In the Burdwan case, the Court executing the decree, it appears, had before it a substantial application on the part of the decree-holder for the arrest of the representative of the original debtor, and the question arose whether such representative, being a lady of rank, was liable to be taken in execution or not. The Court finally decided that she was not so liable, and the Privy Council, in disposing of that question, remarked that up to the time when that order was passed, there was a proceeding to keep in force the judgment, decree, or order originally made, and that that proceeding was pending "every day of the time "and every hour of every day" until it was disposed of by the order above referred to.

In this case, however, there was no proceeding of that sort pending, because all that the execution creditor had done was to ask for execution without indicating the mode in which execution was to be obtained. The Court called upon him to supply that omission by filing a list of the property to be attached, which however, he never did. Finally, the Court, on his continued omission, ordered the case to be struck off. We think, therefore, that the Judge was justified in holding that the plaintiff was barred, and that this appeal ought to be dismissed with costs.

The 18th May 1871.

Present:

The Hon'ble A. G. Macpherson and Onoocool Chunder Mookerjee, *Judges.*

Jurisdiction—Priestly ministrations—Sharer's rights—Right of action.

Case No. 155 of 1870.

Regular Appeal from a decision passed by the Subordinate Judge of Patna, dated the 10th May 1870.

Mugjoo Paudaen (Plaintiff) *Appellant,*

versus

Ram Dyal Tewaree and others (Defendants) *Respondents.*

Baboos Mohesh Chunder Chowdhry and *Romesh Chunder Mitter* for Appellant.

Mr. M. L. Sandel for Respondents.

A suit will lie against priests for a certain share of their earnings, if brought on the ground of partnership or of contract, express or implied; but in the absence of such partnership or contract such a suit will not lie even against a priest newly appointed by the jujman, simply on the ground of hereditary right to perform the ceremonies of a particular family, such right being not enforceable at law.

A party seeking to establish his right to share in the ministrations of officiating priests, is entitled to bring a civil suit to have his rights ascertained and declared, if based partly on kobalahs which are contested, and partly on the right of succession.

Mookerjee, J.—THE object of this suit is two-fold. The plaintiffs seek in the first instance to establish their right to share in the ministrations on the river bank at Patna from the ghaut of Maharajah Ram Narain Singh to the garden of Jafer Khan by purchase from Ram Dyal and others under 4 kobalahs, dated respectively 11th November 1857, 15th January 1859, 15th August 1863, and 2nd October 1866, plaintiffs being members of the same family with defendants. *Secondly*, the plaintiffs pray that a sum of 75 rupees 9 annas be awarded to them, being a moiety of rupees 151-2 annas received by the defendants on the occasion of the shradh of one Kaloo Misser, as by virtue of the aforesaid kobalahs they are entitled to a half share of all offerings received by the defendants at the above ghaut. The plaintiffs allege that having sued the defendants in the Court of Small Causes for the recovery of this amount, the defendants raised the false plea that the

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kobalahs were not *bonâ fide* documents executed on receipt of any consideration, but were mere paper transactions executed benamee in the name of the plaintiffs for a certain purpose. It is then alleged that in consequence of this plea the Court of Small Causes refused to entertain the suit, but dismissed it as involving questions of title which that Court had no jurisdiction to try, referring plaintiffs to the ordinary Civil Court for redress.

The plaintiffs have, consequently, instituted this suit for an adjudication of their right on the ground that they have actually and *bonâ fide* purchased from the defendants their share of the offerings, and have paid full and good consideration for the same. The plaint is not very full and explicit, but there appears to be no doubt whatever that one of the objects of this suit is to have a declaration from the Court that the purchases are not nominal but *bonâ fide*. I am of opinion that it is quite competent to a Civil Court to entertain a suit of this nature. The simple question to be determined in such a case is the question which the Subordinate Judge has laid down for decision in the 1st issue* of fact in page 13 of the printed book.

The other prayer contained in the plaint is also, I think, a matter cognizable by theCivil Court, though it may be also cognizable by the Court of Small Causes. The plaintiffs allege that although the defendants have sold to them a moiety of their right to share in the ministrations at a particular place of the river bank, the defendants have taken the whole of the offerings and would not give to the plaintiffs their legitimate and proper share of them which they had expressly covenanted and agreed, for a valuable consideration, to give to them by the several kobalahs executed by the defendants in plaintiff's favor. This would be a matter of simple contract, and the only material points that would arise for determination would be whether by the terms of the deed the defendants have agreed to allow the plaintiffs to share in the profits arising from the ministrations in the ghaut, and whether the defendant having obtained articles of a certain value on account of these ministrations have refused to give plaintiffs their share of those articles.

* [This issue was to the following effect:—Whether the purchase of the alleged share of the birt by plaintiffs and their ancestors was *bonâ fide*, or fraudulent, the purchase having been made without consideration, and whether plaintiffs and their ancestors have had possession of it since the time of their purchaser.]

I think the Subordinate Judge was wrong in holding that—"If the plaintiff's alleged "right on *persons* be recognized on ground "of her being a hereditary priestess, it will "be improperly interfering with the liberty "of men who have an interest and inalien- "able right to choose their own priests for "performance of ceremonies which the Hin- "doo Law which governs their case pre- "scribes." This is not a suit by a priest to enforce any right as against jujmans, but is one for a share of the fees obtained by the members of a family of purohits, one of whom had transferred his share to the plaintiff for a valuable consideration, the plaintiff being also a member of that family.

Suppose A was a purohit of a family and was in receipt of all the fees paid by that family on occasions of religious ceremonies. Suppose A died leaving 2 sons, one a major and another a minor, and the jujmans being still anxious to employ the descendants of their late priest, call in the adult member to officiate at the ceremonies in their family because he was a son of their priest, and with a view that the members of the family of his late priest be supported by the fees given on such occasions to the officiating priest, showing no inclination to prefer the one member to the exclusion of the other; I apprehend that under such circumstances the minor son of A will be entitled to share with his brother the offerings received by him at these ministrations. This will not be interfering with the liberty of the jujman to employ whomsoever they like, but will be furthering the object the jujmans had in view.

In the present case, if Ram Dyal had, as a matter of contract, agreed and stipulated to share with the plaintiffs the fees that would be received by him from persons who have to perform certain ceremonies at a particular place, he would, I think, be bound to fulfil his part of the contract and give the plaintiff the share he has covenanted to give for a valuable consideration, supposing the first issue is decided in plaintiff's favor. The decisions in in V Weekly Reporter, page 222; X Weekly Reporter, page 114; S. D. for 1852, page 405; S. D. for 1855, page 2; and S. D., 1857, page 362, are in point and show that a suit brought against a defendant on the ground of inheritance or contract will lie in the Civil Court though it be for fees paid by a jujman to the defendant as the officiating priest. I wish it to be clearly

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understood that I perfectly agree with the decisions quoted by the respondent's pleader that a suit will not lie against the jujman for fees paid by him to the officiating priest either on the ground of hereditary right of priesthood or of any contract entered into with the plaintiff by the priest who officiated. The right of a purohit to officiate at the ceremonies of a family because his ancestors had performed the ceremonies before, has been justly held to be a right not enforceable at law. No one can compel another to employ him as a purohit against his will, and a Court of justice has no power to enforce its order against the conscience of the party. But I hold that a suit will lie against priests if the suit is brought "on "the ground that a partnership existed "between the defendants and himself "(plaintiff) or that they are bound by a "contract, express or implied, to give "him (plaintiff) a certain share of their "earnings." Where there is no such partnership or no such contract, a suit will not lie even against a priest who has been but newly appointed by the jujman, by any member of the family of the old priest simply on the ground of a hereditary right to perform ceremonies of a particular family, because the fees paid by a jujman to the priest who officiates at ceremonies performed by him are, according to the custom prevailing in Hindoo families and also according to the Hindoo law, voluntary gifts paid for work actually done or for the sake of spiritual benefit supposed to flow to the donor when his gifts are accepted by pious and holy Brahmins. These gifts can never ordinarily be subject to partition either by the Hindoo law or any other systems of law.

As regards the claim of the plaintiff against the other members of the family of his vendors who are no parties to the contract and who are under no obligation to share with the plaintiffs, the rule laid down in the decision of 1857 seems to me to be the proper rule which the Subordinate Judge ought to follow. In page 366, Mr. Trevor says that "it appears to me "that if a jujman or a party in the exer-"cise of the liberty allowed to him pays "a sum as fees to an *individual*, so as to "show that they were intended for the "*individual*, no claim can be preferred by "others though they may be joint heirs "in the family purohitship to the property "so received; but that if the fees be paid "to a person only as a member of the "collective body of which he is an unit, "the claim is admissible and should be "decided in accordance to the rules by "which ordinary cases of inheritance are "decided."

In the present case, if the Subordinate Judge finds that the fees paid at Kaloo Misser's shradh had been paid by the heirs of Kaloo Misser to the collective body of priests, plaintiff would be entitled to share in the offerings in proportion to his share in the rights of that collective body; but if, on the other hand, it is proved that the party who made the gift gave it only to one member of the family for services done by him for his *individual* benefit, the plaintiff will not be able to recover from him any portion of the fees so paid.

The case must go back to the Subordinate Judge for trial on the merits.

Macpherson, J.—I agree in thinking that this suit will lie so far as it seeks to establish as against the defendants the right of the plaintiff to share in the ministrations at the ghat in question. But the persons who use the ghat will not be affected by any decree which may be made in this suit. The decree can affect those only who are defendants and contest with the plaintiff the right to share in the performance of ceremonies and receipt of fees There can be no decree directing any person or class of persons to employ the plaintiff or to pay fees to her.

I do not think that the proceedings in the Small Cause Court are any bar to the present suit, even so far as it seeks to recover the 75 rupees which are claimed as the plaintiff's share of fees actually received. The matters in dispute between the parties might doubtless have been inquired into and decided in the Small Cause Court in the suit for the 75 rupees. They were not, however, in fact inquired into or decided. The total value of the right which the plaintiff claims and now seeks to establish is quite beyond the jurisdiction of the Small Cause Court; and under the circumstances, it appears to me that the plaintiff is entitled to bring this suit to have her rights ascertained and declared, based as they are, partly on the kobalahs which are contested and partly on the right of succession.

The case is remanded. The Lower Court must go fully into the merits, and must decide whether, under the kobalahs on which

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she relies, the plaintiff has any (and if any, what) right to share in the ministrations at this ghat as against the defendants, or as against any (and which in particular) of them.

If the Court shall be of opinion that the plaintiff has the right, the issue as to the 75 rupees must then be gone into and decided.

The costs of this appeal will follow the result of the remand.

The 19th May 1871.

Present:

The Hon'ble G. Loch and G. C. Paul, *Judges.*

Necessitous debtor — Attachment — Small Cause Court—High Court.

Reference to the High Court by the Small Cause Court for the Suburbs of Calcutta including Howrah, dated the 22nd March 1871.

A. Harris, *Judgment-creditor,*

versus

R. Britain, *Judgment-debtor.*

The High Court is not authorized by law to interfere for the relief of a necessitous judgment-debtor whose salary has been attached in execution of a decree of a Small Cause Court.

Case.—The judgment-debtor in this case, an ex-employé of the Eastern Bengal Railway Company, whose salary was attached under mesne process, moves the Court to obtain a small sum from the money attached for his subsistence; otherwise he will have to seek refuge in the alms house. The Court considers the judgment-debtor to be in distressed circumstances and is disposed to make a small allowance out of the money attached, but is in doubt whether it has the power to do so. The Insolvent Court in Calcutta generally allows a debtor seeking relief a portion of his salary for subsistence, and the analogy between the two cases appears sufficient to warrant a Small Cause Court to relieve a necessitous judgment-debtor. As there is no law or precedent bearing on the subject, I have the honor to solicit the favor of your laying before the Hon'ble the High Court for their opinion the following point:—

Whether, after attachment of a judgment-debtor's salary, a Small Cause Court can allow him out of the money held in attachment a small sum for subsistence.

The judgment of the High Court was delivered as follows by—

Loch, J.—We think that this Court cannot interfere in this matter. The analogy attempted to be drawn between the Small Cause Court and the Insolvent Court does not hold in any way.

The Judge when decreeing the case might have ordered the money to be paid by instalments, and the defendant tells us that the Judge was applied to to make the decree in this form, but the application was refused.

That being so, we know of no law which enables us to interfere in the matter, and we accordingly decline to interfere. The Small Cause Court Judge will be informed of this.

The 19th May 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Corporate bodies—Agents—Form of action—Sections 73 and 350, Civil Procedure Code.

Case No. 148 of 1871.

Special Appeal from a decision passed by the Second Subordinate Judge of Hooghly, dated the 29th November 1870, *reversing a decision of the Moonsiff of Sulkeah, dated the 15th August* 1870.

Nubeen Chunder Paul (Plaintiff) *Appellant,*

versus

Mr. Cecil Stephenson, Agent of the East India Railway Company (Defendant) *Respondent.*

Baboos Hem Chunder Banerjee and *Bama Churn Banerjee* for Appellant.

Baboo Mohinee Mohun Roy for Respondent.

Where a corporate body, *e. g.*, the East India Railway Company, is sued, not in its corporate capacity, but through an agent, the suit is brought in a wrong form.

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As, in such a case, the corporate body is not likely to be affected by the result of the suit, a Court is justified in refusing an application to make such corporate body a party in the suit under Section 73 Act VIII. 1859.

Where a decree makes a party liable who is not liable (*e. g.*, an agent instead of the corporate body whose agent he is) the error is one affecting the merits within the meaning of Section 350, Civil Procedure Code.

Kemp, J.—THIS suit was instituted by the plaintiff, special appellant, to recover the sum of 995 rupees 8 annas 10 pie, being the amount of a claim which he had for a certain quantity of bricks which he alleges he prepared for the East India Railway Company. In the plaint, he states that the District Engineer of Burdwan, Mr. Phillips, gave an order, that on the 13th of November 1866, Mr. Elam, an Inspector, gave a further verbal order to the plaintiff, to prepare 10 lakhs of bricks. It is not necessary now to enter into the conditions of the contract between the parties. It will suffice to say that the plaintiff alleges that he acted up to his part of the contract, and that he applied first to Mr. Palmer for redress; that that gentleman referred him to the district authorities; and that obtaining no satisfaction from them he brings the present suit.

The suit is brought against Mr. Cecil Stephenson as agent of the East India Railway Company.

The suit was defended by Mr. Stephenson, and the first Court after a local enquiry passed a decree in favor of the plaintiff, not against the East India Railway Company, but against Mr. Stephenson in his capacity of agent of that Company.

On appeal before the Subordinate Judge of Hooghly, a question was raised whether a suit against the East India Railway Company would lie in the present form, and a decision of the late learned Chief Justice and Mr. Justice Dwarkanath Mitter was cited.* The Subordinate Judge with reference to that decision held that the suit had not been brought against the East India Railway Company. He, therefore, dismissed the plaintiff's suit, and reversed the decision of the first Court.

In special appeal, it is contended; 1st,—that as no objection was taken in the first Court that the agent did not represent the Railway Company itself, the Lower Appellate Court was wrong in allowing that objection to be taken at a late stage of the case and reversing the judgment of the first Court contrary to the provisions of Section 350 of the Code of Civil Procedure; 2nd,—that the ruling of the High Court relied upon by the Subordinate Judge does not apply to the circumstances of the present case, inasmuch as the High Court dismissed the appeal and did not use a technical objection to reverse the judgment of the Court below; 3rd,—that at any rate, the Lower Appellate Court ought to have allowed the special appellant to make the East India Railway Company a party to the suit under Section 73 Act VIII of 1859, instead of dismissing it and making the plaintiff pay the costs of the other party.

With reference to the first point, we find that Section 350 lays down "that the judgment may be for confirming or reversing "or modifying the decree of the lower "Court. But that no decree shall be reversed "or modified, nor shall any case be remanded "ed to the lower Court, on account of any "error, defect, or irregularity either in the "decision or in any interlocutory order "passed in the suit not affecting the merits "of the case or the jurisdiction of the "Court." Now in this case, the decree of the lower Court is one which makes a party liable who is clearly not liable, and therefore there is an error in the decision which affects the substantial merits of the case.

As the decision at present stands of the first Court the plaintiff has obtained a decree against Mr. Stephenson in his capacity of agent to the East India Railway Company in a suit in which he has sued the wrong party and in which he ought to have sued the East India Railway Company as a corporate body.

With reference to the second ground taken in special appeal, it is very clear to us that the decision reported in Volume X does apply to the case before us. In that decision it is laid down "that it is a clear rule "of law that a corporation must sue and be "sued in its corporate name, and Section "26 of Act VIII of 1859 points out how a "corporation is to be described in the plaint." Now in this case it is not disputed that the East India Railway Company are a corporate body. It has not been shewn that they are authorized to sue or be sued in the name of an officer or trustee, and therefore the plaintiff having sued the East India Railway Company, not in their corporate capacity, but through an agent, namely, Mr. Stephenson, have brought their suit in a wrong form.

Then it is said that under Section 73, the Lower Appellate Court ought to have

* 10 W. R., p. 366.

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directed that the East India Railway Company be made a party to the suit. That Section appears to us to refer to parties who may be likely to be affected by the result of the suit or who may claim some share or interest in the suit. Now it cannot be said that the East India Railway Company were likely to be affected by the result of this suit, inasmuch as they were never sued at all. Moreover, not being sued in their corporate capacity and not being before the Court, they were in no way persons entitled to or claiming some share or interest in the subject matter of the suit, nor could they be affected by any decree which might be passed against Stephenson; and further under Section 73 it is not imperative on the Court to admit parties to a record. It is in the discretion of the Court to do so or not, and we think that the Subordinate Judge, even if he had been applied to under that Section, and it does not appear that he was, would not have been wrong in saying that inasmuch as the East India Railway Company had not been sued and are not likely to be affected by the result of a decree against Stephenson it was unnecessary to make them parties to the suit.

The plaintiff must seek his remedy against the proper party and in a proper form. The present suit has been properly dismissed, and the decision of the Subordinate Judge must be confirmed with costs of all the Courts payable by the plaintiff.

The 19th May 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Special appeal—Right of action.

Cases Nos. 53 and 54 of 1871.

Special Appeals from a decision passed by the Judge of Cuttack, dated the 12th August 1870, affirming a decision of the Moonsiff of Balasore, dated the 31st May 1870.

Doorga Pershad Mohapattur (Plaintiff) *Appellant,*

versus

Radha Mohun Mytee and others (Defendants) *Respondents.*

Mr. R. E. Twidale for Appellant.

Baboos Woomesh Chunder Banerjee and *Obhoy Churn Bose* for Respondents.

Where a Hindoo widow, jointly with her sons, sued for confirmation of title, and both the Courts below found adversely to her title to hold the land in dispute as separate property, it was held that her sons who had no interest in the result of the suit were not competent without her to prefer a special appeal.

Glover, J.—A PRELIMINARY objection has been taken by the pleader for the special respondent in this case.

The facts are as follows:—The plaintiff, one Rungoma, the daughter of Amroop and Chandrama, and her sons Doorga Pershad and others sued for confirmation of their possession in a certain portion of land which they said had been held by Chandrama for the last 50 years in her own separate possession, and which passed by gift from Chandrama to her daughter Rungoma. The cause of action is alleged to be the defendant taking away the crops which were grown on these lands and the dismissal of a petition preferred to the Magistrate with reference to this act. The dismissal of this petition is said to have cast a slur on the plaintiffs' title, and they now sue for confirmation of it. The preliminary objection taken is that as both the Courts below have found adversely to Rungoma's title, holding that the property was acquired by the joint family and was not separate property, and as Rungoma has not preferred any special appeal, her sons, who have no interest in the result of this suit, are not competent to prefer an appeal.

It is, we may say, admitted by the pleader for the special appellant that this objection is fatal to the preferring of a special appeal by the sons. There is no doubt that as the case stands, Rungoma is the only person who claims to hold this property, and that her sons, even supposing that a decree had been given to Rungoma, can, as long as she lives, have no right or title to the property. Rungoma has not joined in this special appeal. The preliminary objection is therefore good, and this special appeal must be dismissed with costs. At the same time, and considering that the omission of Rungoma's name from the list of special appellants has probably been brought about by some mistake, inasmuch as she was jointly carrying on the suit with her sons from first to last in the Courts below, we give the special appellant's pleader permission to appear again before us by way of motion in

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order to the making of an order for the extension of the time allowed to prefer a special appeal in favor of Mussamut Rungoma.

This appeal will be dismissed with costs.

The 20th May 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Lakhirajdars—Right of suit—Section 15 Regulation VII of 1822.

Case No. 167 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of West Burdwan, dated the 29th November 1870, *affirming a decision of the Moonsiff of Bishenpore, dated the 15th July* 1870.

Bishoroop Hazrah and another (Defendants) *Appellants,*

versus

Dumonutee Debia (Plaintiff) *Respondent.*

Baboo Rash Beharee Ghose for Appellants.

Baboos Khetter Mohun Mookerjee and *Motee Lall Mookerjee* for Respondent.

Lakherajdars whose land have been resumed have the right under Section 15 Regulation VII of 1822 (if not barred by limitation) to bring a civil suit to revise, annul or alter a settlement made by the Collector, not only as against those who claimed the settlement before the Revenue authorities, but against all who have claims.

Glover, J.—This was a suit to annul a settlement of 60 beegahs of land in mouzah Khureebaree made by the Collector with the defendant on the 25th May 1867.

The plaintiff claims to be the lessee (under a putnee) of the original lakherajdars with whom, on resumption, a settlement was made by the Revenue authorities. His case is that after the settlement was made with his lessors (who were three purdanusheen ladies) the defendant fraudulently colluded with their Mookhtear, and induced the Deputy Collector to give him a settlement of 60 beegahs of what had already been settled with the ex-maliks, on a false sunnud, alleged to have been granted by them. In consequence of this collusion, no notice of the defendant's claim was given to the settlement holders, and they did not appear before the Deputy Collector to object. That officer treated their absence as an acquiescence and gave the defendant a settlement of 60 beegahs of land, which were included in the settlement already made with the lakherajdars. The plaintiff asks to have this settlement annulled on the ground that the sunnud on which it was granted was spurious, and that his lessors never acquiesced in the settlement with the defendant, no notice of the same having been given to them.

The defendant contended that the plaintiff had no right to bring the suit, inasmuch as the settlement had been made with the knowledge and consent of his lessors. He also pleaded limitation.

Both Courts gave the plaintiff a decree.

The only point that has been argued in special appeal is that as the plaintiff's lessors refused to take the settlement, the title given by them after the date of the settlement with the defendants is worthless and the plaintiff is not entitled to sue.

This objection, we may observe, was never taken in any stage of the case in the Courts below. The defendant's plea was that the lakherajdars, although having notice acquiesced in his claim to the settlement, no question was raised as to the date of the plaintiff's putnee lease, and opportunity was given him of showing when it was given.

Now, with regard to the notice, it has been found as a fact by the Court below that there was collusion between the defendant and the lakherajdar's Mookhtear, and that the ex-maliks were not aware of the defendant's claim. These parties were, it must be remembered, Hindoo ladies, being purdanusheen, and entirely in the hands of their

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agents so far as notice of the defendant's application went,—and it is in the highest degree improbable that immediately after getting a settlement with Government at half rates for the whole mehal, they would willingly give up no less than 60 beegahs of it to a stranger. The concurrent finding of both Courts below that the defendant's sunnud which he alleged himself to have received from the maliks was false is strong corroboration of the antecedent improbability, and leaves no doubt in our minds that the finding of the Subordinate Judge as to the defendant's collusion with the Mookhtear was a perfectly sound one. But if proof of collusion were wanting, there seems no reason why the plaintiff should be prevented from bringing this suit. He has all the rights that the old lakherajdars had, and under Section 15, Regulation VII of 1822, they could undoubtedly have brought a civil suit to "revise, annul or alter" the settlement made by the Collector, supposing them not to be barred by limitation. The words "other claimants" in the Section do not, we consider, refer only to those who claimed the settlement before the Revenue Authorities, but to all who had claims.

If, therefore, the finding as to fraud were got over, the lakherajdars would still have been able to bring a civil suit for the settlement; and if they could do so, then the plaintiff, their lessee, could do so, for, as we remarked above, no question was raised in the Courts below as to the date or genuineness of his putnee lease.

There was an objection taken at the close of the argument that in any case the plaintiff ought not to be allowed possession but only a declaratory decree.

The objection is not very intelligible, but we have no doubt that on the facts found the plaintiff is entitled to deprive the defendant of all the advantage he got by his fraudulent conduct. It has been found by both lower Courts that he has no honest defence to this action, that he got the settlement by keeping the knowledge of his application secret from those who had an interest in opposing him, and by supporting his claim with a forged document. He ought most certainly to lose a possession so dishonestly acquired.

We see no reason to interfere with the decision of the Subordinate Judge, and we dismiss this special appeal with costs.

The 22nd May 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble E. Jackson, *Judge*.

Execution against surety—Interlocutory appeal—Sections 204 and 339, Act VIII of 1859—Bond—Liability.

Case No. 11 of 1871.

Miscellaneous Appeal from an order passed by the Recorder of Moulmein, dated the 26th October 1870.

Akhoot Ramanah and another (Decreeholders) *Appellants*,

versus

Ahmed Eusoofjee (Judgment-debtor) and another (Surety) *Respondents*.

Mr. A. F. Lingham and *Baboo Issur Chunder Chuckerbutty* for Appellants.

Mr. J. W. Lowe for the Surety Respondent.

E having applied for execution of a decree, the judgment-debtors (*R* and *K*) paid the amount due into Court, praying that it might be retained pending an appeal to the High Court. The money was ordered to be retained till further orders, after which plaintiff was allowed to take it out on giving security, the surety depositing title-deeds and binding himself, in an obligation for a sum equal to the money drawn out, to pay any sums decreed against his principals in the event of the appeal proving successful. The appeal, though at first dismissed for default, was re-admitted and decreed, plaintiff's suit being dismissed with costs. Meantime, on production by the surety of a certificate (without notice to appellant) that the appeal had been dismissed, the grant was returned and the bond cancelled. After the appeal was decreed, the appellant applied to the Recorder for an order calling on the surety to pay the amount originally deposited and that subsequently decreed. The Recorder dismissed the case as against the surety.

HELD that under Section 204 of the Code of Civil Procedure the decree of the Appellate Court might be executed against the surety and that the Recorder's order dismissing the case against the surety was open to appeal.

HELD that the Recorder's order discharging the surety and cancelling the bond, was erroneous and invalid.

HELD that in the absence of an application under Section 339, Code of Civil Procedure, or of any thing to show whether or not the surety bound himself beyond the penal sum of the bond, that sum only could be required from him.

Norman, C. J.—THIS is an appeal from the decision of the Recorder of Moulmein.

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The material facts are as follows :—

Ahmed Eusoofjee having obtained a decree against Akhoot Ramanah and Ramkurinjee in the Court of the Recorder of Moulmein applied for execution, on which the defendants paid into Court the amount of the decree and costs, *viz.*, rupees 4,825-3.

The defendants prayed that the money might be retained in Court pending an appeal to the High Court.

The Recorder made an order that the money be retained in Court till the further order of the Court.

The appeal to the High Court was filed on the 7th of May.

The plaintiff applied to the Recorder for liberty to take the money out of Court, which was granted, the plaintiff giving security.

Hadjee Abdool Ryman Moodeny, as security for the plaintiff, entered into an obligation as follows :—

"Know all men by these presents that "I, Hadjee Abdool Ryman Moodeny, am "held and firmly bound to John Coryton, "Esquire, Recorder of Moulmein, in the "sum of Rs. 4,825-3 to be paid to the said "John Coryton, Esquire, or to the Record-"er of Moulmein for the time being, for "which payment I bind myself, heirs, execu-"tors, and administrators ; and for better "security I deposit grants Nos. 196, 201, "and 1932, dated 16th November 1857, "and 15th August 1864, respectively, of "the house and ground belonging to me "situated in Great Pagoda Street, No. 4 "Division. Dated this 5th day of May "1869.

"Whereas the above-named John Coryton, "Esquire, hath allowed Ahmed Eusoofjee to "draw from the Court the sum of rupees "4,825-3 deposited therein to the credit of "the decree passed in favor of the said "Ahmed Eusoofjee and against Akhoot "Ramanah and Ramkurinjee for rupees "4,825-3 costs included in civil regular "suit No. 16 of 1869 notwithstanding that "the said Akhoot Ramanah and Ramkurinjee "have appealed against the said decree to "the High Court of Judicature at Fort "William in Bengal. Now, the condition "of the above written obligation is such "that if the said decree should be reversed "or modified in appeal, the said Hadjee "Abdool Ryman Moodeny shall, when "called upon by the said John Coryton, "Esquire, pay or cause to be paid unto the "said John Coryton, Esquire, or to the "Recorder of Moulmein for the time being, "all such sum and sums of money as shall "be decreed against the said Ahmed "Eusoofjee."

The surety Hadjee Abdool Ryman Moodeny also deposited as further security the title deeds of the three grants, *viz.*, Nos. 196, 201, and 1932.

The appeal having been set down for hearing was dismissed for default of prosecution on the 24th of November 1869. The appellant within 30 days applied for re-admission of the appeal.

On the 19th of January 1870, the surety applied for the return of his grant and the cancellation of his bond. No notice of this application appears to have been given to or served on the appellant ; but the Recorder on the *ex-parte* application of the surety and on production of a certificate, dated the 14th of December, shewing that the appeal had been dismissed for the want of prosecution allowed the grants deposited as securities to be taken out of Court and wrote the word "cancelled" across the bond.

The High Court, having re-admitted the appeal on the 21st of April 1870, reversed the decree of the Recorder and dismissed the suit of the plaintiff with costs. On the 3rd of October 1870, the appellants applied to the Recorder for an order calling on the surety Hadjee Abdool Ryman Moodeny and the plaintiff to pay into Court the sum of Rs. 4,825-3 with interest and costs awarded by the decree of the Appellate Court, amounting on the whole to the sum of Rs, 6,460-5-5. The Recorder dismissed the case as against the surety with costs.

From that decision, an appeal has been presented to this Court.

The first question we have to consider is whether the decree of the Appellate Court can be executed against the surety.

By the 363rd Section of the Code of Civil Procedure, it is enacted that decrees "of an Appellate Court shall be executed "by the first Court in manner and accord-"ing to the rules hereinbefore contained for "the execution of original decrees."

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By Section 204—"Whenever a person has "become liable as security for the perform- "ance of a decree, the decree may be exe- "cuted against such person to the extent to "which he has rendered himself liable in "the same manner as a decree may be en- "forced against a defendant."

The cases of Ramkishen Dass *versus* Aurkoo Singh, VII Weekly Reporter, p. 329, and Gojendro Narain Roy *vs.* Hemangini Dassee* cited by the respondent's Counsel are distinguishable from that before us. They are cases of engagements by sureties subsequent to the final termination of the suit, wholly independent of and collateral to it. That which we have before us is a contract entered into in the course of proceedings in the appeal and which is itself in the nature of a proceeding in the suit, whereby the surety renders himself liable to an order to be thereafter made on the appeal.

We think that the view taken by the appellant is correct. The surety having rendered himself liable as security for the performance of the decree of the Appellate Court, there seems no reason to doubt that under Section 204 such decree may be enforced against him as if he had been a defendant or respondent in the suit.

The next point is whether an appeal lies from the order of Mr. Coryton dismissing the case against the surety. By Section 27 of the Recorder's Act, it is enacted that in suits determined by the Recorder in which the amount exceeds 3,000 rupees and is less than rupees 10,000, an appeal shall lie to the High Court subject to the rules contained in the said Code of Civil Procedure (*i. e.*, Act VIII of 1859 as amended by Act XXIII of 1861) regarding regular appeals."

Section 11 of Act XXIII of 1861 enacts that all questions regarding the amount of any mesne profits which by the terms of the decree may have been reserved for adjustment in the execution of the decree, or of any mesne profits or interest which may be payable in respect of the subject matter of a suit between the date of that suit, and the execution of the decree, as well as questions relating to sums alleged to have been paid in discharge or satisfaction of the decree or the like, *and any other questions arising between the parties to the suit in which the decree was passed and relating to the execution of the decree*, shall be determined by the order of the Court executing the decree, and not by separate suit, and *the order passed by the Court shall be open to appeal.*

The question is whether an order under Section 204 relating to the execution of a decree against the surety is open to appeal.

We think it is not an unnatural construction of the words of this Section to hold that a surety who becomes liable as security for the performance of a decree, against whom an order may be made under the 204th Section that the decree may be executed against him as surety, is a party to the suit within the meaning of that term as there used. He is a person against whom an order may be made in the suit. He has a right to be heard in the suit to show cause against any order directly affecting him. He has surely a right to be treated as a party to the proceedings upon any execution issued against him. It seems impossible to suppose that a surety against whom an order for execution should be made under Section 204, would not have a right of appeal against orders made in the course of the execution of a decree against him. If so, it must be because he has become a party to the suit as surety.

In the case of Bhikaji Vithal Ambikar, 4 Bombay Reports, 119, the Sudder Ameen, upon the application of one of two sureties against whom a decree was being executed under Section 204, ordered an attachment on the property of the sureties to be removed. The High Court of Bombay on the appeal of the judgment creditor held that an appeal lay under Section 11 of Act XXIII of 1861 in a matter between the judgment-creditor and the surety of the judgment-debtor.

This ruling, which is directly in point, is in accordance with the previous decision of a Division Bench of the High Court here—Mr. Justice L. S. Jackson and Mr. Justice Hobhouse—in Ghoree Lall Jha *versus* Sheo Narain Singh, VIII Weekly Reporter, 24, where the question arose upon an appeal by the surety against an order passed by the Court in executing a decree against him.

The next question is what is the effect of the order of the Recorder on the petition of the 19th of January 1870, and the cancellation of the bond which then took place.

* 13 W. R., p. 85.

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It appears that this order was made on the application of the respondent and without notice to the appellants. Had such notice been given, there can be no doubt but that the appellants would have pointed out that a petition had been presented for the re-admission of the appeal. The cancellation of the bond appears to have taken place in consequence of a mistake on the part of the Recorder in supposing that the appeal had been finally dismissed. The security which was given under Section 339 was for the restitution of the money and for the due performance of the decree of the Appellate Court. We think this means the performance of such order or decree as the Appellate Court shall finally pass. The order discharging the surety while proceedings in the Appellate Court were still pending and before the final decree of the Appellate Court had been pronounced, was, in our opinion, erroneous and invalid.

The only remaining point is to what extent the surety is liable under the obligation.

Mr. Lowe compared the case to that of a bond in the English form, by which the obligor binds himself in a penal sum usually double the amount of the sum intended to be secured, and there is a condition that if the obligor duly pays the sum secured or performs the acts stipulated for, the bond is to be void; but that otherwise it shall remain in full force. Mr. Lowe contended that the sum of rupees 4,827-3 must be treated as a penal sum beyond which the obligor could not be made liable. And if this obligation were simply a bond in the ordinary English form, Mr. Lowe's argument would have been unanswerable. On the face of such a bond in the ordinary form, conditioned for the performance of particular acts, all that the obligor engages to do is to pay the penalty; and there is a proviso that if the condition be performed the bond or obligation shall be void. It is well settled that the liability of the obligor is limited to the amount of the penalty in such cases. See Branscombe *versus* Scarborough, 6 Queen's Bench Reports, page 13.

The rule, however, is not inflexible. Where it appears that upon the true construction of the agreement as contained in the bond the obligor has really entered into an engagement binding him to an extent beyond the sum mentioned in the first part of the bond that obligation may be enforced. Thus, in Francis *versus* Wilson, Ryan and Moody, page 105, the bond was in the sum of £120 conditioned for the payment of £120 and interest, and it was held by Littledale, J., that interest beyond the amount of the penal sum of £120 might be recovered. The obligation before us is not in the form of an ordinary English bond.

The 339th Section of the Code of Civil Procedure empowers the Court allowing execution of a decree which has been appealed from to require security; *first*, for the restitution of property taken in execution; and *secondly*, for the due performance of the decree of the Appellate Court.

The obligation entered into by the surety by the instrument before us is substantially in the form contemplated by Section 339. That part of the bond which comes as a condition purports to bind Hadjee Abdool Ryman Moodeny to the payment of *all such sums of money as should be decreed against Ahmed Eusoofjee by the Appellate Court.* Had the bond been given upon an application of the appellants that the respondent should give security under Section 339 before receiving the money out of Court, we should be disposed to think that we ought to construe this particular bond as a covenant binding the surety to the extent contemplated by the 339th Section, *i. e.*, not only to the restitution of the money but to the performance of the decree.

The appellant's petition of the 23rd of April 1869 simply prays the Court to detain the money in Court pending the decision of the appeal.

The order on this application is "let the money be held till the further order of the Court."

There is not on the proceedings any application by the appellants that the respondents should furnish security under Section 339.

The order upon which the money was paid out of Court and the bond taken is not amongst the proceedings. It was for the appellant to have brought this order before us.

We are, therefore, unable to say that there was any order under Section 339 which shewed that Hadjee Abdool Ryman Moodeny as surety was to be bound to any greater extent than the sum which stands as the penalty of this bond. Upon the whole, we cannot say that we are satisfied

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either that the surety meant to bind himself beyond the extent of rupees 4,825-3 or that upon the true construction of the bond he is bound to a greater extent.

We order that the amount of rupees 4,825-3 be paid to the appellants by the said Hadjee Abdool Ryman Moodeny within seven days after the service of this decree upon him, and that in default execution do issue against him.

An order for such execution mus be applied for by the appellants in the usual way.

The surety Hadjee Abdool Ryman Moodeny must pay the costs of this appeal. We allow twenty gold mohurs for counsel's, pleader's and agent's fees.

The 22nd May 1871.

Present:

The Hon'ble F. B. Kemp and G. C. Paul, *Judges.*

Kisteebundee—Execution—Procedure.

Case No. 2477 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Hooghly, dated the 30th August 1870, *affirming a decision of the Moonsiff of Ghattal, dated the 31st March* 1869.

Madhub Chunder Dundput (Defendant) *Appellant,*

versus

Madhub Lall Khan (Plaintiff) *Respondent.*

Baboo Hem Chunder Banerjee for Appellant.

Baboo Tarucknath Sein for Respondent.

There is no procedure under Act VIII of 1859, amounting to a warrant of attorney under the English law, according to which execution may be taken out of a kisteebundee incorporated into a decree or made part and parcel thereof, without a previous resort to a regular suit.

Paul, J.—In this case, it is quite clear that the Judge of the Court below has not in any way attempted to carry out the order of remand which very clearly directed him to try the additional issue raised by the supplementary plaint and the written statement put in in answer thereto. He has passed a judgment somewhat unintelligible and wholly irrelevant to the question which he was directed to try, and we have in the appellate stage of the case to decide a question of law which was raised in the written statement to the supplementary plaint, and which up to this moment has not been in any way considered by the Lower Appellate Court, so that the remand which was made virtually turns out unnecessary and unfructuous.

The facts of this case are very shortly these. The plaintiff obtained against one Doorga Monee a decree on the 8th of July 1865. Doorga Monee was unable to pay off that decree, and she executed a kisteebundee for the money due under the decree as well as for other sums of money due (but not under that decree) amounting to the sum of 180 rupees to be paid off in 20 years time, and pledged amongst other properties the property in dispute in this cause. The terms of the kisteebundee not being observed, the plaintiff sued out execution under the kisteebundee, put up the property in dispute to sale, purchased the same on the 3rd November 1867, and obtained a sale certificate on the 23rd January 1868. In endeavouring to take possession of the property so purchased, he was opposed by the defendant whose title to the property is also derived under another decree passed at or about the time of the decree against Doorga Monee, under which execution was sued out and the property in dispute purchased by the defendant on the 29th of March 1867. The defendant raises two points against the plaintiff's claim:—1st, that the plaintiff was not according to law entitled to sue out execution under the kisteebundee by which the property was pledged; and 2nd, that if she were entitled so to do, the kisteebundee itself was a collusive transaction, and that it was so, was so apparent on the face of the transaction that he proposed to examine the plaintiff with regard to it, but that his prayer to have the plaintiff examined was not heeded by the Court below.

With regard to the first point, it is quite clear to us that where a kisteebundee is not incorporated into a decree and made part and parcel of a decree, there is no procedure under Act VIII amounting to a warrant of attorney under the English law according to which execution may be taken out without first resorting to a regular suit, and consequently this attempt to take a short cut at a

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remedy which is only given under decrees must fail, and the first point which the defendant raises must be decided in his favor. As against this view, the pleader for the respondent has cited a case reported in Volume II, Bengal Law Reports, p. 223,* which is based upon two cases in Volume V, Weekly Reporter, Small Cause Court References, p. 19, and Volume VI, Small Cause Court Case, p. 1. The case in the Bengal Law Reports, no doubt, fully bears out the proposition put forward by the respondent's pleader, but inasmuch as that case furnishes no reasons but implicitly relies upon and follows the authority of the other two earlier cases above alluded to, we cannot regard it as an authoritative declaration of the law beyond the fact that it professes to follow two cases previously decided. The first case on which it is based, namely, the one in 5th Weekly Reporter, Small Cause Court Cases, page 19, does not appear to contain anything in support of the proposition laid down in the Bengal Law Reports; and the judgment in the second case, in Volume VI, Small Cause Court Cases, page 1, on being read with the case as submitted merely tends to support the proposition which we admit is a correct proposition of law that where an arrangement by kisteebundee or otherwise has been incorporated in a decree and forms part of that decree, execution can be sued out.

Moreover, in this case, it must not be forgotten that the kisteebundee was executed not only for the money due under the decree but for other sums of money, so that even if the authority upon which the pleader for the respondent relies, and we may say fairly relies, was perfectly correct in law, still the present case is clearly distinguishable by reason of the kisteebundee in it covering sums of money other than the sums decreed; and we do not think that any case has gone to the length of holding that the kisteebundee executed for the payment of a sum due under a decree and for other sums of money due can be executed in a summary manner by execution being taken out under it, instead of the more regular form of proceeding by a regular suit.

This objection of the defendant prevailing, the suit of the plaintiff is necessarily dismissed. But we would also observe on the 2nd branch of the case that the circumstances under which the kisteebundee was executed, the time for the re-payment of the small sum of 180 rupees being 20 years and the amounts of the instalments being less than 10 rupees a year, clearly indicate that the judgment-debtor was not to be harassed so long as it pleased him, for no reasonable person could believe that any one would require 20 years to repay the small sum of rupees 180. These circumstances tend to cast a cloud of suspicion over the truth of the transaction disclosed by that kisteebundee, and so clear was the defendant in his impression that the kisteebundee was not *bonâ fide*, that he was prepared to abide by the evidence of the plaintiff himself with regard to its *bona fides*, and he accordingly prayed that the plaintiff should be examined. The prayer was a very proper one and should have been granted, but it appears that owing to some views which both the Courts below took of the matter wholly irrelevant to the question to be tried, his prayer was rejected. Therefore, in deciding the case, as we have done on the other ground, although this was not a technical point but a very material point in the case, we are glad to observe that there is much in the case besides that to satisfy us that the ends of justice would be better served if the plaintiff were left to resort to a regular suit to prove the *bona fides* of the kisteebundee on which he relies.

The special appeal will, therefore, be allowed and the suit of the plaintiff dismissed with all costs.

* 11 W. R., p. 86.

The 22nd May 1871.

Present:

The Hon'ble A. G. Macpherson and W. Ainslie, *Judges.*

Section 143 Act X of 1859—Distress—Construction.

Case No. 69 of 1871 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Jessore, dated the 4th November 1870, *affirming a decision of the Deputy Collector of Nurrail, dated the 31st March* 1870.

Raye Kumul Dossee (one of the Defendants) *Appellant,*

versus

Jhoroo Mollah and others (Plaintiffs) *Respondents.*

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Mr. M. M. Datta and *Baboo Motee Lall Mookerjee* for Appellant.

Baboo Grija Sunkur Mojoomdar for Respondent.

In order to maintain a suit under Section 143 Act X of 1859 the plaintiff must prove that the defendant in making the distress was acting not only without right but without any thing to justify him in supposing that he had a right to distrain;—a mere trespasser without any reasonable foundation for the claim set up.

Macpherson, J.—It appears to me that this case ought to be remanded because there is no distinct finding by the Court as to the circumstances under which the defendant made the distress on which the plaintiff's suit is based.

The Judge below evidently considered that the suit was brought under Section 141 of Act X of 1859, but it is clear, and it is admitted by the respondent's pleader, that the suit was not brought under that Section but under Section 143 under which alone it will lie. The provisions of Section 143 are quite different from those of Section 141; and in order to maintain his suit under Section 143, the plaintiff must prove that the defendant in making the distress was acting not only without right, but without anything to justify him in supposing that he had a right to distrain.

The effect of Section 143 was fully considered in the case of Joy Lall Shaikh *versus* Brijo Nath Paul Chowdhry, reported in IX Weekly Reporter, page 162. In delivering judgment in that case, Sir Barnes Peacock said:—"It is clear that the Section "(143), refers to the case of a person dis- "training under color of the Act when he is "not empowered to distrain, and it is clear "that by the use of the words 'under color "of the Act,' the Legislature did not mean "under circumstances which were sufficient "to induce the distrainer honestly to believe "that he was justified in making the dis- "tress; for if that had been their intention "they would have enacted that the distrain- "er should be subject to the penalties for "the offence of criminal trespass.

"Section 142 gives an action against a "person empowered to distrain who shall "distrain otherwise than under the provi- "sions of the Act. That is an example of "a suit arising out of the exercise of the "powers of distraint; whilst Section 143 "furnishes an example of a suit arising out "of an act done under color of the exercise "of the said power. Both are suits within "the provisions of Section 23, and the pre- "sent suit is one which might be brought "under Section 143, and consequently can- "not be brought in any other Court than "that of the Collector. * * * *

"If a person sues another as his ryot for "rent when there is no pretence or founda- "tion whatever for the allegation that the "land belongs to him, or that the defendant "is his ryot, or that there is rent due, such "suit is cognizable only by the Revenue "Courts; and the Legislature seems to have "intended to have left to the Collector the "sole determination of suits arising out of "acts done in the colorable exercise of the "power of distress, as well as suits for rent "claimed to be due."

Adopting the interpretation thus put upon Section 143, it appears to me that the plaintiff must establish distinctly that the defendant distrained when he was a mere trespasser, and when there was no reasonable foundation whatever for the allegation that he was entitled to the rent which he claimed in respect of this land. The mere fact that the defendant had no legal right to make the distress will not be sufficient.

In trying this case again, the Court must direct its attention specially to the position which the defendant at the time of distraining occupied with respect to the land for the rent of which the distress was made. There is no doubt the defendant had (or at any rate had recently had) *some* connection with the land: because it is clear that he got an amulnamah for it from the zemindar's gomastah. The Court must find distinctly what, if anything, was done besides the mere giving of the amulnamah. The gomashta by his evidence apparently desired to support the defendant's case. But his evidence requires to be considered very carefully, because there are some patent discrepancies in his statements. He says that the lands covered by the amulnamah (which I presume included these particular lands, for if it did not, the amulnamah has no bearing on the matter in dispute,) were in the khas possession of the zemindar at the time the amulnamah was given. At the same time dakhilahs are put in by the plaintiff commencing with 1269, which is prior in date to the amulnamah. If these dakhilas are true, and if the plaintiff was paying rent in 1269 and the subsequent years, it is difficult to see how the gomastah's statement that

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the land was in the khas possession of the zemindar at the time the amulnamah was given to the defendant can be true.

There is a good deal of other evidence besides that of the gomastah; and in calling attention to the matter to which I have just referred, I am not to be taken as expressing any opinion one way or the other as to the general conclusion which the lower Court ought to draw from the gomastah's evidence taken as a whole. I only say that his evidence and all the other evidence on the record ought to be very carefully and accurately considered *de novo*, with reference more especially to the particular point involved in Section 143,—which point was not in fact present to the minds of the Judges of either of the lower Courts.

The case will go back for re-trial, and the costs of this appeal will follow the result of the remand.

Ainslie, J.—I concur.

The 23rd May 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Error in decree—Execution—Landlord's debt—Payment by tenant.

Cases Nos. 1841 and 1842 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Additional Judge of Nuddea, dated the 3rd June 1870, *reversing decisions of the Deputy Collector of that District, dated the 5th and 7th May* 1869.

Mr. James Hills (Defendant) *Appellant*,

versus

Wooma Moyee Burmonee (Plaintiff) *Respondent*.

Baboos Sreenath Dass and *Bipro Dass Mookerjee* for Appellant.

Baboos Umbika Churn Banerjee and *Kalee Mohun Dass* for Respondent.

Where an appeal was inadvertently decreed against four share-holders instead of against five, the Court which executed the decree was held to have erred in recovering the entire amount decreed out of the shares of the four.

Where a tenant is left in that condition in which he is compelled to pay his landlord's debt to save his own security from forfeiture, the circumstances constitute a sufficient authority to make the payment, *e. g.*, the payment of Government revenue to save the estate from sale.

Norman, C. J.—Case No. 1841—As has been said by the vakeel of the respondent the question in this appeal is simply this whether Wooma Moyee Burmonee, who has purchased the rights of Biroja Moyee in 23 mouzahs, part of 59 mouzahs which were let in ijarah to Mr. Hills, is entitled to a proportion of the rent of these 23 mouzahs as if Biroja Moyee were a share-holder possessing 2 annas 13 gundahs 1 cowree and 1 krant, or a share-holder possessing 2 annas 10 gundahs 10 cowrees 2 krants, as found by the first Court.

Now the facts are, as has been stated very properly by the vakeels on both sides, exceedingly complicated. But the facts which it is material to consider to answer the question before us are not very numerous, nor, when a little care is taken to comprehend them, are they difficult to understand.

There were five persons who were in possession of a large estate, namely, Kristo Nath, Biroja Moyee, Shushee Mookhee, Keshub Chunder, and Eshan Chunder. Biroja Moyee, Shushee Mookhee, and Eshan Chunder, three out of these five, gave in ijarah to Mr. Hills in 1259, 9 annas and 12 gundahs as their share of the 59 mouzahs at a rent of rupees 28,523. By agreement with Mr. Hills, that rent was afterwards reduced to rupees 26,628. The date of the second agreement was the 9th Bysack 1264, or in other words, April 1857. Subsequently to the date of that last arrangement, Wooma Moyee Burmonee, the same person who is now plaintiff before us, brought a suit for possession of one-sixth of the property which had been formerly in the possession of the five co-sharers; namely, 2 annas 13 gundahs 1 cowree and 1 krant.

Her suit was dismissed by the first Court. She preferred an appeal, and in consequence of an accidental circumstance, namely, the death of the guardian of the minor, Kristo Nath, and the omission to serve a summons on Bama Soonduree, the mother and guardian of Kristo Nath, after the death of the former guardian Chunder Mohun, the appeal proceeded as against four respon-

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dents only, namely, Biroja Moyee, Shushee Mookhee, Keshub Chunder, and Eshan Chunder. The suit eventuated in a decree against these four respondents, *viz.*, a decree of the Sudder Court, dated the 31st December 1869, declaring the right of Wooma Moyee Burmonee to that which was claimed by her, namely, one-sixth or 2 annas 13 gundahs, 1 cowree, 1 krant.

Now it is clear that the Sudder Court did not apparently advert to the fact that in executing that decree—if it could have been properly executed at all in the absence of Kristo Nath—Wooma Moyee was not entitled to take from the shares of Biroja Moyee, Shushee Mookhee, Keshub Chunder or Eshan Chunder any thing more than what would leave to each of the co-sharers a proportion of 2 annas 13 gundahs 1 cowree and 1 krant, and as against the 4 respondents she ought to have recovered an amount equal to 4-5th of the total of that to which she was entitled, namely, 4-5th of 2 annas 13 gundahs 1 cowree 1 krant. Instead of that, by an error which we must say is of a most astonishing description, the Subordinate Judge appears in executing that decree to have made four of the defendants suffer for the omission of Wooma Moyee in not making Kristo Nath a party, and he actually took out of *their* shares the amount which Wooma Moyee ought to have recovered from the estate of Kristo Nath.

Gross as that error was, it appears to have been submitted to by all the parties, who would not, did not, or could not, have the matter set right; and Wooma Moyee comes into Court in the present suit declaring that she now is in possession in her own right under that decree of 2 annas 13 gundahs 1 cowree and 1 krant.

Now let us see how that operates on the rights of Mr. Hills, the tenant of the three ijmalee holders, Biroja Moyee, Shushee Mookhee and Eshan Chunder, who, as we have already said, let to Mr. Hills 9 annas 12 gundahs of the whole estate. At the present date, Kristo Nath is, as he always has been, in possession of 3 annas 4 gundahs.

Wooma Moyee is in possession under the decree in her favour in her own rights by a title quite independent of Mr. Hill's lease of 2 annas 13 gundahs 1 cowree and 1 krant, and Keshub Chunder by himself or his ryots is in possession of 2 annas 10 gundahs 2 cowrees and 2 krants.

The sum of these several shares of which Mr. Hills is not in possession is 8 annas 8 gundahs, leaving to Mr. Hills at the present time, instead of 9 annas 12 gundahs as originally let to him by the three co-sharers, only 7 annas 12 gundahs of the 59 mouzahs.

It is open to Mr. Hills to show that the title of the landlord has expired; and he shows in this present suit that his landlords are no longer in possession of more than 7 annas 12 gundahs of the entire property.

Mr. Hills is willing to pay rent to these several parties in proportion to their shares in this 7 annas 12 gundahs.

It is quite clear, looking at it as we have done, that the decision of the first Court which gives to Wooma Moyee, as the purchaser of the interests of Biroja Moyee in the 23 mouzahs, a decree for rent proportionate to a 2 annas 10 gundahs 2 cowrees 2 krants share is correct. That being so, the decision of the Judge must be reversed, and the decree of the first Court must be restored and affirmed, the respondents paying the costs both of this appeal and of the appeal to the lower Court. We think, however, that the rate of interest allowed by the first Court should be reduced to 6 per cent. per annum from the date of the decree in the first Court. In cases of this kind where there is much contest as to what the sum to be decreed ought to be, interest at a penal rate should not be allowed.

Case No. 1842.—In this case, an additional question arises. The defendant, Mr. Hills, alleges that he paid the Government revenue on account of the share of Biroja Moyee in the years 1272 and 1273. Mr. Hills is a person who has advanced a large sum of money by way of *peshgee* on security of the lease which he obtained in 1264, and being so interested in the estate he paid the Government revenue in order to protect it from sale. His position is this,—that if he had made a deposit of the arrear of revenue due, and if he proved before a competent Civil Court that the deposit was made in order to protect his own lien on the estate, the amount so deposited would be added to the amount of the original lien. This is the provision of Section 9 of Act XI of 1859. There are several reasons why he cannot avail himself of the benefits of that provision in the present suit,—in the first place because it is doubtful whether the Collector's Court

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is a competent Civil Court within the meaning of Section 9.

Unless Mr. Hills can treat the payment of the Government revenue for the share of Biroja Moyee as a payment to Biroja Moyee, he cannot have the benefit of that payment in the present suit.

It is argued, and it is rightly argued, that Act X of 1859 contains no provision for any defence by way of set-off. But there are several cases which show that if a tenant pays money to a creditor of the lessor under the lessor's express authority, the amount of money so paid might be deducted in a suit for rent in the Collector's Court. See the case of Karron Lall Thakoor, decided on the 18th March 1863, Hay's Reports, page 443 ; also, Mussamut Joy Kooer *versus* Mr. J. Furlong, Weekly Reporter (Gap Number) page 112, Act X Rulings, which are authorities to that effect.

It is true that in the present case, it is not suggested that Biroja Moyee gave any express authority to Mr. Hills to pay the Government revenue, but she left Mr. Hills in that condition that he was compelled to pay that which was his debt unless he wished to forfeit his own security.

We think that this constitued a sufficient authority to Mr. Hills to make the payment of the Government revenue due on account of Biroja Moyee's share. There are many English cases where a point similar to this has been ruled. A set-off is no answer to a distress for rent. But payments made by the tenant under threats or the fear of distress for ground rent or land tax in discharge of the landlord's liability are treated *as payment of so much rent then due.* Sapsford *vs.* Fletcher, 4 Term Reports, 511 ; Taylor *vs.* Zamira, 6 Taunton, 524; Stubbs *vs.* Parsons, 3 Barnewall and Alderson, 516 ; Carter *vs.* Carter, 5 Bingham, 406, per Pollock, Chief Baron ; Jones *vs.* Morris, 3 Exch., 746.

We think that justice and good sense fairly warrant us in holding that the payment of Government revenue by Mr. Hills due in respect of Biroja Moyee's share ought to be treated as a payment on account of rent due to Biroja Moyee. The result is that the case must be remanded in order to give Mr. Hills an opportunity of showing what amount of revenue he paid on account of Biroja Moyee, and to that extent he will be credited. The appeal is decreed with costs.

The 23rd May 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble W. Ainslie, *Judge.*

Decree—Section 287 Act VIII. 1859—Execution—Instalments.

Case No. 455 of 1870.

Miscellaneous Appeal from an order passed by the Judge of 24-Perguunahs, dated the 10th September 1870.

Ram Sudoy Ghose and other (Decree-holders) *Appellants,*

versus

Raj Bullubh Saha (Judgment-debtor) *Respondent.*

Baboo Ashootosh Mookerjee for Appellants.

Baboo Nubo Kishen Mookerjee for Respondent.

A decree directing payment by instalments ought to be executed to the extent of the instalments falling due within 3 years before the application for execution.

Norman, C. J.—We are of opinion that the decision of the Judge is erroneous.

The decree which the decree-holder sought to execute was passed in a suit instituted in Zillah Hooghly and was transmitted to the Court of the Judge of the 24-Pergunnahs for execution. A decree so transmitted has under the 287th Section of Act VIII of 1859 the same effect as a decree made by the Court of the Judge of the 24-Pergunnahs. The Judge, therefore, if he would have entertained an application for execution in a decree of his own Court similar to the present, should have been entertained the application which was made to him to execute this decree.

Then comes the question whether the right to execute the decree before us is barred by limitation.

The decree directs that a debt be paid by instalments, the last of which was to become payable in Kartick 1276 or November 1869. The Judge ought to have allowed the decree to be executed to the extent of the instalments which fell due within three years before the application for execution of the 28th of January.

As the plaintiff in his application asked for more than he was entitled to, we do not give him any costs in the appeal. With these observations, we remand the case to the Judge.

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The 23rd May 1871.

Present:

The Hon'ble Dwarkanath Mitter and G. C. Paul, *Judges.*

Hindoo law—Adoption—Minor.

Case No. 95 of 1871.

Miscellaneous Appeal from an order passed by the Officiating Judge of Rungpore, dated the 4th January 1871.

Rajendro Narain Lahoree (Petitioner) *Appellant,*

versus

Saroda Soondaree Dabee and another (Opposite Party) *Respondents.*

Baboos Nuleet Chunder Sein and *Kalee Prosonno Dutt* for Appellant.

Baboo Essur Chunder Chuckerbutty for Respondents.

A childless Hindoo is bound to adopt a son, if at all anxious for his own salvation; and what is required to be done for that end is not optional with him, but an imperative obligation.

An adoption is not invalidated by the mere fact of the adoptive father being a minor, if he has attained the years of discretion. Such an adoption is not attended by any civil disability.

Mitter, J.—We think there is no ground for the appeal. The ceremony of adoption under this Hindoo Law is essentially of a religious character; and as under that law, every childless Hindoo is deemed sure to go to the hell called "Put," the obligation to adopt a son must be necessarily considered as imperative as a matter of religious duty among Hindoos. It has been argued that a childless Hindoo is under no religious obligation to adopt a son; but this opinion is contrary to the texts both of the Duttaka Chundrica and the Duttaka Mimansa, which are undoubtedly entitled to be considered, and have been always considered, as the highest authorities on the subject of adoption. This is clearly shewn by the following passages in page 3 of the Duttaka Mimansa.

"On this subject Atri says:—'By a man "destitute of a son only, must a substitute "for the same always be adopted, with some "one resource for the sake of the funeral "cake, water, and solemn rites.'

"A man destitute of a son (*aputra*) is one "to whom no son has been born, or whose "son has died, for a text of Saunaka expresses, "'one to whom no son has been born, or "whose son has died, having fasted for a son, "&c.' Another reading recites:—'The impo-"tent man, or also one whose offspring has "died.'

"By a man destitute of a son, &c." "Since it is shown by this, that the being so "destitute is a cause; in omitting to adopt "a son, *an offence even is incurred*, for the "precept enjoining the production of a son "being positive, it results that the contra-"vention of it is the cause of an offence; "and on defect of any son in general, ex-"clusion from heaven is declared in this "text':—'Heaven awaits not one destitute "of a son, &c.' And further, in the fol-"lowing passage also, a son in general is "shown to be the cause of redemption from "debt:—'A Brahmana immediately on "being born, is produced a debtor in three "obligations; to the holy saints, for the "practice of religious duties; to the gods, "for the performance of sacrifice; to his "forefathers, for offspring. Or he is ab-"solved from debt who has a son, has per-"formed sacrifices, and practices religious "duties.'"

These passages conclusively show that a childless Hindoo is bound to adopt a son, if he is at all anxious for his own salvation and for the preservation of the obsequies due to his ancestors.

It has been said that what is required to be done for securing a man's own salvation must be considered as optional, whereas what is required to be done for the benefit of the souls of his ancestors must be considered as imperative. This distinction seems to us to be absurd on the very face of it. Every religious ceremony which a Hindoo is required to perform has reference to his own salvation, and the performance of the obsequies due to his ancestors is but a means to that end.

It is further argued that adoption has been treated by Hindoo Lawyers under the head of "Civil Acts." But this circumstance cannot affect the real character of the ceremony which is essentially founded upon religious considerations. Supposing, however, that adoption is a civil act, it does not necessarily follow that the adoption in this particular case would be invalid merely because it was made under a deed of

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permission executed by a minor. Every act done by a minor is not necessarily null and void. Those acts only which are prejudicial to his interests can be questioned and avoided by him after he reaches his majority. But no such prejudicial character can be predicated of adoption in the case of a childless Hindoo, and as under the Hindoo Shasters a minor who has arrived at the age of discretion is not only competent, but bound to perform the religious ceremonies prescribed for his salvation, we cannot hold the adoption made in this case to be invalid, merely because the adoptive father was in the eye of the law a minor. Baboo Shama Churn Sircar, in his Digest of the Hindoo Law, admits that an adoption made by a minor who has attained the age of discretion is valid from a religious point of view: but he goes on to say that a son so adopted would not be entitled to succeed to the estate of his adoptive father as heir. Upon what reasoning or authority this latter conclusion is based we are unable to make out; for if it is once conceded that the adoption is valid, all the legal consequences attached to it must follow as a matter of course. It cannot be contended for one moment that the property of the adoptive father is to pass to his distant relatives when he has left behind him one who is entitled to stand towards him precisely in the same position as his own *owrasa* son.

For the above reasons, we are of opinion that the conclusion arrived at by the Judge below is correct, and we therefore dismiss this appeal with costs.

Paul, J.—I entirely concur. The obligation to adopt by a sonless Hindoo being of the highest moment to him in a religious point of view, I wholly fail to follow the argument which has been addressed to us to the effect that an infant Hindoo who has attained his years of discretion cannot adopt a son. The passages cited by my learned colleague leave no doubt whatever on the matter, and the suggestion that civil disability precludes an infant Hindoo from adopting is one which entirely conflicts with the fundamental principles on which the disability of infants are based as a matter of civil law. The provision is intended for their protection, and matters which are highly beneficial are not within the disability.

I concur in dismissing both the appeals with costs.

The 23rd May 1871.

Present:

The Hon'ble L. S. Jackson and W. Ainslie, *Judges.*

Mokurruree grant—Resumption.

Cases Nos. 142 and 147 of 1870.

Regular Appeals from a decision passed by the Subordinate Judge of Gya, dated the 30*th March* 1870.

Mirza Himmut Bahadoor and others (Defendants) *Appellants,*

versus

Ranee Sooneet Kooer (Plaintiff) *Respondent.*

Mr. J. P. Kennedy for Appellants.

The Advocate General (*Graham*) for Respondent.

A mokurruree tenure granted in perpetuity cannot be resumed by the grantor, even if the grantee dies without leaving heirs.

Ainslie, J.—The plaintiff, who is one of the widows of the late Rajah Mode Narain Singh, has brought this suit to recover from the defendants a 7½ annas share of Mouzah Pranpore granted in mokurruree by the Rajah to his daughter Shurfoonissa in the year 1248, F. S., on the allegation that the grant was limited to the life of the grantee and that she died on the 30th Kartick 1265, F. S.

It is alleged that the plaintiff was not aware of the death of the grantee till the end of 1272, when she took possession of the village, but was put out of possession by an order of the Magistrate of Gya, made under Section 318 of the Code of Criminal Procedure, on the 7th February 1866 (the middle of 1273).

Shurfoonissa was the illegitimate daughter of the Rajah (who had no legitimate issue) by a Mahomedan lady named Buratee Begum.

The defendants who appear in this Court as appellants are a brother and sister of Shurfoonissa and a deceased brother's widow.

They allege that she died in infancy on the 10th Chyet 1249, F S., and that on her death the village was held under the mokurruree grant by their mother Buratee Begum up to her death in 1267 (about two years after the death of the Rajah) and subsequently by themselves.

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The lower Court has held that the grant to Shurfoonissa was not merely for life but in perpetuity. But inasmuch as she died childless, and in a recent decision of this Court reported in XII Weekly Reporter, page 512, it was held that in the circumstances of this family no right of inheritance, under Imameah Law, vests in the surviving brother or sister, the Subordinate Judge came to the conclusion that the grant had become inoperative and that the grantor had a right to resume it. It was contended before him that even supposing the defendants not to be rightful heirs, yet the plaintiff would have no right to resume the grant as the property would be liable to be taken by the ruling power as an escheat, and that so long as the party rightfully entitled abstained from pressing his claim, the defendants were entitled to retain possession undisturbed. This plea was overruled on the ground that the defendants in possession were mere trespassers, and that as the legal right to the property is either in the grantor or the Crown, the former in the absence of any claim by the latter is entitled to maintain the suit.

The defendants also pleaded limitation, but this plea was overruled.

Mr. Kennedy, who appeared for the special appellants, stated that the main objection to the finding of the lower Court is in respect of that portion in which the Subordinate Judge lays down that as the succession is vacant the grantor is entitled to re-enter. For the purposes of this appeal we may confine ourselves to this objection.

The Court below holds that the mokururee tenure was granted in perpetuity and not for life, and this finding has not been questioned by way of cross-appeal, or under Section 348 Act VIII of 1859.

The grant is made to Shurfoonissa and her children from generation to generation, and in it she is described as absolute (*moostukkil*) mokururreedar.

Tenures created in these terms and not in any way limited by other special conditions are always treated as of the most absolute character, and are every day transferred both by private sale and in execution of decree. Had Shurfoonissa conveyed the estate to another, the grantor could not have ousted the assignee. Supposing she had died leaving a husband and children, this estate would have descended according to the ordinary rules of Mahomedan Law, and no change in the order of succession would have been caused by the use of the words "to her children from generation to generation." It is, at least, extremely doubtful whether the grantor could have altered the course of descent established by law, if he had intended to do so. It is, however, sufficient to say that the terms of the grant are those ordinarily employed in creating an estate governed by those rules, and that if it had been the intention of the grantor to limit the grant in some other mode he would have specifically stated this intention. In the absence of any words of limitation, we cannot hold that the Rajah in tended to create anything but an estate in perpetuity with absolute power to the grantee to deal with it as she thought proper, and that he never contemplated the possibility of failure of issue or intended to interfere with the ordinary course of descent.

It is hardly necessary to consider the conduct of Rajah Mode Narain which has been referred to as showing that he never thought that his grant was less than absolute, but it certainly was not in any way inconsistent with an intention to grant a mokururee tenure without any reservation. He made no attempt to resume it on the death of his daughter but allowed her mother to enjoy it, and it is admitted that up to 1272 (seven years after his death) receipts for the reserved rent continued to be granted in the daughter's name, and the mokururee tenure as originally established was treated as subsisting.

There is a dispute as to the precise date of Shurfoonissa's death. The direct evidence on this point on either side is unsatisfactory, but looking to the examination of the Ranees there is no room to doubt that the plaintiff's case is false, and that in fact Shurfoonissa died at an early age.

We find that Buratee Begum lived within the Rajah's mansion at Ticcaree and that the particular apartment or building occupied by her stood between the apartments of the Ranees. Those ladies admit that they knew of the existence of the three later born children and used to see them about the house, but profess never to have set eyes on the eldest.

Yet if the statement in the plaint is true, Shurfoonissa had attained the age of 17 years before she died, and it is incredible that these ladies should have known nothing of her. It may not be established with certainty that Shurfoonissa died on 10th Chyet 1249 as alleged by defendants, but there can be no doubt that she died in the lifetime of her father, and not two months after him as alleged by plaintiff.

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As it appears to us that the plaintiff has altogether failed to show that any right to resume the grant on failure of issue was reserved to the grantor, we hold that the judgment of the Court below cannot be maintained. The plaintiff can succeed only on the strength of her own title and not on the weakness of that of the defendant. She is bound to show that she was the party entitled to take the estate when it became vacant on the death of Shurfoonissa before she can ask the Court to eject the defendants who are in possession.

The Subordinate Judge seems to think that there is something in the nature of a mokururee grant which renders it capable of resumption, if there be no known heir of the last holder, but no authority has been shown to support this opinion.

It would hardly be contended that a man who makes a gift has a better title than a stranger to the thing given, if the owner, after accepting and holding it for a time, should abandon it.

The Rajah created a certain estate and impressed the stamp of perpetuity on it for the express purpose of making a free—gift of it to his daughter, and the fact that she had to pay a certain rent, or in other words, that the gift was of a part only of the profits of the land, does not make it any thing less than a gift. He reserved to himself a certain right over the lands given, namely, the right to receive a fixed rent, but he absolutely divested himself of any other right. The transfer of the property to a stranger in no way affects the right reserved, which attaches to the land in whosesoever hands it may be, and is therefore at all times adequately secured. If the rent be not paid there are proper legal remedies, but resumption of the grant is not among these, where there is no express stipulation to that effect.

We think that the plaintiff has failed to establish any title to resume the mokururee grant, and therefore without entering into the other questions involved in this suit, we admit the appeals and reversing the judgment of the Court below dismiss the plaintiff's suit with costs of both Courts.

The 25th May 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Section 35 Act XXIII of 1861—Illegal order.

In the matter of

Tara Chund Mundul (Decree-holder) *Petitioner*,

versus

Bhyrub Chunder Chukerbutty, (Judgment-debtor) *Opposite Party*.

Baboo Bama Churn Banerjee for Petitioner.

Baboo Oopender Chunder Bose for Opposite Party.

A rule having been issued calling on a judgment-debtor to show cause why an order of the Collector in appeal reversing an order made by a Deputy Collector in execution, should not be set aside, the rule was discharged with costs, inasmuch as although the Collector had no jurisdiction to make the order which he made, the Deputy Collector's order was wrong, being a violation of the provisions of Section 92 of Act X of 1859, and could not be upheld.

Norman, C. J.—A RULE was issued by a Division Bench of this Court upon a petition of the decree-holder in this case under Section 35 of Act XXIII of 1861, calling on the judgment-debtor to show cause why an order passed by the Collector of the 24-Pergunnahs on appeal, reversing an order made by the Deputy Collector of Barripore in execution of a decree for rent under Act X of 1859, should not be set aside as having been made without jurisdiction.

The facts are shortly these :—

Plaintiff obtained a decree on the 29th of August 1866 for a sum under rupees 500 for RENT and costs.

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On the 12th of September 1869, the decree-holder made an application to the Deputy Collector for the sale of the tenure of the judgment-debtor. The Deputy Collector admitted the application, and on the 15th of December 1870 the tenure was sold.

The judgment-debtor appealed from the order of the Deputy Collector allowing the sale to the Collector of the 24-Pergunnahs.

The Collector reversed the order of the Deputy Collector on the ground that Section 92 of Act X of 1859 precluded the issue of process of any description on a judgment under that Act for less than rupees 500 after the lapse of three years from the date of the judgment.

We think that under Act X of 1859 no appeal lies to the Collector from the order of a Deputy Collector made in execution of a decree, and consequently that the order of the Collector was one which he had no power to make.

A large discretion is left to the Court by Section 35. If we were to make an order for setting aside the Collector's decision, we should be giving an appearance of validity to the order of the Deputy Collector made in violation of the provisions of Section 92.

The object of the petitioner as disclosed in his petition is to set up the sale made under the order of the Deputy Collector. We think he is not entitled to ask any such relief at our hand. We shall follow the example set us in a somewhat analogous case by the Full Bench, 6 Weekly Reporter, Act X Rulings, page 54, and discharge the rule with costs.

The 25th May 1871.

Present :

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble Onoocool Chunder Mookerjee, *Judge*.

Sale for arrears of revenue—Purchaser's rights—Section 37 Act XI, 1859 — Resumption decree — Proprietary rights—Cause of action.

Case No. 15 of 1871.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 28th December 1870, affirming a decision of the 2nd Subordinate Judge of that District, dated the 26th May 1870.

Thakoor Dass Roy Chowdhry and others (Defendants) *Appellants*,

versus

Nubeen Kishen Ghose (Plaintiff) *Respondent*.

Baboos Romesh Chunder Mitter and *Anund Chunder Ghossal* for Appellants.

Baboos Mohinee Mohun Roy and *Sreenath Doss* for Respondent.

A purchaser at a sale for arrears of revenue, with a paramount title under Section 37 Act XI of 1859, acquires the estate free from any incumbrance which accrued thereupon from the laches of former proprietors, in the same way as he would have acquired it free from any incumbrance created by sale, lease, or mortgage.

In the absence of any proof to the contrary, such purchaser must be assumed to be the owner.

A resumption decree does not destroy the proprietory right of the lakherajdars which continues unless and until they are dispossessed in due course of law. By obtaining a permanent settlement they acquire no new right; a cause of action accruing to them if ousted before settlement.

Norman, C. J.—This is a special appeal from the decision of the Judge of the 24-Pergunnahs.

The facts are very clearly stated in the judgment of the learned Judge, which is as follows :—

"On the 31st December 1838, the Govern-"ment recovered a decree in a suit for the "resumption of beegahs 738-13 of lakheraj "land in mouzah Joikistonugur. The area "is so specified in the chittah of 1190 and "in the taidad No. 8242 filed in 1204. The "Deputy Collector, Doorga Pershad Ghose, "was directed to make a settlement of these "lands, and he deputed an Ameen, Chunder "Kant Chuckerbutty, who measured them "in 1841 in 17 plots and found beegahs "942-1 of which only 160 beegahs were "cultivated. By a proceeding dated August "6th 1846, the Deputy Collector approved of "the Ameen's proceedings, and a settlement "of the estate which was entered on the "rent-roll as No. 1137 was made for 10 "years with Chunder Koomar Dutt, the "representative of Issur Chunder Dutt, who "was the defendant in the resumption pro-"ceedings. The original lakherajdars noted "in the taidad were Sudasib Dutt and others, "sebaits of the dewutter endowment of "Luckhee Junnardun Thakoor.

"On the expiration of this temporary "settlement, Deputy Collector Okhoy Churn "Bose was deputed to make a new settle-"ment, and he measured 880 beegahs

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"almost all of which was immediately "claimed by the neighbouring zemindars. "It was then found that the survey officers "had not recognized talook No. 1137, and "the Collector proposed to measure the "neighbouring talooks, and after excluding "the lands belonging to their owners, to "take the remainder as the lands rightfully "belonging to talook No. 1137. But the "representatives of the ex-lakherajdar, Issur "Chunder Dutt, opposed this measure, and "alleging that they had remained since 1846 "in undisturbed possession of the 942 "beegahs found by Doorga Pershad Ghose, "demanded a settlement of the whole. The "Board of Revenue set aside the proceedings "of Deputy Collector Okhoy Churn Bose, "and directed the Collector to make a "settlement of beegahs 942-1 on the basis "of Deputy Collector Doorga Pershad Ghose's "chittahs of measurement. The Board's "order is dated July 5th, 1861; and on the "30th April 1863 the estate so constituted "was put up to sale for arrears of revenue and "was purchased by the present plaintiff.

"But the new purchaser was never allowed "to take possession; and he has instituted "this suit to recover possession of the "beegahs 942-1 which were measured by "the Deputy Collector Doorga Pershad "Ghose.

"He is met in the first instance by the "plea of limitation on the ground that the "defendants, who are the proprietors of the "adjoining talooks, have had possession "of the lands in question for more than "twelve years. The Subordinate Judge "observes that the plaintiff has acquired "the rights which accrued to Government "under the resumption decree on the 31st "December 1838, and is entitled to the 60 "years limitation from that date. The plaint-"iff cannot take any lands which were "included in the defendant's talooks at the "decennial settlement, but he is entitled "to recover all lands which Doorga Pershad "Ghose included in the first settlement.

"It appears to me that this ruling is "erroneous. It is true that the public claim "to the resumed lands might be pursued "at any time within 60 years from the date "of the resumption decree, but no such right "accrued to the persons with whom the "settlement was made, or to the plaintiff. "When the settlement was made, the estate "became subject to the same rules and con-"ditions as all other permanently settled "talooks, and the persons with whom the "settlement was made could not claim "exemption from the ordinary rules of limit-"ation. If the representatives of Issur "Chunder Dutt had not opposed the propo-"sal of the Collector to re-measure the lands "for the purpose of identification, the full "period of limitation applicable to public "claims would have been saved; and the "settlement would have been made of such "lands only as the revenue authorities "might find to be identified by evidence of "some kind. But they repudiated the aid "of the Collector and alleged actual posses-"sion, and therefore the settlement was made "with them, and they took the position of "other talookdars. Nevertheless, I am of "opinion that the suit of the plaintiff to "obtain possession of the lands rightly be-"longing to the estate under the resumption "decree is not barred by the rules of limita-"tion. The Government had a period of "60 years from the date of the resumption "decree, that is to say, from 1838; and that "period has not expired. *The persons with "whom the settlement was made had a period "of* 12 *years from the date on which the "settlement was made, that is to say, from* "1863; and that period has not expired. "The plaintiff would have been bound by "the expiry of the 60 years if the date "had preceded the expiry of the 12 years, "but that is not the case here, and a large "proportion of each period has still to "run."

* * * * *

"It has been urged by the defendants "that the plaintiff is not a *bonâ fide* pur-"chaser of the estate, and that the old pro-"prietors allowed default in order to pur-"chase the estate and avoid limitation. "But as it appears that limitation would not "have affected the case if there had been no "sale, it is unnecessary to consider the ques-"tion."

We think it may be taken as established that the Dutts were in possession of the land as lakheraj in 1190, and so continued down to the time when the lands were surveyed by Chunder Kant Chuckerbutty under the order of Doorga Pershad Ghose at the period of the settlement in 1841.

The dispossession seems to have dated from a subsequent period, the exact date of which is not apparent.

It has been argued on behalf of the appel-lants that the Judge was in error in not trying the question whether the plaintiff purchased

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at the sale for arrears of revenue in April 1863, and acquired the property at such sale *bonâ fide* on his own account, or whether he merely purchased on account of and benamee for the former proprietors, he himself not having any real interest in the matter.

It was also contended that assuming the plaintiff to have purchased in his own right the Government and the former proprietors having been out of possession at the date of the sale for arrears of revenue, the plaintiff acquired a mere right of action which he was bound to pursue within the time allowed to the former proprietor, and that limitation ran from the period when the defendants had dispossessed the former proprietors.

Upon the last point we feel no difficulty. Though the defendants might by the laches of the former proprietors have acquired a title good as against them, we think that the plaintiff, as a purchaser at a sale for arrears of revenue coming in under a paramount title under Section 37 Act XI of 1859, would acquire the estate free from any incumbrance which had accrued upon the estate from such laches, exactly in the same way as he would have acquired the estate free from any incumbrance created by a sale, lease, or mortgage by the former owners.

If however the plaintiff's is a mere name, and the real purchasers at the sale for arrears of revenue and the parties now interested and conducting this suit are the former proprietors, we think that we should be bound to treat the case as if the former proprietors were plaintiffs on the record before us.

Now the effect of the decree in the resumption suit was not to destroy the proprietory right of the lakherajdars. That proprietory right would continue unless and until they should be dispossessed in due course of law. Compare Section 4, Regulation XIX of 1793, Sections 21 and 22, Regulation II of 1819. The former possessors of the estate were proprietors while holding the lands lakheraj; they continued proprietors while in possession under the temporary settlement, and they acquired no new title of ownership as proprietors of the land by the permanent settlement which after the resumption was made with them in 1862. It may be that a stranger obtaining a settlement of resumed lands by grant from the Government might be treated as having first acquired a right of suit from the date of the settlement; and if nothing had taken place by which a suit by the Government would have been barred, he might be entitled to a period of limitation of 12 years from the date of acquisition of his right.

But we think that the former proprietors obtaining a permanent settlement stand in a very different position from a person acquiring a new right by the settlement. A cause of action—a right of suit to recover possession—had accrued to the former proprietors by their ouster before the date of the settlement. No new wrong could be done to them and no new right accrued to them in consequence of the settlement.

We are, therefore, of opinion that in order to arrive at a proper determination of the question whether the suit is barred by limitation, the Judge should have enquired whether the plaintiffs hold merely benamee for the former proprietors or not.

The onus of proof of this point is of course upon the defendants.

We think that in the absence of any proof to the contrary, the purchaser at a revenue sale must be assumed to be the owner. The defendants had an opportunity of adducing evidence as to the alleged benamee holding under the issue as originally framed by the Subordinate Judge. As at present advised, we do not think it necessary that the Judge should allow fresh evidence to be recorded upon the point. We remand the case in order that the Judge may take up the question and try it on appeal, using his own discretion when he hears the case whether he should allow either party to adduce further evidence.

If the Judge finds that the purchase by the plaintiff at the sale for arrears of revenue was on his own account, of course the existing decision in favor of the plaintiff will stand.

But if the Judge finds that the purchase was made by the Dutts in the name of the plaintiff, the question will remain whether the suit is barred by the operation of the 12 years period of limitation. That is an issue which would have been immaterial in the view which the Judge took of the case, and has probably therefore not been fully considered by the Judge. In the event of the Judge finding the first issue against the plaintiff, this question will have to be tried also.

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The 25th May 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Mahomedan Law—Marital agreement—Divorce—Re-marriage.

Case No. 1702 of 1870.

Special Appeal from a decision passed by the Judge of Tipperah, dated the 7th May 1870, affirming a decision of the Moonsiff of Ameergaon, dated the 28th August 1869.

Budrunissa Bibee (Plaintiff) *Appellant,*

versus

Nufeeutoollah (Defendant) *Respondent.*

Moulvie Murhumut Hossein for Appellant.

No one for Respondent.

An agreement entered into by a Mahomedan with his wife at the time they were married that, if he entered into a second marriage during her lifetime without her consent, she would be entitled to divorce herself and take a second husband, was held to be in consonance with the Mahomedan Law.

Jackson, J.—The plaintiff brought this suit for a declaration that her marriage with her husband was dissolved. She alleged that at the time she was married to her husband an agreement was entered into between them, one condition of which was that if he married another wife without her consent she would be entitled to divorce herself and take another husband.

There seems to have been no question before the lower Courts as to this agreement having taken place. There was an allegation that the second marriage took place with the consent of the first wife. But both the Courts seem to have found that this was not proved. Still both Courts dismissed the plaintiff's suit on the ground that such a condition was against the Mahomedan Law. The Judge says that there are numerous modes in the Mahomedan Law by which a husband can divorce his wife whenever he pleases, but it does not give equal facility to the wife to divorce her husband. The Judge is of opinion that this contract is against the law and that the plaintiff's suit should be dismissed.

The special appeal to this Court is on the ground that the contract is directly according to the Mahomedian Law. No one has appeared on the part of the special respondent to support the decision of the lower Court upon this point of law. We have looked into the Mahomedan Law books. The Judge has stated in his decision that Macnaghten does not allude to the subject. But both the Hedaya and Baillie's Mahomedan Law have special Chapters upon it.

The Hedaya in Book 4, Chapter 3, page 257, lays down as the law that a husband may give power to the wife to divorce herself. "If a husband say to his wife 'divorce your-"self when you please,' she is at liberty to "divorce herself either upon the spot or "at any future period, because the word "*when* extends to all times; and hence it is "the same as if he were to 'say divorce "yourself at whatever time you like.'"

If this is the correct law, the husband can certainly enter into an agreement with his wife that if he enter into a second marriage during her lifetime without her consent she can divorce herself.

Baillie in Chapter 2, on the subject of Divorce, Section 2, page 218, says:—

"Repudiation is said to be referred to a "time when its effect is postponed from the "time of speaking to some future time speci-"fied, without any condition. And repudia-"tion is said to be suspended on or attached "to a condition, when it is combined with a "condition and made contingent on its occur-"rence. In the former case, repudiation "takes effect immediately on the arrival of "the time to which it has been referred; "in the latter it takes effect on the occur-"rence of the event on which it has been "made to depend. And revocable as well "as irrevocable repudiations are susceptible "of being referred to a time, or made subject "to a condition. The two kinds of *izafut*, "or reference to a future time with or with-"out a condition, might, therefore, I think, "be treated together; but as they have been "treated separately by the compilers of the "*Futawa Alumgeeree* and other writers on "Mahomedan Law, I follow the same ar-"rangement."

He goes on to show that repudiation may take place either at some future time or in consequence of any particular acts, either on the part of the husband or on the part of the wife.

Looking to these Chapters of the law, we think that the agreement between the parties was not contrary to the Mahomedan Law. But, on the contrary, there are Clauses in the law which are distinctly consonant with such agreement.

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We, therefore, set aside the Judge's decision, and decree the plaintiff's suit with all costs.

The 25th May 1871.

Present :

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Arbitration award—Rent—Jurisdiction—Appeal.

Case No. 147 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Midnapore, dated the 16th November 1870, reversing a decision of the Moonsiff of that District, dated the 19th August 1869.

Altaf Hossein (Plaintiff) *Appellant,*

versus

Grish Chunder Roy (Defendant) *Respondent.*

Mr. G. A. Twidale for Appellant.

Baboo Rash Beharee Ghose for Respondent.

A Moonsiff has no jurisdiction to entertain an application and pass an order on the enforcement of an arbitration award relating to the determination of rent.

When a Moonsiff acts without jurisdiction, the question may be the subject of an appeal to the Appellate Court of the District.

Bayley, J.—This was an application for the enforcement of an award made by arbitrators under Section 327, Act VIII of 1869, on a claim for the determination of rent.

The Moonsiff took jurisdiction and confirmed the fysullah of the arbitrators. An appeal was made to the Lower Appellate Court on the ground that the Moonsiff had no jurisdiction, and the Lower Appellate Court reversed the order made by the Moonsiff, holding that he had no jurisdiction to confirm an arbitration award relating to revenue matters.

In special appeal, the first ground taken is that the Lower Appellate Court itself had no jurisdiction to hear the appeal, and the second ground is that the Moonsiff had no jurisdiction in the matter.

On the first ground, we have only to state when a Moonsiff acts without jurisdiction, the question may be the subject of an appeal to the Appellate Court of the District, for every superior Court is bound to take cognizance of all acts done without jurisdiction by the Courts subordinate to them.

On the second ground, the case turns on the original character of the suit. The words of Section 327 are when any matter has been referred to arbitration "without the interven- "tion of any Court of justice and an award has "been made, any person interested in the "award may, within six months from the "date of the award, make application to the "Court *having jurisdiction in the matter to which "the award relates,* that the award be filed "in Court." Now, the matter which was referred to arbitration and *to which this award related* was the determination of rent, and the Court *which had jurisdiction* in the matter was the Collectors' Court, and not the Moonsiff's. The application, therefore, could only be made in the Collector's Court if it could be made at all, and not in the Moonsiff's Court. In other words, the Moonsiff had no jurisdiction to entertain such an application and pass an order for the enforcement of the award as he has done, alleging his act to be under the provisions of Sections 325 and 327 of Act VIII of 1859, the latter of which Section itself shews that he had no jurisdiction in this particular case.

We, therefore, dismiss this special appeal, but without costs, looking to all the circumstances of the case.

The 25th May 1871.

Present :

The Hon'ble G. Loch and G. C. Paul, *Judges.*

Section 27, Act XXIII. 1861—Question of title—Special Appeal.

Case No. 1921 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Backergunge, dated the 29th June 1870, affirming a decision of the Moonsiff of Mendeegunge, dated the 29th June 1869.

Pachoo Karee and another (Defendants) *Appellants,*

versus

Gooroo Churn Dass (Plaintiff) *Respondent.*

Baboo Kashee Kant Sein for Appellants.

Baboo Abinash Chunder Banerjee for Respondent.

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Where a question of title arises in a suit of a nature triable by a Small Cause Court, which must be determined before plaintiff can get a decree, and the Lower Appellate Court fails to determine it, a special appeal is admissible.

Loch, J.—The plaintiff claiming to be a 3 anna sharer in a certain howalah brings this action against the defendants whom he describes as kursa ryots, on the following grounds. He says that the defendants hold some land in the howalah; that without any authority they have dug a hole some three cubits deep and thereby caused damage to the plaintiff; and he therefore prays that the defendants be required to fill up the hole or to pay him rupees 18-12 which he estimates as his proportionate share of expenses for filling it up. The defendants admit the superior title of the plaintiff and the fact that they have dug a hole as stated by him, but they plead a pottah from the plaintiff's father under which they are entitled to make such an excavation as they have now made.

The first Court found that the pottah put in by the defendants was not proven and that they had no right whatever to excavate as they pretended, and that the plaintiff's share of the costs for filling it up would amount to rupees 5-10, and he gave plaintiff a decree for that amount "as compensation of "damage"—with costs in proportion to the claim decreed.

On appeal, the Subordinate Judge affirmed the judgment of the Court below, holding that the defendants had without any right sank an excavation in the plaintiff's land and thereby caused damage to him.

The Subordinate Judge has not apparently entered into the defendants' case and determined whether the pottah adduced by them was genuine or not; nor, if genuine, whether it gave them any right to dig in the manner they have done.

The case has come up in special appeal, and a preliminary objection to hearing it is made that as the suit was one of a nature triable by a Small Cause Court, *viz.*, for damages, and being of a value under rupees 500, no special appeal would lie under the provisions of Section 27 Act XXIII of 1861; and in support of this allegation two cases decided by this Court were quoted. The first is reported at page 130 of X Weekly Reporter. There the Chief Justice says—"The plaint asks for "one of two things, either that the defendant "may be ordered to fill up the excavation at "his expense, or that the plaintiff may have "rupees 25 as damages. The latter alternative is one entirely within the jurisdiction "of the Small Cause Court. The plaintiff is "not, we think, entitled to a decree for the performance of the specific act but only to the "alternative relief sought by him. It is, therefore, a suit for damages and the Small Cause "Court cannot be ousted of its jurisdiction "merely by asking for an alternative relief to "which the plaintiff is not entitled. In this "view, the Principal Sudder Ameen was "correct in saying that the suit is one which "is cognizable by the Small Cause Court." The above judgment is given at length, as the facts so far as they are stated correspond in some respects to the facts admitted in this case; but in the absence of the pleadings we cannot admit it as sufficient to rule the case before us, for we do not know whether in that case any question of adverse title was set up, as there has been in the present case.

The other case is reported at page 127 of the Special No. of the Weekly Reporter, and is a Full Bench Ruling to the effect that Small Cause Courts have jurisdiction to try questions of title which incidentally arise in suits cognizable by them—a ruling in which we quite concur; and it is because we find that the question of title raised in this case has not been properly disposed of that we consider a special appeal is admissible. We have been referred to certain other reported cases, but these do not assist us. It has been held by the High Court of Bombay that where a suit appears from the plaint to be one of a nature cognizable in a Court of Small Causes, but a question of title has been gone into and decided by the District Court in appeal, a special appeal will lie,—II Bombay Reports, page 4, Dekchit *versus* Dekchit.

The converse of this has happened in the present case. A question of title has arisen which must be determined before the plaintiff can get a decree, and the Lower Appellate Court has failed to determine it.

We think, therefore, that a special appeal is admissible under these circumstances, and we remand the case to the Lower Appellate Court to come to a distinct finding from the evidence on the record in the case put forward by the defendant; 1st,—whether the pottah adduced by the defendants is genuine; and 2nd,—whether, if it be, it gives them either directly or impliedly a right to make excavations; and to dispose of the case according to the finding he may come to. The costs of this appeal to follow the result.

Paul, J.—I concur.

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The 25th May 1871.

Present:

The Hon'ble G. Loch and W. Ainslie, *Judges.*

Registration—Determination of value—Section 17 Act XX of 1866.

Case No. 1733 of 1870.

Special Appeal from a decision passed by the Officiating Judge of Moorshedabad, dated the 27th May 1870, reversing a decision of the Moonsiff of Gowas, dated the 31st January 1871.

Rohinee Debia and another (Plaintiffs) *Appellants,*

versus

Shib Chunder Chatterjee (Defendant) *Respondent.*

Baboo Rajendro Nath Bose for Appellants.

Baboo Mutee Lall Mookerjee for Respondent.

The necessity for registration must be determined by the value of the consideration stated in the deed.

Ainslie, J.—PLAINTIFF sues on a conveyance, dated 1st Magh 1275. Defendant, among other pleas, urged that the document was inadmissible in evidence for want of registration, the actual value of the property to which it refers being above rupees 100, although the consideration stated in the deed is below that amount.

The Moonsiff held that the necessity for registration must be determined by the value stated in the instrument, and overruled the objection.

On appeal the Judge took the opposite view, and finding the market value to be considerably above rupees 100 he rejected the document and dismissed the suit.

The plaintiff now in special appeal contends that the view taken by the Moonsiff was the correct one.

The law in force at the date of the disputed conveyance was Act XX of 1866, by the 17th Section of which it is enacted that "the instruments next hereinafter mentioned "shall be registered * * * * "(that is to say) * * * * "2. Instruments (other than an instrument of gift) which purport or operate to "create, declare, limit, assign or extinguish, "whether in present or in future, any right, "title, or interest, whether vested or contingent, of the value of 100 rupees and "upwards, to or in immoveable property."

By Section 49, it is further enacted that "no instrument required by Section 17 to "be registered shall be received in evidence "in any civil proceeding in any Court, or "shall be acted on by any public servant, as "defined in the Indian Penal Code, or shall "affect any property comprised therein, unless it shall have been registered in accordance with the provisions of this Act."

In the earlier Registration Act, No. XVI of 1864, there were similar provisions to the above in Section 13. That Act also contained another provision in Section 14 as follows, which has been omitted in the later Act :—"For the purposes of this Act, the "value of any right, title or interest in any "immoveable property, created, declared, "transferred or extinguished by any instrument shall be taken to be the value indicated by the stamp affixed thereto or impressed thereon under Act X of 1862, or "under any other Act for the time being in "force for regulating the stamp duties."

A similar provision is to be found in the table of fees prepared in accordance with Section 86 Act XX of 1866, but there is nothing to this effect in the Act itself. The omission, however, is not in my opinion at all material, because there is nothing in the Act to show that it was intended to do away with any restriction resulting from this Section in the earlier Act.

On comparing Acts XVI of 1864, XX of 1866, and VIII of 1871, it will be seen that in all of them the words "purport or operate" are used without distinction both in regard to interests in immoveable property of the value of 100 rupees and upwards, and to interests in such property of the value of less than 100 rupees, and also in regard to moveable property without reference to value. It, therefore, seems to me that the word "operate" must be read as used in a sense common to all these three classes of property. The value being omitted from the last, it cannot be said that "operate" in the Clauses referring thereto* is to be read in connection with value; but if we read 'operate" in connection with "to create, declare, &c." and independently of value, all difficulty

* Clause 4 Sec. 16 Act XVI. 1864.
Clause 5 Sec. 18 Act XX. 1866.
Clause 5 Sec. 18 Act VIII. 1871.

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vanishes. I think it is clear that "operate" must be taken as used in contradistinction to "purport," as referring only to the mode of "creating, declaring, assigning, limiting or extinguishing" a title and interest, and not to the extent of such interest.

If this view is correct, the omission of Section 14 Act XVI of 1864 in the later Act is of no importance.

Not only is there nothing in the terms of the law to require that any enquiry as to actual value of an interest in immoveable property affected by an unregistered instrument should precede its admission in evidence, but I think there is nothing to warrant such an enquiry. Certainly, such an enquiry would be extremely inconvenient and would introduce into many cases collateral issues which often could lead to nothing. Who shall say whether the true value of a property is 99 rupees or 101? There may be no difficulty where one side puts forward a nominal value of 50 rupees and the other proves a probable value of 5,000. But the remedy is not by excluding the document, but by using the inadequacy of consideration as an element in the evidence of *mala fides*. In this supposed case, would the party who propounded the document be any the better or his adversary any worse, if the document were actually registered under Section 18?

The following passage from Story's Equity Jurisprudence, Volume I, page 276, appears to me to indicate very clearly the difficulties the Courts would be thrown into if the doctrine that evidence of value could be tendered to exclude an unregistered deed were adopted. Section 245—"Inadequacy of consideration then of itself is not a distinct "principle of relief in equity. The Common "Law knows no such principle. The consi- "deration, be it more or less, supports the con- "tract. Common sense knows no such prin- "ciple. The value of a thing is what it will "produce and it admits of no precise stand- "ard. It must be in its nature fluctuating "and will depend on ten thousand different "circumstances. One man, in the disposal "of his property, may sell it for less than "another would. He may sell it under a pres- "sure of circumstances which may induce "him to part with it at a particular time. "If Courts of equity were to unravel all "transactions, they would throw every thing "into confusion and set afloat the contracts "of mankind. Such a consequence would "of itself be sufficient to show the inconve- "nience and impracticability, if not the in- "justice, of adopting the doctrine that mere "inadequacy of consideration should form a "distinct ground for relief."

It may well happen that a man under pressure may consent to take 90 for what, if free from pressure, he would not sell for 150. Still the value to him at the time would be the 90 he could get at once, and not what the purchaser under other circumstances might be tempted to give. The purchaser having obtained the property may in his turn value it at 150.

Having thus two valuations, which are we to select? Clearly the value at which the property actually changed hands, supposing the transaction to be *bonâ fide*. If not a *bonâ fide* one, registration will not make it unimpeachable.

The rule, then, in my opinion is that followed by the first Court. The necessity for registration is determined by the stated consideration. Inadequacy of consideration, so far as it can be considered at all, can only be considered with reference to the *bona fides* of the transaction.

I would therefore decree this appeal, and remand the case to the Judge for trial on the merits.

Loch, J.—I think the view of the law taken by my colleague is correct. The inconvenience which would arise if the view of the law taken by the Judge be correct is inconceivable. In every case the admission of an unregistered document as evidence might be opposed on the ground that it operated to create a title of a value exceeding rupees 100, though the consideration entered therein is below that sum; and thus a contention foreign to the question at issue between the parties would arise. I am quite alive to the difficulty which arises from the wording of the law, but when we consider that the value of a thing depends very much on the circumstances which attend the sale, and not on the intrinsic value of the thing sold; that the circumstances of the seller may be such that he is willing to sell for a comparatively low sum property which when the purchaser acquires he estimates at a much higher value, I think we must accept the consideration entered in the deed as sufficient to determine the question whether the unregistered docu-

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ment is or is not admissible in evidence. In support of his argument the pleader for the special appellant referred to the provisions of Section 14 of the former Registration Act XVI of 1864, and to the table of Fees prepared under the 86th Section of Act XX of 1866. That Section is to the effect that the value of any right shall be taken to be the value indicated by the stamp affixed thereto or impressed thereon; but the provisions of this Section were enacted for carrying out the purposes of the Act so as to enable the registration officers to determine the amount of the fees to be paid on registration, and it does not assist us in determining the question before us.

I think with my colleague that the case should be remanded for trial on the merits. Costs of this appeal to follow the result of the trial.

The 26th May 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble A. G. Macpherson and Dwarkanath Mitter, *Judges*.

Putneedars—Zemindars—Arrears of rent—Payment into Court—Notice—Sale—Regulation VIII of 1819.

Case No. 253 of 1869.

Regular Appeal from a decision passed by the Subordinate Judge of Tipperah, dated the 3rd August 1869.

Kristo Mohun Shaha and others (Plaintiffs) *Appellants,*

versus

Moonshee Aftabooddeen Mahomed and others (Defendants) *Respondents.*

Baboos Unnoda Pershad Banerjee and *Chunder Madhub Ghose* for Appellants.

Baboos Romesh Chunder Mitter, Kulee Mohun Dass and *Sreenath Banerjee* for Respondents.

An instalment of rent having been due from certain putneedars, a proclamation was issued under the provision of Regulation VIII of 1819 fixing the day of sale. Before that day a sum of money sufficient to cover the arrears was deposited in the Collectorate by one of the putneedars, the payment being made to the Collector's accountant who gave a receipt for it; but no intimation of the payment was given to the Collector. Accordingly the sale proceeded and the putneedars now sue to have it annulled.

HELD (Mitter, J., *dissentiente*) that there is nothing in Regulation VIII. 1819 which empowers a putneedar to make a deposit either in the Judge's Court or in the Collectorate before the day of sale, or which gives to such payment, if made, the effect of a payment to the zemindar or his agent, and that plaintiffs had no ground to ask relief on any principle of equity.

An application for the sale of a tenure where the right of sale has been specially reserved with a view to the realization of rent is quite distinct from a suit, proceedings thereon being more nearly analogous to the remedy by distress.

It is not competent to a defendant to bring money into Court privately and secretly on an *ex-parte* application without notice to plaintiff either before or after payment.

Mitter, J.—I AM of opinion that a putneedar whose tenure has been advertized for sale by the Collector under the provisions of Regulation VIII of 1819, is entitled to pay to that officer the amount of arrears claimed from him by the zemindar, and that such a payment, if duly made within the period of the notice issued under the second and third Clauses of the 8th Section of that Regulation, is a legal bar to the sale.

I take it to be an undisputed proposition of law that a person who is sued in a Court of justice for a specific sum of money, is entitled to bring that money into Court together with the costs incurred by the plaintiff up to the date of the payment, and that such a payment, if *duly* made, is sufficient to put a stop to all further proceedings against him and his property upon the same cause of action. The question is therefore whether a payment to the Collector by a putneedar whose tenure has been advertized for sale under the provisions of Regulation VIII of 1819, is entitled to be ranked in the same category as a "payment "into Court" within the meaning of the above proposition.

I am of opinion that this question ought to be answered in the affirmative.

Clause 1 Section 8 authorizes the zemindar to apply for the periodical sales of putnee tenures held under them, in order to realize any arrears of rent that may be due to them from the putneedars.

Clauses 2 and 3 enact that on the first day of Bysack or of Kartick in each year,

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the zemindar *shall present a petition* to the Civil Court of the district and a *similar one* to the Collector *containing a specification of the balance due to him from the putneedar;* that the said petition shall be thereupon stuck up in a conspicuous part of the cutcherry, together with a notice that if *the amount of the demand be not paid* before the first of Jyet or the first of Aughun, as the case may be, *the tenure of the defaulter will be sold in liquidation;* and that a similar notice is to be sent to the mofussil for the due service of which the zemindar is to be held responsible.

Section 9 declares that the sale shall be made in the public cutcherry by the Registrar of the Civil Court in a certain specified manner.

Section 10 says "a person shall attend "on the part of the zemindar with a parti- "cular statement of the payments made up "to the day of sale, on account of the "balance of each advertized lot, together "with the receipt for or certificate of the "notice directed to be published in the "mofussil, nor shall any lot be put up to "sale until the statement produced shall "have been inspected and the existence of "a balance for the year ascertained therefrom, "nor until the receipt for the notice shall "have been read, the observance of which "forms shall be recorded in a separate pro- "ceeding to be held upon each lot sold. "If the sale be of the description provided "for in the 3rd Clause of Section 8, the "kistbundee of the defaulter shall be like- "wise produced in order that it may be "seen that the balance remaining unpaid "exceeds a four anna proportion of the de- "mand up to the date of sale."

Clause 1 Section 13 speaks of the injury that might be done to the inferior tenantry by the putneedar withholding the rents due to the zemindar, and the propriety of affording them some means to save their tenures by preventing the sale.

Clause 2 provides that whenever the tenure of a talookdar of the first degree is advertized for sale, it shall be competent to the talookdars of the second degree, or any number of them, to stay the final sale *by paying into Court* the amount of balance due, or even by lodging money antecedently for the purpose of eventually answering any demand that may remain due on the day fixed for the sale.

Clause 1 Section 14 declares :—"Should "the balance claimed by the zemindar re- "main unpaid upon the day fixed for the "sale, the sale shall be made without re- "serve in the manner provided for in Sec- "tions 9 and 10 of the Regulation; nor "shall it be stayed or postponed on any ac- "count unless the *amount of the demand* "*be lodged.*"

Clause 2 enacts :—"In cases *also* in "which a talookdar may contest the "zemindar's demand of any arrear as speci- "fied in the notice advertized, such "talookdar shall be competent to apply for "*summary investigation at any time* "within the period of notice. The zemin- "dar shall then be called upon to furnish "his kubooleut and other proofs at the "shortest convenient notice, in order *that* "*the award* may, if possible, be made before "the day appointed for sale. *Such award,* "*if so made, will of course regulate the* "*ulterior process;* but if the case be still "pending, the lot shall be called up in its "turn notwithstanding *the suit,* and if the "zemindar or his agent insist on the de- "mand, the sale shall be made on his re- "sponsibility nor shall it be stayed or the "summary suit allowed to proceed unless "the amount claimed be lodged in cash or "Government securities by the talookdar "contesting the demand; and if such "deposit be not made, the putneedar will "have no remedy but by a regular action "for damages and for a reversal of the "sale."

The above provisions are, in my opinion, sufficient to show that a proceeding under Regulation VIII of 1819 is in fact a summary suit for rent instituted in a Court of justice, although it is required to be dealt with in a somewhat peculiar manner. Indeed the very word "Court" is expressly used in Clause 2 of Section 13, and as the functions which the Civil Court of the district or the Registrar of that Court had to perform under the Regulation as it originally stood, have been all vested in the Collector by subsequent legislation, the *cutcherry* of that officer must be necessarily regarded as a "Court" within the meaning of that Clause, and therefore within the meaning of the Regulation itself. The expressions "amount claimed," "amount of the demand," frequently used in the Sections cited above, clearly show that the zemindar is the plaintiff in the suit, and we must therefore look upon the petition filed by him under

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Clauses 2 and 3 of Section 8 as the plaint by which that suit is commenced. Indeed, the very expression "summary suit" is distinctly used in Clause 2 Section 14. and if it is once admitted that the proceeding is a summary suit a payment to the Collector would stand precisely in the same category as a payment to any other Court of justice in any other suit for money.

It has been argued that Clause 2 Section 14 refers to cases in which the putneedar has come forward to contest the zemindar's demand, and that it would be therefore improper to characterize the proceeding in an uncontested case as a summary suit within the meaning of that Clause. This objection is not entitled, in my opinion, to any weight whatever. In the first place, it is clear that even in uncontested cases the Collector is bound, under the express provisions of Section 10, to enquire whether there is an arrear or not, although the enquiry is directed to be confined in such cases to the mere inspection of the accounts produced by the zemindar, who alone is answerable for their authenticity. Conceding, however, that an enquiry of this sort is not, strictly speaking, such as is ordinarily made by a judicial tribunal, the character of the proceeding would still remain the same. That proceeding must be supposed to have commenced with the petition filed under the 2nd and 3rd Clauses of Section 8; and it is upon that petition, treated as a plaint, that the Collector has to make his award under Clause 2 of Section 14, for there is no provision in the Regulation which requires the presentation of any other plaint or petition on the part of the zemindar. The mere fact that the putneedar has not come forward to deny the truth of the zemindar's claim cannot alter the character of the proceeding from what it was at the time of its original institution. It was a suit at its commencement when the zemindar's petition was filed, and it must consequently retain the character of a suit until it is terminated either by an award under Clause 2 Section 14, or by a sale held in the mode prescribed in the robokaree required to be recorded by the concluding words of Section 10. If the defendant in the suit is desirous of having a summary investigation, he is entitled to have it by the express terms of the Regulation; but in a case in which no such investigation is asked for, the Legislature could well afford to dispense with its necessity, for an appeal to the Civil Court in the shape of a regular suit is after all the only ultimate remedy in either case. An undefended suit is just as much a suit as a defended one, and the mere fact that the Legislature has laid down two different modes for their disposal cannot make any difference whatever in the determination of the question now under our consideration.

Every contested case, it is clear, must be regarded as a summary suit under the express wording of Clause 2 Section 14, and as the position of the putneedar in such a case is precisely the same as that of a defendant in a suit for money, there can be no doubt whatever that he is entitled to save his tenure from sale by paying to the Collector the full amount of rent due from him to the zemindar, provided that the payment is *duly* made within the period of the notice which has been so often referred to. Even on the day of sale, it is competent to him to get the sale stayed or postponed by "lodging" the amount in cash or Government securities under the provisions of Clause 2 Section 14; and it is to be further borne in mind that there is nothing in the language of that Clause to support the contention that the said amount cannot be so lodged on any previous date although it falls within the period of notice. It has been suggested in the decision of the late Sudder Court,* relied upon by the Subordinate Judge in this case, that there is a wide distinction between paying money into Court and "lodging money in Court." Both the expressions, however, are used in Clause 2 Section 13, and the only distinction that I can find between them is that the one refers to an unconditional payment, whilst the other refers to a mere deposit, or in other words, to a payment clogged with conditions dependant upon some contingent event; as, for instance, the completion of the award referred to in Clause 2 Section 14; the non-payment of the balance by the putneedar up to the date fixed for the sale, &c. But this distinction cannot affect the question in any manner whatever. Suppose, for instance, that an award is made under Clause 2 Section 14. Suppose also that it is made some days before the day fixed for the sale. If in such a case, the putneedar can save his tenure from sale by lodging the amount claimed in the Collector's office even so late as the day fixed for the sale, can he not do the same thing by lodging it in the same place on an earlier day not beyond the period

* S. D. A., for 1859, p. 521.

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of notice? And if the amount can be so lodged conditionally on any day within that period, can it not be paid unconditionally to the same functionary whether before or after the date of the award above referred to?

If we allow, then, that a payment to the Collector, if made within the period of notice, is a legal bar to the sale in contested cases, what reason have we to come to a different conclusion upon the validity of such payments in uncontested cases? Can it be supposed for one moment that the Legislature ever intended that a dishonest defaulter who has come forward with a false denial of his landlord's claim should enjoy greater facilities for paying the arrears, than one who has come forward with an honest admission of its truth, and who is perfectly ready and willing to pay into Court the full amount of rent claimed to be due from him. According to such a contention, all that a putneedar would have to do in order to give validity to the payment would be to start with a false repudiation of his liability, and I am therefore of opinion that it is entitled to no weight whatever.

That a direct payment to the Collector affords an invaluable security to the putneedar is evident not only from the fact of its being a payment in a public office, but also from the very nature of the proceeding itself. The zemindar may insist upon the sale by repudiating any private payments made to himself or to his authorized agent; and unless the putneedar is in a position to secure a favourable award before the date of sale, he must submit to his property being sold by the Collector, although he is entitled to bring a regular suit for the reversal of the sale. Why then are we to suppose that the Legislature intended to deprive him of the above security at the very time when it was arming the Collector with such plenary powers on behalf of the zemindar? It is true that money paid to the Collector does not immediately pass to the zemindar's hands, but besides that the latter is always at liberty to draw it with the least possible delay, it is beyond all dispute that a little inconvenience of this kind is the inevitable lot of every person who is obliged to resort to a Court of justice or to any other public authority for the recovery of his dues.

Clause 2 Section 13 gives power to the talookdars of inferior degree to pay the amount into Court or even to lodge it antecedently, but the inconvenience suffered by the zemindar in the case of such a payment is precisely the same as in the case of a payment made by a putneedar. It is true that the putneedar is bound to pay his rent directly to the zemindar before he is actually sued for it, but after a suit has been once commenced there is no reason whatever why he should be deprived of a privilege which is every day exercised by a defendant in an ordinary suit for money.

It has been argued that there is no express provision in Regulation VIII of 1819 authorizing a direct payment to the Collector. I am by no means prepared to admit the correctness of this argument even as far as it goes. The wording of the notice issued under the 2nd and 3rd Clauses of the Regulation appears to me to be a sufficient authority for such a payment. That notice is issued by the Collector, and it simply tells the putneedar that if the amount *claimed be not paid* within a fixed date, his tenure will be sold in liquidation. In the absence, therefore, of any specific directions as to the person to whom or the place where the payment is to be made, the putneedar would be fully justified, in my opinion, to pay directly to the very officer by whom the notice is issued. That the tenure can be saved from sale even in uncontested cases by lodging the amount in the Collectorate seems to be pretty clear from the provisions of Clause 1 Section 14. The provision made for contested cases in Clause 2 of that Section is a mere amplification as is clearly shewn by the use of the word "also;" and if we admit that the putneedar is entitled even in an uncontested case to save his property by lodging the amount, there seems to be no reason why he should not be permitted to do so by "paying it" unconditionally as the amount of arrears admittedly due from him. I do not mean to say that there is any thing in the language of the notice above referred to to show that a direct payment to the zemindar or his agent would not be just as valid in law as a payment to the Collector, but I think that the putneedar is fully entitled to say that that language is at any rate sufficient to justify both sorts of payment. It is beyond all question that a payment in Court after legal proceedings have once commenced is much more favoured by public policy than a payment out of Court, as may be seen from the provisons of Section 206 Act VIII of 1859. The publicity attached to the first kind of payment is almost a sure guarantee against further litigation

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upon the same cause of action, and there is no reason whatever for thinking that the framers of Regulation VIII of 1819 intended to deprive the putneedar of that guarantee by the adoption of a contrary policy, when the sole object of the proceeding directed to be held by that Regulation was to enable the zemindar to realize his rents with facility.

But even if it is conceded that there is no express provision in Regulation VIII of 1819 authorizing a direct payment to the Collector, it must be admitted on the other hand that there is no express provision to the contrary; and the case must therefore fall within the operation of the general principle enunciated at the commencement of this judgment in regard to payments in Court. No express provision was necessary in the case of the putneedar who is in fact the defendant in the suit, and against whom directly the zemindar's claim is brought. The case of the dur-putneedars referred to in Section 13 stands on a quite different footing. They are not parties to the proceeding which is one entirely between the zemindar and his tenant, the putneedar, and it was therefore necessary to make some special provision for the protection of their interests, they being not in a position as third parties to avail themselves of the general principle above referred to. Such a provision would have been superfluous in the case of the putneedar, and as the object of the Legislature in making that provision was to protect the dur-putneedars from the consequences of the putneedar's default, the extension of a similar privilege to the latter would be nothing but an additional step in the same direction. If the putneedar is not allowed to pay to the Collector, the consequences would be as injurious to him as to his under-tenants; for the Collector is bound to proceed with the sale without reserve, even in cases in which the rent has been actually paid to the zemindar, if the latter chooses to repudiate such payment on the day appointed for the sale and the dur-putneedars are not in a position to pay the amount. It is clear, therefore, that the security afforded by a payment in a public office is as necessary for the protection of the putneedar as for that of the dur-putneedars; so that the existence of a special provision in favor of the latter rather goes to strengthen the position which I have been seeking to establish.

Some stress has been laid upon the words of Section 10 which say that a person shall be present on the part of the zemindar with a particular *statement of the payments made up to the day of sale.* But these words merely go to show that a private payment to the zemindar himself is not prohibited by the Regulation, and that such a payment would be sufficient to stop the sale if the zemindar would choose to adjust it. Suppose, for instance, that the zemindar is living at a great distance from the district in which the proceeding is instituted, which must be the district in which the putnee is situated. Suppose also that he has got no one in that district duly authorized to receive payments on his behalf. The agent required to be present on the day of sale need not be authorized to receive such payments, for he is required merely to produce a statement showing the payments made up to the date of sale. If the day of sale is near at hand, and if there is no time left to enable the putneedar to go and pay his rent directly to the zemindar, is the Collector to sell his property although he is perfectly ready and willing to pay down the entire amount then and there, or even on an earlier date? It is true that a debtor is bound to pay his debt as soon as it becomes due, and that it is for him to go to his creditor for the purpose of making the payment; but these reasons can be scarcely urged in support of the contention that the putneedar is to lose his property by a public sale if he is ready and willing to pay the full amount due from him to the very officer by whom that sale is to be made. The notice issued under Clauses 2 and 3 of Section 8 gives him a full month's time to pay, but if we deny him the privilege of paying to the Collector the result would be, in some cases at least, to deprive him of the full benefit of that period.

Suppose again that the full amount of the claim is offered to the zemindar in the first instance and the zemindar refuses to receive it. Can it be contended that even in such a case the putneedar would not be competent to pay it to the Collector and thereby to save his tenure from the threatened sale? Such a contention would be, in my opinion, absurd on the face of it; and yet the same arguments which can be brought forward in this case might be urged with equal force in support of it.

The only other light in which we can possibly regard the Collector is that of an

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agent of the zemindar, appointed by the law for the realization of his dues from the putneedar. But in such a view, a payment to the Collector would stand precisely in the same position as a direct payment to the zemindar himself, particularly when it is made after the issue of a notice like that prescribed by Clauses 2 and 3 of Section 8.

The next question which we have to determine in this case is whether the payment relied upon by the plaintiffs was duly made or otherwise.

That it was made within the prescribed time is not disputed, nor has any question been raised as to the sufficiency of the amount.

The plaintiffs allege that they paid the money to the accountant of the Collectorate, who was authorized according to the practice prevailing therein to receive such payments; and that they have got a receipt which they have filed in evidence. This receipt consists of a duplicate challan containing a full specification of the object for which the payment was made, and an endorsement on the back of it under the seal of the Collector acknowledging the receipt of the money. The defendants contend that this mode of payment was irregular, and that the plaintiffs ought not to derive any benefit from it, particularly when they took no steps whatever to give any notice of the payment either to the Collector or to the zemindar. The accountant of the Collectorate has been made a defendant in this case, and the plea set up by him is that it was no part of his duty to inform the Collector of the payment.

This part of the case, however, has not been gone into by the Subordinate Judge. He says :—"They (the plaintiffs) "do not pretend that they are covered by "the putnee sale law of 1819, No. 8, mak- "ing the deposit at the Collectorate before "the sale. All they say is this,—that it was "the custom at the Collectorate to receive "such deposits from defaulting putneedars "and to stop the sale; and that they had "made the deposit in conformity to the "custom. But no custom, however long "practised, could justify the violation of "the law."

I have already shown that there was no violation of law in this case, and if the custom of the Collectorate was as it is represented by the plaintiffs, there seems to be no reason whatever why they should not get the full benefit of the payment. Whether we look upon the Collector as a judicial officer presiding over a Court of justice in which a summary suit for rent has been instituted by the zemindar, or as an agent of the latter, it seems to be equally clear that the plaintiffs ought not to suffer for having acted in conformity to a custom prevailing in his office. I would, therefore, send this case back to the Subordinate Judge under the provisons of Section 354 of the Civil Procedure Code for the purpose of enquiring into the following points, namely :—

1*st*.—What was the customary mode prevalent in the Collectorate of Tipperah with reference to the receipt of monies paid by putneedars whose tenures were advertized for sale under Regulation VIII of 1819.

2*ndly*. — Whether the plaintiffs were bound according to that custom to do any thing more than what they have done in order to *complete* the payment relied upon by them in this case.

3*rdly*.—Whether the accountant of the Collectorate had any authority to receive that payment, and whether he or any other amlah on the Collector's establishment was bound according to the customary routine of his duties, to give notice of it to the Collector in order to stop the sale.

4*thly*.—Whether the said payment came to the knowledge, or received the sanction of the Collector at any time before the sale.

The most important evidence on these points is likely to come from the Collectorate itself; but the parties ought to be allowed to produce any evidence they may think proper.

Macpherson, J.—The object of this suit is to set aside a sale of a putnee tenure which was sold under Regulation VIII of 1819 for arrears of rent claimed by the zemindar: and the question at issue seems to me to turn very much on the construction to be put upon certain Sections of that Regulation.

Regulation VIII of 1819 enacts (Section 8 Clause 2) that a zemindar who has a right to sell a putnee tenure for an arrear of rent may on the first of Bysack (*i. e.*, at the commencement of the year following that of which the rent is due) present a petition to the Collector containing a speci-

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fication of any balances due to him for the expired year: "the same shall then be stuck "up in some conspicuous part of the "kutcherry, with a notice that if the amount "claimed *be not paid* before the first of Jyet "following, the tenures of the defaulters "will on that day be sold." A similar notice is to be stuck up the sudder kutcherry of the zemindar, and to be also sent into the mofussil and served there as directed.

By Section 10, at the time of the sale a person shall attend on the part of the zemindar with a particular statement *of the payments made up to the day of sale* on account of the balance of each advertised lot, "nor shall any lot be put up to sale until "the statement produced shall have been "inspected and the existence of a balance "for the year ascertained *therefrom, &c.*" "*The zemindar shall be exclusively res-*"*ponsible for the correctness and authenti-*"*city of the papers to be thus exhibited,*"*nor shall the public officer making the*"*sale be answerable in any respect,* except "for its fairness and publicity, and for the "observance of the rules prescribed for his "guidance in this Regulation."

Section 11 declares that tenures sold for default shall be sold free of incumbrances created by the defaulter. But in order to protect holders of under-tenures, such as dur-putneedars and the like, Section 13 gives them the right to save the putnee from sale *by paying into Court* the arrear due. Clause 2 of Section 13 provides that "the talook-"dars of the second degree, or any number "of them, shall be entitled to stay the final "sale, *by paying into Court* the amount of "balance that may be declared due by the "person attending on the part of the zemin-"dar on the day appointed for sale; in like "manner, they shall be entitled to *lodge* "*money* antecedently, for the purpose of "eventually answering any demand that "may remain due on the day fixed for the "sale, and should the amount *lodged* be "sufficient, the sale shall not proceed, &c."

The whole of Section 13 treats exclusively of the protection of holders of under-tenures and the remedies of that class of persons.

Section 14 provides (Clause 1) that should the balance claimed by the zemindar *remain unpaid* upon the day fixed for the sale of the tenure, the sale shall be made without reserve, "nor shall it be stayed or post-"poned on any account, unless the amount "of the demand *be lodged.*" Any one, however, desirous of contesting the right of the zemindar to make the sale, whether on the ground of there having been no balance due or any other ground, may sue the zemindar for a reversal of the sale: the purchaser is to be made a party in any such suit, and shall (if the sale be reversed) be indemnified against all loss, at the charge of the zemindar or person at whose suit the sale may have been made.

Clause 2 of Section 14 is as follows:— "In cases *also in which a talookdar* (or put-"needar) may contest the zemindar's de-"mand of any arrear as specified in the "notice advertised, such talookdar shall be "competent to apply for a summary inves-"tigation at any time within the period of "notice. * * * * * If the case be "still pending, the lot shall be called up in "its turn, notwithstanding the suit; and if "the zemindar or his agent in attendance "insist on the demand, the sale shall be "made on his responsibility, nor shall it be "stayed, or the summary suit be allowed "to proceed, *unless the amount claimed be* "*lodged* in cash * * * by the talook-"dar, &c."

In the case now before us, the facts are that after the sale had taken place, apparently in the manner prescribed by law, it turned out that the putneedars had some days before the sale paid into the office of the Collector the amount of arrear specified by the zemindar in his notice of sale. So far, however, as the evidence goes, the putneedars gave no notice to the Collector, or to the zemindar or his agent, that they had made any payment into Court. Both the Collector and the person attending the sale on behalf of the zemindar were at the time of the sale entirely unaware that any such payment had been made, as also was the purchaser. The plaint contains various allegations of fraud, notice, refusal of money tendered, and the like; but no evidence has been given in support of those allegations.

For the putneedars, it is contended that the money having been brought into Court, there was no balance due at the time of sale, and therefore the sale ought to be reversed.

For the zemindar and purchaser, it is contended (and as it appears to me rightly) that the putneedars are not entitled to treat the payment of the money into Court as a payment to the zemindar, and that therefore

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the balance claimed by the zemindar did remain unpaid at the time of sale, which consequently cannot be impeached.

I agree in the opinion that a zemindar's petition and notice of his intention to sell under Section 8 of Regulation VIII of 1819 is not in any legal sense a "suit," and I also think that a payment into Court without notice to the person entitled to receive the money is no payment to that person in the absence of any law declaring that it shall be deemed to be payment to him.

There is nothing in Regulation VIII of 1819 which either expressly or impliedly declares that a payment such as the putneedars in this case made shall be deemed to be payment to the zemindar. It is expressly declared that "talookdars of the second degree" may stay the sale by *paying into Court* the money declared due on the day of sale, or *lodging* or *depositing* the money *antecedently* for the purpose of eventually answering any demand that may remain due on the day fixed for sale (inasmuch as it has been decided that "talookdars of the second degree" are *bound* to bring the money into Court, and are not entitled to pay direct to the zemindar—see VI Weekly Reporter, 84) —but there is no such declaration as regards putneedars or talookdars of the first degree. On the contrary, the language of Regulation VIII shows rather that the only case in which it was contemplated that the putneedar was to bring the money into Court was that provided for in Clause 2 of Section 14, the case of the zemindar's demand being contested and the putneedar applying for a summary investigation.

By Clause 2 of Section 8, the original notice informs the putneedar that his tenure will be sold if the amount claimed is not *paid* before the appointed day, but nothing is said as to bringing the money into Court, and payment in the ordinary fashion is alone contemplated.

By Section 10, it is the zemindar's agent who is at the time of sale to state the *payments made* up to that day; and the agent's statement is to be inspected, and the existence of a balance ascertained *therefrom:* the zemindar is exclusively responsible for the correctness of the statement: and the officer conducting the sale is responsible only for publicity and fairness and observance of prescribed rules. All these provisions evidently contemplate payments being made to the zemindar. If payments into Court had been contemplated, the provisions of this Section must have been different, and we certainly should expect to find the Court declared responsible for them.

Then come the rules allowing the dur-putneedars, &c., to save themselves by paying the money *into Court.* These rules are immediately followed by Clause 1 of Section 14, which is much relied on for the appellants. As to this Clause, I think that its proper interpretation is that the sale is not to be "stayed or postponed on any account, unless the amount of the demand be *lodged,*" in the sense in which alone the word *lodged* is used in Regulation VIII, *i. e., lodged* by a "talookdar of the second degree" under the provisions of Section 13, or *lodged* by a putneedar applying for a summary investigation under Clause 2 of Section 14. The word *lodged,* as used in Clause 1 of Section 14, has, to my mind, no legal meaning save such as is to be gathered from the use of the word in Section 13 and in Clause 2 of Section 14.

If the word "*lodged*" in Clause 1 of Section 14 is read in this limited sense, there is absolutely no ground for saying that Regulation VIII anywhere contemplated the putneedar's bringing into Court the arrears claimed by the zemindar except in the one case provided for by Clause 2 of Section 14. There being thus nothing in the Regulation which makes a payment into Court, of itself, a payment to the zemindar, I think it is impossible to say that, under the circumstances which occurred in this instance, the balance claimed by the zemindar did not "remain unpaid upon the day fixed for the sale."

I further am of opinion that, whatever the ordinary practice of the Collector's office may have been, this sale cannot now be set aside if it was made strictly in accordance with law. The existence of a loose or irregular practice in the Collectorate will not entitle us to reverse this particular sale if it was in itself regularly held, and if there is no evidence of any thing fraudulently or wrongly done by the purchaser or by the zemindar. It is said that the position of the putneedars is one of great hardship. But I do not see that this is so. It is not now for the first time that it is held that putneedars are bound to deal directly with their zemindars, and are not entitled to pay the balance claimed into Court. In 1859, Clauses

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1 and 2 of Section 14 of Regulation VIII of 1819 were construed by the Sudder Court in the same sense in which I would now construe them (S. D. A., 1859, page 521). Then the *laches* of the putneedars throughout has been most remarkable.

No doubt in the course of this suit, the existence of a very loose and improper practice in the office of the Collector has been disclosed. In the first place, the office received a balance which was due from a putneedar to a zemindar and which was paid in by the putneedar to save his estate from sale, when the Collector was aware that such payment by the putneedar would not legally have the effect which the putneedar supposed it would have. And in the second place, the amlah of the Collectorate having received the putneedar's money never informed the Collector, or any body else, of the fact; so that in ignorance of it, the putnee was sold some days subsequently. The Collector's office is clearly greatly to blame for what occurred. But the putneedars themselves are also greatly to blame,—so much so that I may say they have themselves to thank for the result. They wilfully abstained from paying their zemindar whom they were bound to pay, and chose in preference to pay the money into Court: having paid it into Court they gave notice of what they had done neither to the zemindar nor to any body else, and they stood by and allowed the sale to proceed without ever suggesting that they had already placed the money in Court.

I do not see that, under the circumstances, there is any reason why the case should be remanded: for in my opinion the plaintiffs could in no possible event now be entitled to a decree. I would dismiss the appeal with costs.

Norman, C. J.—This case has been twice argued. It is a suit to recover possession of 13 annas 12 gundahs of a putnee talook, Mouzah Utter Ramchunderpore, sold for arrears of rent under the provisions of Regulation VIII of 1819.

The facts are shortly these:—An instalment of rent up to Magh 1274 being due from the plaintiffs who were the putneedars, a proclamation was issued under the provisions of Regulation VIII of 1819, fixing the 13th of May 1868 as the day of sale.

On the 9th of May, a sum of money sufficient to cover the whole amount of the arrears was deposited by Shaikh Abir, one of the plaintiffs in the Collectorate. This payment was made to the accountant of the Collector who took the money and gave a receipt for it, but no intimation of the fact that such payment had been made was given to the Collector either by Shaikh Abir or by the amlah of the Collectorate. The plaintiffs appear to have given no proof in support of an allegation in their plaint, which is distinctly denied by the defendants, that they had given notice of the deposit to the agent of the zemindar. On the 13th of May, the putnee was sold, the respondent Moonshee Aftabooddeen Mahomed becoming the purchaser.

The main question argued before us was whether the rent having been paid into the Collectorate before the day of sale, the plaintiffs are entitled to ask to have the sale annulled

In order to see whether the sale proceeded regularly under Regulation VIII of 1819, it is convenient that I should refer to the several Sections of the Regulations and Acts under which it took place.

By Section 8 of Regulation VIII of 1819 as modified by Act XXXIII of 1850, zemindars under direct engagements with Government are empowered to *apply for sales of tenures*, upon which the right of selling for arrears of rent has been reserved in the following manner. On the first of Bysack, that is, at the commencement of the year following that of which the rent is due, the zemindar is to present to the Collector a petition for the sale of the tenure which must contain a specification of the balance due to him. The petition is to be stuck up in the kutcherry, with a notice that if the amount claimed is not paid by the first day of Jyet following, the tenure of the defaulter will, on that day, be sold by public sale in liquidation of the arrears. A similar notice is to be stuck up at the kutcherry of the zemindar, and a copy of the notice is to be sent by the zemindar to be similarly published at the kutcherry or at the principal town or village upon the land of the defaulter.

By Section 9 of Regulation VIII of 1819 as modified by Section 16 Regulation VII of 1832, the sale is to be made in public kutcherry by the Collector, Deputy Collector, or Head Assistant, to the highest bidder.

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By Section 10 of Regulation VIII of 1819, it is enacted that at the time of sale "a person shall attend on the part of the "zemindar with a particular statement of "*the payments made up to the day of "sale*, together with the receipt or certifi- "cate of the notice directed to be published "in the mofussil; nor shall any lot be put "up for sale until the statement produced "shall have been inspected, and the exis- "tence of a balance acertained therefrom, "nor until the receipt for the notice shall "have been read."

The observance of these forms is to be recorded in a roobokaree. The Section further provides that the zemindar shall be exclusively responsible for the correctness and authenticity of the papers exhibited.

The effect of such a sale being to avoid incumbrances created by the defaulting putneedars, in order to prevent the injury that might be done to inferior talookdars if a putneedar should withhold the rent from the zemindar and allow his tenure to be sold, Section 13 empowers talookdars of the second degree "to stay the final sale by "paying into Court *(a)* the amount of balance "that may be declared due by the person "attending on the part of the zemindar on "the day appointed for the sale. And in "like manner they are declared entitled "to lodge money antecedently for the "purpose of eventually answering any de- "mand that may remain due on the day "fixed for the sale."

By Section 14, Clause 1, it is enacted that "if the balance claimed by the zemindar "on account of the rent of an under-tenure "shall remain unpaid upon the day fixed "for the sale of the tenure, the sale shall "not be stayed or postponed on any ac- "count unless the amount of the demand "be lodged."

There is nothing in Regulation VIII of 1819 which empowers a putneedar to make a deposit either in the Judge's Court or in the Collectorate before the day of sale, or which gives to such payment, if made, the effect of a payment to the zemindar or his agent.

(a) The word "Court" had reference apparently to the Civil Court of the district in which, by Section 8 of Regulation VIII of 1819 as it originally stood, one copy of the petition was to be presented, and by the Judge or Officer of which the sale was under that Regulation conducted.

It is not pretended that any tender of the rent had been made at the mâl kutcherry of the zemindar, or that the payment into the office of the Collector was made after such tender in the mode prescribed by Section 4 of Act VI of 1861, B. C., with any declaration such as is prescribed by the 5th Section of that Act.

The 2nd Clause of Section 14 Regulation VIII of 1819 provides for cases where the putneedars contest the zemindar's demand of any arrears. The putneedar in such cases is empowered to apply for a summary investigation within the period of notice, but even in such cases if the zemindar insists on his demand the sale is not to be stayed, nor will the summary suit be allowed to proceed unless the amount is *lodged* by the putneedar contesting the demand; and if such deposit be not made, the alleged defaulter will have no remedy but by a regular action for damages and for a reversal of the sale.

My learned colleague Mr. Justice Dwarkanath Mitter is of opinion that if the payment to the accountant of the Collector can be treated as payment to the Collector it would of itself put a stop to all further proceedings. With the greatest respect for his opinion, I am compelled to say that I cannot agree with him.

He assumes in the first place that the petition to the Collector is a summary suit.

But an application for the sale of a tenure, where a right of sale has been specially reserved in order that the applicant out of the proceeds of the sale may realize his rent, seems to me to be something quite distinct from a suit. The investigation which may be demanded by the putneedar under Clause 1 Section 14 is no doubt a summary suit. But the sale is not to be stayed till that suit is decided. Before its determination the sale may proceed on the responsibility of the zemindar. The proceedings on petition of the zemindar to bring the estate to sale are more nearly analogous to the remedy by distress than to a suit.

But suppose we treat the petition under Section 8 as the commencement of a summary suit, it is *not a suit for money*. It is a proceeding to enforce a particular stipulated remedy. I know of no reason or principle on which it can be said that in a suit to enforce such remedy, the Court has indepen-

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dently of any special authority conferred by statute power to receive money paid into Court so as to bar the remedy.

Could it be contended that in a suit for injunction or specific performance or in an action for damages the Court would have power to accept some pecuniary payment which it might assume to be a satisfaction of the plaintiff's claim? No doubt in a suit for a specific, ascertained or ascertainable sum of money, the defendant has a right through the intervention of the Court to satisfy the claim. He may obtain an order for liberty to pay into Court the amount of the claim.

In Hallett *versus* The East India Company, II Burrow's Reports, 1120, which was a rule to show cause why the defendants should not have leave to bring into Court the sum of £2,670 for demurrage, the principle on which the Court proceeds in such cases is very clearly stated. "Where "the sum *demanded* is a sum certain or cap- "able of being ascertained by mere com- "putation without leaving any other sort of "discretion to be exercised by a Jury, it is "right and reasonable to admit the defen- "dant to pay the money into Court and "have so much of the plaintiff's demand "upon him struck out, and that if the "plaintiff will not accept it, he may pro- "ceed at his peril." This is done upon a rule duly served or on notice to the plaintiff.

There is no case that I am aware of in which it has ever been held that a defendant can bring money into Court privately and secretly, on an *ex-parte* application and without giving notice to the plaintiff either of his intention to pay, or of the fact that the money has been paid into Court and may be taken out by the plaintiff.

The case I have mentioned above was a rule which gave notice to the plaintiff. Act VI of 1862, Sections 4 and 5, of the Bengal Council, and the form of plea of payment into Court in England which is given by a rule of Court having the force of a statute, provide for notice to the plaintiff informing him that the money is in Court ready to be paid out to him if he chooses to take it.

Payment into Court does not, as my learned colleague supposes, of itself put a stop to further proceedings in the action; it merely justifies the Court, after notice to the plaintiff, in making an order for the stay of proceedings, where the whole demand of the plaintiff is satisfied by the defendant placing the amount of that demand at the disposition of the plaintiff. In other cases the plaintiff, on receiving notice of the payment into Court towards satisfaction of his demand, may either take out the money and accept it in satisfaction, or proceed in the suit at the peril of a decision against him if he fails to establish his claim to an extent beyond that which the payment into Court is sufficient to cover.

I think it clear that if the payment to the Collector's accountant made before the day of sale be treated as equivalent to payment to the Collector himself at the time when it was made, it would not *ipso facto* amount to a stay of the proceedings. I think that an irregular payment to the amlah of the Collectorate, not immediately notified to the Collector, ought not to be treated as payment to the Collector, so as to affect the rights of a zemindar who had had no notice of such payment. If such presumption could be made, it would open a door to fraud and litigation and injure both zemindars and putneedars by imperiling the security of titles acquired at sales on account of arrears of rent.

Can the payment to the amlah of the Collectorate be treated as payment to the zemindar? Clearly not. "To pay" is to "discharge a debt." To make a good plea of, or in other words, to establish, the defence of payment, the payment must be made to the creditor or to some agent of his having authority to receive the money in satisfaction of the debt.

Now, the Collector's accountant was in no sense the agent of the zemindar to receive this rent. It cannot then be said that the balance claimed by the zemindar did not remain due on the day fixed for the sale.

The sale having been for an arrear of rent due at the time of the sale, I think it is final and binding and cannot now be set aside.

It seems to me that the plaintiffs have no ground to ask for relief on any principle of equity. The zemindar, in putting in force the remedy which the law gives him for the security of his rent, has done no wrong. He has simply exercised his legal right and has been guilty of no default.

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If a decree were to be made under Section 14 reversing the sale, it would be manifestly contrary to justice to indemnify the purchaser against the loss he would sustain at the charge of the zemindar.

The purchaser has done no wrong to any one. He has acquired a legal title at a sale duly held in pursuance of the powers given by the Regulation. It would be most unjust to deprive him without cause of the property which is now vested by the sale in him. If the plaintiffs have suffered a loss, it seems to me that the loss has been caused by their own default. Had they chosen to attend at the Collectorate at the time of sale with their receipt: had they contended then and there that the arrears were not due, that what had taken place amounted to a payment of the rent: had they produced the receipt of the Collector's accountant showing that the full amount of rent had been deposited in the Collectorate, there can be no doubt but that the Collector would have stayed the sale. They did nothing of the sort. The defendants then have only themselves to blame for the loss which they have doubtless sustained. The decision of the Deputy Collector appears to me to be perfectly correct.

There is one point which was adverted to during the argument. The plaintiff alleged that they had tendered the amount of the rent to the mofussil agent of the zemindar Rajah Suttya Surun Ghossal. The Rajah by his answer denied this. It appears that the plaintiffs, though they gave a list of witnesses to prove this point, did not deposit the necessary expenses and diet money for these witnesses.

After we had gone into the facts, the objection that an issue on this subject had not been tried was abandoned by the appellant's vakeel.

The appeal must be dismissed with costs.

The 26th May 1871.

Present:

The Hon'ble G. Loch and W. Ainslie, *Judges.*

Insolvency—Small Cause Courts—Civil Procedure Code—Security.

In the matter of

Bhoobun Mohun Bose, *Petitioner.*

Mr. J. S. Rochfort for Petitioner.

The provisions of the Code of Civil Procedure in respect of insolvency, *viz.*, Section 273 Act VIII of 1859 and Section 8 Act XXIII of 1861, are applicable to decrees of Courts of Small Causes in the mofussil.

The question of the sufficiency of the security tendered by an insolvent is one entirely for the lower Court to determine.

Loch, J.—We think that we cannot interfere with the proceedings taken by the Small Cause Court in this case. It appears that the judgment-debtor, Burroda Kant Bose, was brought up before the Small Cause Court on the 9th May 1871. He then pleaded insolvency, and the Judge fixed the 29th May for the hearing of the insolvent's petition, gave notice to the plaintiff directing him to appear on that date and to make any objection he might think fit to that petition, and released the judgment-debtor on security.

The plaintiff now comes up to this Court and objects to this order of the Small Cause Court on the grounds that the Small Cause Court has no authority to inquire into the question of insolvency; and even if it has, the procedure adopted in the present case was wrong; that the security taken is altogether insufficient and that no proper inquiry has been made regarding it. We do not see why Small Cause Courts in the mofussil should not inquire into the allegation of insolvency when made before them, under the provisions of Sections 273 Act VIII of 1859 and Section 8 Act XXIII of 1861. We find that by Section 47 of the Mofussil Small Cause Court Act XI of 1865, the provisions of the Code of Civil Procedure are, so far as the same are or

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may be applicable, extended to all suits and proceedings under this Act.

It also appears to us that the rules which are laid down by the provisions of Act VIII of 1859 for execution of decrees in places out of the jurisdiction of the Court have been held, and are, applicable to decrees of the Small Cause Courts, and therefore we see no reason why other Sections of Act VIII of 1859, such as those which relate to enquiries into the solvency of the debtor, should not be equally applicable to decrees of those Courts.

As to the procedure adopted by the Small Cause Court in this case, it is said that the pleader for the plaintiff was present at the time the debtor was brought before the Court, and therefore he, the debtor, should then and there have been examined. There is no doubt that if the pleader for the plaintiff was present and ready to act, the proper course for the Small Cause Court was then to examine the judgment-debtor. But we do not see that any material damage has occurred or is likely to occur to the plaintiff in consequence of the Judge's having fixed another date on which he may take up the petition of the insolvent, when the plaintiff will be able to meet any allegation that may be made by the judgment-debtor, and, if necessary, the Judge will grant time to the plaintiff to disprove the debtor's statement.

With regard to the third objection to the security, we think the question of its sufficiency is one entirely for the Small Cause Court Judge to determine. The application is rejected.

The 30th May 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Intervention—Section 73 Act VIII. 1859—Appeal by Intervenor—Remand—Right of appeal.

Case No. 2575 of 1870.

Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 6th August 1870, *reversing a decision of the Moonsiff of Seetamondee, dated the 29th April* 1870.

Bucha Singh (Plaintiff) *Appellant,*

versus

Mirza Mashook Ali Beg and another (Defendants) *Respondents.*

Baboo Bama Churn Banerjee for Appellant.

Baboo Grish Chunder Ghose for Respondents.

A suit having been decided by the first Court after an intervenor had been made a party under Section 73, Code of Civil Procedure, it was remanded on the appeal of the intervenor whose name was ordered to be expunged from the record. The suit was decided again in favor of the plaintiff, but the decision was reversed in appeal.

HELD that the fact of the defendant having, in the first instance, allowed the intervenor alone to appeal did not debar him, after the case was re-opened by remand, from appealing in his own person.

HELD that directly the intervenor's name had been struck off on the ground that he had no interest in the case, all the evidence he had put in ought to have been removed from the record.

Glover, J.—THE plaintiff in this case sued to recover possession of certain lands which had been leased to him by the defendant on the 26th of December 1866. The defendant admitted the lease but denied that he had in any way interfered with the collection of rents on the part of the plaintiff or dispossessed him. He alleged on the contrary that the plaintiff was in possession and had been so from the date of his lease. A third party, one Sheikh Noor Ali, intervened, claiming to hold these lands under a lease previously given to him by the defendant, and he was made a party to the suit under Section 73 of the Code of Civil Procedure. The case was decided in the first instance by the Moonsiff, but the Additional Judge on appeal remanded it with directions to expunge Noor Ali's name from the record, he not being a party interested in the suit. On remand, the Moonsiff again gave a decree in favor of the plaintiff. The Judge on appeal has reversed this decision, holding that the plaintiff had never been dispossessed

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and that he had brought this suit unnecessarily into Court.

In special appeal it is contended that the present defendant had no right to appeal against the judgment of the Moonsiff, inasmuch as on the first occasion it was not he who appealed to the Judge, but the intervenor. Now, in the first place, we may remark that this objection was never made by the plaintiff in the Court below. He suffered the defendant to prefer his appeal without objection and was content to abide by the result of the Judge's investigation. The order of remand by the Additional Judge, moreover, re-opened the whole case, and if the defendant was satisfied to let the intervenor only appeal against the original judgment, it would by no means follow that he is to be debarred, now that the case has been re-heard and re-decided, from appealing in his own proper person. This objection is, therefore, over-ruled.

The 2nd ground is that the first Court, in coming to the decision that the plaintiff had been dispossessed, relied upon certain evidence, oral and documentary, which had been filed originally by the intervenor; that the Judge was wrong in refusing to look at that evidence; and that if he had done so, he would undoubtedly have agreed with the Moonsiff in holding that the plaintiff had proved his case. Now, it is clear to us that in this matter the Judge was right. How this evidence was allowed to remain on the record after the person who produced it had been removed from his position as defendant it is not easy to see. Directly the intervenor's name had been struck off on the ground that he had no interest in the case, all the evidence which he had put in ought to have been removed with him.

Another and last objection is that the first Court came to its decision upon a considerable quantity of evidence, and that the Judge is wrong in saying that there is no evidence to prove the plaintiff's dispossession. This appears to be a mistake. The Judge no where says that there is no evidence. On the contrary, he alludes to evidence which he considers sufficient to prove that the plaintiff was never out of possession, but was all along and is now in possession of the lands leased out to him. This is a finding of fact on the evidence and raises no ground of special appeal.

We dismiss this appeal with costs.

The 30th May 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Res-adjudicata.

Case No. 2586 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Gya, dated the 30th August 1870, *reversing a decision of the Moonsiff of that District, dated the 8th January* 1870.

Sahadeo Pandey (Defendant) *Appellant,*

versus

Nokhid Pandey and another (Plaintiffs) *Respondents.*

Baboo Bhowanee Churn Dutt for Appellant.

No one for Respondents.

In a suit for removal of an alleged nuisance which was dismissed because plaintiff did not produce his witnesses and failed to prove his case, it was held that there had been an adjudication and that another suit would not lie on the same cause of action.

Kemp, J.—THE plaintiffs brought this suit to remove a privy on the allegation that the said privy had been recently erected by the defendant and was a nuisance to the plaintiffs. The defendant pleaded in the first instance that the present claim had already been adjudicated upon in a suit brought by the plaintiffs' father against the defendant in 1869, and on the merits he said that the privy was erected on his own land and was not a nuisance to the plaintiffs.

The Moonsiff found on the issue in bar, namely, the issue of res-adjudicata, that the claim now instituted was substantially the same as the claim instituted by the plaintiffs' father in 1869. The Moonsiff,

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however, appears to have gone into the merits of the case, and on the merits he found that the privy was erected on the defendant's own land and was not a nuisance to the plaintiffs.

On appeal, the Subordinate Judge, without deciding the question of res-adjudicata, finds with the first Court that every body is at liberty to exercise his rights of ownership in respect of his own land, but that he must do so in such a way as not to injure his neighbour. In this case, the Subordinate Judge found that as theprivy is within a few cubits of the plaintiffs' house, it must be a nuisance to the plaintiffs, and not only to the plaintiffs but to the persons passing along the road. He, therefore, held that the defendant had no right to erect the privy and that it was consistent with justice to remove it. The appeal was therefore decreed.

In special appeal, the ground taken is that the claim is res-adjudicata. The pleader for the special appellant has read to us the decision passed on the 14th of June 1869. It is very clear that in that case that plaintiffs' father sued the defendant, and the issue raised was whether the privy was built by the defendant on his own land, and, if so, whether it was a nuisance to the plaintiff, and as such, could be removed. The suit was not as alleged below nonsuited. That suit was disposed of in this way ; it was dismissed because the plaintiff did not produce his witnesses and failed to prove his case. There has, therefore, been clearly an adjudication on the same cause of action between the same parties, or between a party to whom the plaintiff is privy and the defendant.

We, therefore, decree this appeal, reverse the decision of the Subordinate Judge, and dismiss the plaintiff's suit with costs.

The 31st May 1871.

Present :

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Appeal—Transfer—Execution cases—Jurisdiction—Section 19 Act XVI of 1868—Sections 26 and 27 Act VI of 1871—Remands.

Case No. 469 of 1870.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Beerbhoom, dated the 19th September 1870.

Chowdhry Hamedoollah and others (Decree-holders) *Appellants,*

versus

Muteeoonissa Bibee and others (Judgment-debtors) *Respondents.*

Baboo Sreenath Dass for Appellants.

Baboos Mohinee Mohun Roy and *Debender Narain Bose* for Respondents.

A District Judge is not competent to transfer a case of execution of a decree which has been passed by his own Court, to the file of the Subordinate Judge for disposal. Such a case is not one of the "civil proceedings" referred to in Section 19 Act XVI of 1868, read with Section 362 Civil Procedure Code, and interpreted by Sections 26 and 27 Act VI of 1871.

A case remanded to a District Judge for the purpose of a local inquiry cannot be transferred to a Subordinate Judge for disposal.

Loch, J.—This case was remanded to the Judge of Beerbhoom by an order of this Court dated the 20th March 1868. He

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was required in that order to make certain enquiries as to the amount of the mesne profits which were due to the decree-holder. After the case had been some time before the Judge under the order of remand, he, acting under the provisions of Act XVI of 1868, applied to this Court to be allowed to transfer the case to the file of the Court of the Subordinate Judge. In that application, the Judge made no reference whatever to the remand order of this Court, and in fact he set before the Court none of the circumstances sufficient to guide the Court as to the order that should have been made upon his application; but he obtained, however, the sanction of this Court to the transfer of the case from his own file to that of the Subordinate Judge. The Subordinate Judge has now made the investigation which was required by this Court, and has passed a judgment in the case, and an appeal has been preferred from that judgment to this Court.

A preliminary objection to the hearing of this appeal is taken to the effect that as the case had been transferred to the Subordinate Judge for disposal, a regular appeal would, under the provisions of Section 19 Act XVI of 1868, lie to the Judge, and only a special appeal would lie to this Court. On the other hand, it is contended on the part of the appellant that the Subordinate Judge had no jurisdiction to try the case; that this is not one of those civil proceedings referred to in Section 19 of Act XVI of 1868 which may be transferred by the District Judge from his own file to that of the Subordinate Judge; and that even though the sanction of this Court was obtained, that sanction could not give jurisdiction in such a case to the Subordinate Judge.

We think that this contention of the appellant is right. Looking at the terms of Section 19 Act XVI of 1868, and reading them with the provisions of Section 362 Act VIII of 1859, it appears to us that it was not the intention of the Legislature to enable the Judge to transfer from his own file cases of execution of decrees which had been passed by his Court, to the file of the Subordinate Judge for disposal. If this had been the purpose of the Act, it would have led to this very great inconvenience, namely, that cases might be transferred to the file of the Subordinate Judge of the value of above 5,000 rupees, and the appeal, instead of lying directly to this Court, would lie to the Judge, and only a special appeal would lie to this Court, and this Court would be ousted of its jurisdiction in such cases to hear them as regular appeals. A further argument may, I think, be drawn from the provisions of the new law, Act VI of 1871, Sections 26 and 27. These Sections provide that the District Judge may, from time to time under the orders of the High Court, refer certain classes of cases to the Subordinate Judge for disposal; but among these cases we do not find that the Judge can transfer cases of execution of decrees passed by him or by his Court, to the Subordinate Judge for disposal; and we have from these Sections, I think, an interpretation of what the Legislature meant by the words "civil proceedings" used in Section 19 of the former Act.

There is a further reason why we think the Judge should not have applied for the transfer of this case to another Court; because the case had been previously heard by this Court in appeal from an order passed by him, and that order having been found to be erroneous this Court directed him to make a local enquiry for the purpose of ascertaining the amount of the mesne profits due to the decree-holder. Therefore, it was the duty of the Judge to take up the case and dispose of it himself in accordance with the instructions contained in the order of this Court, and not to transfer it to a subordinate tribunal.

For all these reasons, we think that the order of the Judge transferring the case, and the proceedings held by the Subordinate Judge, must be set aside, and that the case must be remanded to the Judge for disposal according to the terms of the remand order of this Court dated 20th March 1868. Each party will pay his own costs.

Mitter, J.—I am of the same opinion. Act VIII of 1859 says distinctly that the Court which passed the decree is bound to execute it; and I do not think that the provisions of Sections 26 and 27 Act VI of 1871 were intended to apply to execution cases. But be that as it may, the Judge had no power to transfer the case to the Subordinate Judge in the face of our order of remand. The permission given to him by the Judge in the English Department was given in ignorance of that order, nor can that permission be binding upon this Court.

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FULL BENCH RULINGS.

The 13th December 1870.

Present :

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, F. B. Kemp, L. S. Jackson and G. C. Paul, *Judges*.

Reviews.

Applications for review of judgment passed by the Hon'ble Justices G. Loch and Sir Charles Hobhouse, Bart., on the 25th and 26th May 1870, *in Special Appeals Nos.* 2267 *of* 1869 *and* 14 *of* 1870.

Case No. 107 of 1870.

Chinta Monee Paul and another (Appellants) *Petitioners*,

versus

Pearee Mohun Mookerjee (Respondent) *Opposite Party*.

Mr. M. M. Datta and *Baboo Debendro Chunder Ghose* for Petitioners.

Baboo Mohendro Lall Shome for Opposite Party.

Case No. 110 of 1870.

Shah Soobeeooddeen Aboo Saleh (Appellant) *Petitioner*,

versus

Assadoonissa Bibee (Respondent) *Opposite Party*.

Messrs. J. W. B. Money and *R. E. Twidale* for Petitioner.

Baboos Sreenath Doss and *Romesh Chunder Mitter* for Opposite Party.

It cannot be treated as a universal rule that no point can be raised on an application for a review which has been already discussed and decided in the original hearing of the appeal ; or that no new point which has not been raised at the hearing of the appeal can be argued on the application for review. In each case the Court to which application is made must consider and decide whether a review is necessary to correct any evident error or omission or is otherwise requisite for ends of justice.

These cases were referred to the Full Bench by Loch and Hobhouse, J. J., under the following orders :—

Loch, J.—We are asked by Mr. Datta, Counsel for the petitioners in this case No. 107, to review our judgment of 25th May 1870 ; and in showing cause for the admission of his application for review, he proposes to re-argue the case making use of the arguments that were used at the original hearing of the case, and to cite certain authorities that might have been, but which were not, cited at the previous hearing, and to show us by a re-statement of the facts of the case, that the precedent which we supposed to govern that case did not in truth govern it ; and he urged that unless he be allowed to do so, it is impossible for him to be able to show cause for the admission of this application.

In the second case No. 110, Mr. Money for the petitioner asks to be allowed to show cause for the application of a review of our judgment of 26th May 1870 ; and in doing so he proposes to enter upon points either not dwelt upon or not taken at the former hearing, these being points of law which though not prominently or not at all brought to the notice of the Court when the case was before it on the former occasion, the Court is yet supposed to be familiar with and should have borne in mind when deciding the case in question.

This raises the whole question, and a very important question it is, as to the mode in which cause may be shewn in applications for review. There have been a course of decisions of this Court, which I will proceed to notice and which may be said to have laid down the following rule:—that in showing cause no point can be raised which has been already discussed and decided on the original hearing of the appeal ; and no new point which has not been raised at the hearing of the appeal can be argued in the application for review. This is the ruling in the case of Bhowabul Singh *versus* Maharajah Rajendro Pertab Sahoy,* and it has been followed by most of the Division Benches of this Court.

Looking to the provisions of the Code of Civil Procedure regarding the admission of

* 18 W. R., p. 157.

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reviews, we find in Section 376 the grounds on which a review may be sought, in Section 378 the object which is to be attained by the review, and in Section 380 the course to be followed when an application for a review of judgment has been granted.

By Section 376 any person considering himself aggrieved by a decree of a Court and who (1) from a discovery of new matter of evidence which was not within his knowledge, or could not be adduced by him at the time when such decree was passed, or (2) from any other good and sufficient reason, may be desirous of obtaining a review of the judgment passed against him, may apply for a review of judgment by the Court which passed the decree.

The object to be attained is either the correction of an evident error or omission or to satisfy the ends of justice. Section 378 prescribes as follow :—"If the Court shall be of opinion that the review desired is necessary to correct an evident error or omission, or is otherwise requisite for the ends of justice, the Court shall grant the review." The words "evident error or omission" do not, we think, mean merely the correction of a clerical error or supplying the omission of a necessary word, but comprise any evident error or omission; nor do the words "requisite for the ends of justice" signify in our opinion, as has been argued before us, something of the nature of an error or omission.

The first case quoted to us, *viz.*, Bhowabul Singh, decided on 10th February 1870, (Bayley and Markby, J. J.)* laid down, as stated above, that in applications for review of judgment the party applying for review must show that there is good and sufficient cause for granting the review before he can be heard to argue that the decision is erroneous. In so showing, no point can be raised which has been already discussed and decided in the original hearing of the appeal; and no new point which has not been raised at the hearing of the appeal can be argued on the application for review. In the case of the Collector of Tipperah† (29th June 1870, Phear and Mitter, J. J.), Mr. Justice Phear stated that the application for review should "be rejected, because no matter is now brought to our notice for the purpose of inducing us to alter our view which might not have been brought before us and fully argued and discussed when the appeal was heard. Mr. Justice Mitter observed "I am not prepared to say that the ground taken by the petitioner is not a proper ground for review of judgment, if it is otherwise valid. Whether the Full Bench decision referred to by the petitioner was cited before us at the first hearing or not, does not appear to me to be very material. The Court was, in my opinion, bound to administer the law as it was, whether the pleaders who argued the case on that occasion pointed out that decision or not."

In the case of Gureeb Hossein Chowdhry, (14th July 1870, Bayley and Hobhouse, J. J.*) Sir C. Hobhouse said—"In my judg-

* 13 W. R., p. 157.

† 14 W. R., p. 84.

* The 14th July 1870.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Case No. 79 of 1870.

Application for review of judgment passed by the Hon'ble Justices H. V. Bayley and Sir Charles Hobhouse, Bart., on the 8th March 1870, *in Regular Appeal No.* 178 of 1869.

Mehuroonissa Khatoon and others (some of the Defendants) *Petitioners,*

versus

Mr. J. P. Wise (Plaintiff) *Opposite Party.*

Mr. J. W. B. Money and *Baboos Sreenath Banerjee* and *Grish Chunder Ghose* for Petitioner.

Baboo Onookool Chunder Mookerjee for Opposite Party.

Hobhouse, J.—We think, after the best consideration that we can give to the arguments of the learned Counsel for the petitioner for review, that there are only three points which call for any notice on our part. The first is whether there is any error or not in our not coming to a decision on the question of the collusiveness of certain decrees. The second is as regards the multifariousness of the suit, and the third is with reference to the decision of the 17th January 1868. I understand the learned Counsel for the applicant for review to say that if we had found that the decree of one Delwar Hossein was a true decree, then we should have been obliged to find that so far as his client is concerned, the plaintiff had no cause of action. I really do not know whether this would have been the case or not, and in order to determine first of all whether the decree was a true or fictitious decree, and if it was a true decree whether the plaintiff had any cause of action or not, it would, it seems to me, be necessary to go into the whole case again, re-consider the evidence in the case, and re-hear the Counsel for the opposite party.

Now, on turning to the judgment which we gave, I find that the pleaders who were then instructed by the defendant made one common issue on which they elected that we should determine either for the plaintiff or for the defendants, and that issue is thus recorded. I state in my judgment, after referring to certain admissions made, that "it is further not denied that if the said Gureeb "Hossein is found to be the person at present beneficially interested in those properties and in the possession "and enjoyment of them, then he as the possessor is bound "to the extent of the properties to satisfy the decree

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ment an application for review is not the proper place where we can come to a trial and determination of a question which was not raised in the appeal provided by the law, and which requires us to go into the whole evidence once again. In the matter of multifariousness, that is a question which was fully argued at the first hearing; and all that the learned Counsel now asks us to do is that we should hear it once again. Possibly we should hear from him arguments not those which were urged at that time, but certain others which he is prepared to advance on that particular question; but here again, I agree with a number of the Judges of this Court who have held that an application for review is not the place where we should have a re-argument of what has been already argued. If that were so, the Legislature, instead of providing for review on the narrow grounds expressed in the law, would have provided that every case which has once been heard in the way provided by law should be entitled to a second hearing." Mr. Justice Bayley said "As to the admission of new arguments after a decision has been given in the case upon points the very same as were previously put before the Court, I have already expressed my opinion in Review No. 42, decided on the 6th July last by Mr. Justice Markby and myself. The point of multifariousness had been previously raised and disposed of, and cannot, I think, be re-argued on a new footing by a new Counsel."

"against Jokee Chowdry." So that it seems to me that the parties elected that we should determine the case on a question of fact, and that that question should be one altogether independent of that now raised before us. The parties were then at liberty to raise the question which the learned Counsel now contends for, and if they did not do so they have only themselves and their advisers to thank for it, and in my judgment an application for review is not the proper place where we can come to a trial and determination of a question which was not raised in the appeal provided for by the law, and which requires us to go into the whole evidence once again. For these reasons, I do not think that we ought now to allow the parties to raise the question which the learned Counsel would now raise.

In the matter of multifariousness, there is a question which was fully argued at the first hearing, and all that the learned Counsel now asks us to do is that we should hear it once again. Possibly we should hear from him arguments not those which were argued at that time but certain others which he is prepared to advance on that particular question; but here, again, I agree with a number of the Judges of this Court who have held that an application for review is not the place where we should have a re-argument of what has been already argued. If that were so, the Legislature, instead of providing for review on the narrow grounds expressed in the law, would have provided that every case which has once been heard in the way provided by the law should be entitled to a second hearing.

In the matter of the decree of the 17th January 1868. I think we went too far when we said that it was *no* evidence at all against the plaintiff, but at the same time I do not think that it is conclusion on the point which was in issue before us, and I am quite clear, therefore, that that decree, standing alone should not induce us to alter our judgment on the facts found.

The other grounds which the learned Counsel would take are, in my judgment, (although the learned Counsel does not think it to be so), determined by the decision which we have originally passed in the case.

I would reject this application with costs.

Bayley, J.—I quite concur with Mr. Justice Hobhouse who has delivered the judgment of the Court in this case.

As to the admission of new arguments after a decision has been given in the case upon the very same points as were previously put before the Court, I have already expressed my opinion in review No. 42, decided on the 6th July last by Mr. Justice Markby and myself.

In regard to the manner in which this case had been placed before us, I would state that the pleaders argued the case as on the merits upon the one point only, *viz.*, whether Gureeb Hossein Chowdhry was really the beneficial owner of the property in suit, and after carefully hearing the evidence as it was read by consent and argued upon by the pleaders on both sides, we came to the conclusion of fact that Gureeb Hossein was such beneficial owner.

The point of multifariousness had been previously raised and disposed of and cannot, I think, be re-argued on a new footing by a new Counsel.

I agree in rejecting this application with costs.

In the case of Bany Madhub Ghose, 20th December 1869 (L. Jackson and Markby, J.J.),*

* The 20th December 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*
Case No. 225 of 1869.

Application for review of judgment passed by the Hon'ble Justices L. S. Jackson and W. Markby, on the 28th May 1869, in Special Appeal No. 2687 of 1868.

Banee Madhub Ghose, *Petitioner,*

versus

Gunga Gobind Mundul, *Opposite Party.*

Mr. G. C. Paul for Petitioner.

Mr. R. T. Allan for Opposite Party.

Jackson, J.—THE question that we have to consider in the present application is one which we have often considered before, and upon which I for my part have, and as I understand most of the other Judges also have, expressed a decided opinion. It is whether in a case on appeal having been carefully considered by this Court on a point of law argued at length, and the Court having come to a deliberate conclusion on that point, the party dissatisfied with the judgment of this Court has an absolute right to be heard by fresh Counsel in an application for review, merely for the purpose of convincing the Court that its first opinion on that point of law was erroneous.

Mr. Paul contends that a party has such right, and declares that such right is perfectly clear. I can only say that it appears to me to be quite clear the other way. Rights of parties and the duty of the Court in dealing with petitions of review must be gathered, if

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Mr. Justice L. S. Jackson states the case to the following effect:—"The question that we have to consider in the present application, is whether in a case an appeal having been carefully considered by this Court on a point of law argued at length, and the Court having come to a deliberate conclusion on that point, the party dissatisfied with the judgment of the Court has an absolute right to be heard by fresh Counsel in an application for review, merely for the purpose of convincing the Court that its first opinion on that point of law was erroneous. Mr. Paul contends that a party has such right, and declares that such right is perfectly clear. I can only say that it appears to me to be quite clear the other way. It seems to me clear that the only case in which the Court is bound to grant a review is where it shall be of opinion that the review desired is necessary to correct an evident error or omission, or is otherwise requisite for the ends of justice. Mr. Paul contends that his object in this case is to correct an evident error in law in the judgment of this Court. It is necessary therefore to consider what can be called an evident error. Can it be said that an error which is capable of being established by a lengthened argument upon a point which admits of two opinions is an evident error? I think not." Markby, J.,

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any where, from Sections 376 and 378 of the Procedure Code. Section 376 is in these words:—"Any person considering himself aggrieved by a decree of a Court of original jurisdiction from which no appeal shall have been preferred to a superior Court, or by a decree of a district Court in appeal from which no special appeal shall have been admitted by the Sudder Court, or by a decree of the Sudder Court from which either no appeal may have been preferred to Her Majesty in Council, or an appeal having been preferred, no proceedings in the suit have been transmitted to Her Majesty in Council; and who from the discovery of new matter or evidence which was not within his knowledge or could not be adduced by him at the time when such decree was passed, or from any other good and sufficient reason, may be desirous of obtaining a review of the judgment passed against him, may apply for a review of judgment by the Court which passed the decree." Section 378 says:—"If the Court shall be of opinion that there are not any sufficient grounds for a review, it shall reject the application, but if it shall be of opinion that the review desired is necessary to correct an evident error or omission, or is otherwise requisite for the ends of jus ice, the Court *shall* grant the review; and its order in either case whether for rejecting the application or granting the review shall be final, provided that no review of judgment shall be granted without previous notice to the opposite party to enable him to appear and be heard in support of the decree of which a review is solicited."

It seems to me clear that the only case in which the Court is bound to grant a review is where "it shall be of opinion that the review desired is necessary to correct an evident error or omission, or is otherwise requisite for the ends of justice."

Mr. Paul contends that his object in this case is to correct an evident error in law in the judgment of the Court.

It is necessary, therefore, to consider what can be called an e ident error. Can it be said that an error which is capable of being established by a lengthened argument upon a point which admits of two opinions is an evident error? I think not.

It appears to me that the word "evident" is used in the same sense as it is in a passage to which the Chief Justice (whom I have just had the advantage of being able to consult) has referred me in the second Volume of Maddock's Chancery Practice page 484, Title "Re-hearing." I think the word evident means merely that which is manifest, patent or obvious, and it is only where the Court has fallen into an error of that description that it is bound to grant a review.

Mr. Paul refers us to a ruling of the Chief Justice and Justice Mitter, reported in Volume X of the Weekly Reporter, page 143. In that case, the Recorder, after stating the nature of the case in which the point arose, says:—"It seems to me that the ground set forth by Mr. Agabeg is a ground for an appeal instead of a ground for review, and I find that the Chief Justice in the case of Nusseerooddeen Khan *versus* Inder Narain Chowdry, reported in Wyman's Reports, page 127, held that the fact of the Court below having decided against the weight of evidence is a ground for appeal, and not for review, and his Lordship goes on to say that the attempt has frequently been made for the purpose of having the case re-argued by fresh Counsel when parties have been dissatisfied with the first decision. * * * * I would, therefore, request the opinion of the High Court whether an error in a point of law is a ground for review of judgment."

On that the Chief Justice was of opinion "that an error on a point of law is a ground for a review of judgment."

In consequence of this case being cited in argument, I have thought it right to consult the Chief Justice in order to learn whether he intended to go so far as these words might be held to imply. The result of that communication is that I believe myself authorized to state that what the Chief Justice really intended to say on that occasion was not that an applicant for review was entitled to a fresh argument on a point of law, but that if the Judge should be satisfied that he had committed an error in law, so that his own conscience should prompt, and as it were, compel him to rectify such error, it would be quite in accordance with the Procedure Code that he should do so; and in this I fully agree.

Mr. Paul says if this be the correct view, Sections 376 to 378 may as will be struck out of the Code. I think not, and I believe those Sections capable of doing very useful service. But I may observe that if parties had a right to re-argue the same points over and over again (for they are not limited to a single application), it would be simply impossible to carry on the business of the Courts, and I am sure the Legislature never contemplated any such thing. I must, therefore, decline to admit the right claimed by Mr. Paul of re-arguing this case for the purpose of convincing us that the conclusion at which we deliberately arrived on a point of law, was not the conclusion at which we ought to have arrived.

There is, however, a manifest error in the decree in this case, relating to the quantity of land, which might very well have been set right in simple routine, but which I think ought to be corrected, and that correction as pointed out may accordingly be made, but without costs.

Markby, J.—I am of the same opinion. I think it quite clear that no person has a right to call upon the Court to hear a fresh argument upon a question which has been already submitted to it and which it has determined. Were it otherwise, litigation would be absolutely interminable, and though the language of this part of the Code might have been more clear and precise I am quite sure this was never intended.

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says—"I think it quite clear that no person has a right to call upon the Court to hear a fresh argument upon a question which has been already submitted to it and which it has determined. Were it otherwise, litigation would be absolutely interminable; and though the language of this part of the Code might have been more clear and precise, I am quite sure this was never intended."

It is only necessary to quote another case referred to by Mr. Money in the course of his argument. In the case of Gungapershad *versus* The Agra and Masterman's Bank, Appeal 283 of 1869,* the present Chief Justice is reported to have said—"I have ruled for years that a point previously argued cannot be argued in review. It is quite clear that we considered the matter of costs and the circumstances before, and we cannot allow the same point to be argued again in review."

It is unnecessary to refer to other cases, for those already mentioned show clearly what has been the opinion of the Court, as to the course which should be pursued in regard to parties desirous of shewing cause for the admission of an application for a review of judgment. The question has been very fully argued before us by Mr. Money. We feel that while, on the one hand, the danger of allowing a second appeal in the shape of showing cause has to be avoided, it is necessary, on the other hand, to take care that the restriction put by the Court upon parties does not amount to a denial of justice. Under the present practice, a party wishing to show cause for the admission of an application is stopped *in limine* by the Court if he seek to urge points already discussed, or to raise points not previously taken at the hearing of the appeal; so that almost the only ground on which a party can hope for the admission of his application, is by showing that there has been some evident error or omission in the judgment or decree of the Court. It appears to us after much consideration of the subject, that the course now taken by the Court amounts almost to a prohibition of any review of judgment. The effect of the recent rulings on the subject is to prevent a person being heard at all, for it is self-evident that he cannot show cause why his application for review should be admitted if he be not heard. The grounds urged may not be sufficient in the opinion of the Court for admitting the application, but unless a party be heard it is impossible to say that he has failed to show sufficient cause for the admission of his application. The question is one of so much importance that, as the opinion of the Judges are not unanimous on the subject, we think it right to submit it for the consideration of a Full Bench of this Court, and ask it to determine whether the ruling come to by a Division Bench of this Court in the case of Bhowabul Sing, as regards the hearing of grounds for the admission of an application for review, is consistent with law and should be adopted by the Court as the rule by which the admission of applications for review is to be regulated.

The judgment of the Full Bench was delivered as follows by—

Norman, C. J.—We think that it cannot be treated as a universal rule, that no point can be raised on an application for a review which has been already discussed and decided in the original hearing of the appeal; or that no new point which has not been raised at the hearing of the appeal can be argued on the application for review. We think that in each case the Court to which application is made must consider and decide whether a review is necessary to correct any evident error or omission or is otherwise requisite for the ends of justice.

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* The 25th July 1870.

Present:

The Hon'ble Sir Richard Couch, Knight, *Chief Justice*, and the Hon'ble F. B. Kemp, *Judge*.

Case No. 91 of 1870.

Application for review of judgment passed by the Hon'ble Sir Richard Couch, Knight, Chief Justice, and the Hon'ble Justice F. B. Kemp, on the 4th *May* 1870, *in Regular Appeal No.* 283 *of* 1869.

The Agra and Masterman's Bank, Plaintiff (Respondent) *Petitioner*,

versus

Baboo Gunga Perahad, Defendant (Appellant) *Opposite Party.*

Mr. G. C. Paul for Petitioner.

Moonshee Mahomed Yusoof for Opposite Party.

Couch, C. J.—It is clear from our judgment that the point taken in this application for review has been fully considered by us, and we cannot allow it to be re-argued. The application is rejected with costs.

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The 14th December 1870.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, F. B. Kemp, L. S. Jackson and Dwarkanath Mitter, *Judges.*

Mitakshara Law—Alienation — Joint family property.

Case No. 261 of 1869.

Regular Appeal from a decision passed by the Subordinate Judge of Tirhoot, dated the 29th July 1869.

Honooman Dutt Roy and another (two of the Defendants) *Appellants,*

versus

Bhagbut Kishen and Kishore Narain Singh (Plaintiff) *Respondent.*

Messrs. G. Gregory and *C. Gregory* for Appellants.

Baboo Unnoda Pershad Banerjee for Respondent.

On the question whether, under the Mitakshara Law, when a son sues to set aside an alienation made by his father of joint ancestral property on the ground that there was no legal necessity to justify the alienation, and it is proved that no legal necessity for such alienation existed, the son is entitled to recover his own share of the property only, or the whole, and on what terms:—

HELD that that question has been decided by two previous Full Bench judgments cited, in one of which it was ruled that the sale or mortgage of joint undivided property is invalid if made without the consent of all the co-sharers and not valid even for the seller's own share when undivided; and in the other of which it was held that the terms upon which such decree should be made will depend on the equity which the purchaser may have to a refund of the purchase-money, or to be placed in the position of an incumbrancer as against the joint family in the particular case.

This case was referred to the Full Bench by Loch and Hobhouse, J. J., with the following remarks:—

Loch, J.—THE plaintiff sues to set aside certain alienations of ancestral property made by his father, the defendant Bhagbut Narain Singh, on 1st Magh 1266, F. S., in favor of the other defendants Honooman Dutt Roy and Hur Dyal Dass, on the allegation that under the Mitakshara Law, by which the family is governed in all matters of inheritance, his father had no authority in the absence of any legal necessity and without the consent of his son, the plaintiff, to alienate any portion of the said property; and he sues to recover from the hands of the purchasers possession of the property sold to them under the deed above mentioned.

The Subordinate Judge gave a decree to the plaintiff, holding that plaintiff was entitled to bring the possession of the property back to the joint family.

An appeal has been preferred by the purchaser defendant, and the points we are required to try are—

1*st.*—Was there any legal necessity sufficient to justify the sale?

2*nd.*—If not, what is the plaintiff entitled to recover. Can he recover the whole of the property sold, or should the decree be limited to his own share. If he can recover the whole, under what terms can he do so?

The first point may be disposed of in a few words. The Court think that nothing to show the existence of any legal necessity to justify the sale has been made out, and the pleader for the appellant admits that he is unable to sustain this plea.

On the second point, it is contended that the plaintiff is entitled to recover only his own share of the property, and cannot deprive the purchaser of the share to which the father is legally entitled; that as the father could insist upon a partition, the purchaser for valuable consideration and in good faith should be allowed to stand in the shoes of the father, and the Court should direct a partition to be made; that the effect of a decree declaring plaintiff entitled to bring the whole of the property again into the possession of the joint family would be to enable the father, on possession being so restored, to demand a partition and to take possession of his separated share to the exclusion of the purchaser, whose purchase would by

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such decree have been declared null and void.

In the course of the argument we have been referred to the following decisions amongst others :—

VIII Weekly Reporter, page 1, Privy Council.

,, Ditto, page 15, Full Bench.

IX Ditto, page 511.

XII Ditto, pages 1 and 447.

We think it unnecessary to go into any of the earlier decisions quoted, as they have been referred to and reviewed in the more recent judgments of the High Court.

In the first of the cases quoted above, the Privy Council describes the condition of a undivided family under the Hindoo Law and the position of each individual member of it in the following words :—"According "to the true notion of an undivided family "in Hindoo Law, no individual member of "that family whilst it remains undivided "can predicate of the joint and undivided "property that he, that particular member, "has a certain definite share. No indivi- "dual of an undivided family could go to "the place of receipt of rent and claim "to take from the Collector or Bailiff of the "rents a certain definite share. The pro- "ceeds of undivided property must be "brought, according to the theory of an "undivided family, to the common chest or "purse and then dealt with according to the "modes of enjoyment of the members of an "undivided family."

In the case reported in VIII Weekly Reporter, page 15, the Full Bench held that according to the Mitakshara Law a son acquires by birth a right in ancestral property, and has a right during his father's life-time to compel a partition of such property. The father cannot, without the consent of the son, alienate such property except for sufficient cause ; and the son may not only prohibit the father from so doing, but may sue to set aside the alienation if made. The cause of action accrues to the son when the purchaser takes possession.

The question put to the Full Bench, with the judgment passed by the Court thereon, reported in 9th Weekly Reporter, page 511, is as follows :—The question is whether, under the Mitakshara Law, a son who recovers his ancestral estate from a purchaser from the father upon proof that there was no such necessity as would legalize the sale and that he never acquiesced in the alienation, is bound in equity to refund the purchase-money before receiving possession of the alienated property. The answer of the Full Bench was —"There can be no doubt that although the "word 'recovers' is used in this question, "the meaning is whether, under the circum- "stances stated, a son is entitled to recover "except upon condition of refunding the pur- "chase-money. Assuming that to be the "question, the answer should be that in the "absence of proof of circumstances which "would give the purchaser an equitable right "to compel a refund from the son, the latter "would be entitled to recover without re- "funding the purchase-money or any part of "it. We express no opinion as to whether "he would be entitled to recover the whole "or only his share of the estate." The Full Bench then proceeded to say :—"Having "answered the question propounded, we "ought to add that if it be proved to the "satisfaction of the Court that the purchase- "money was carried to the assets of the "joint estate and that the son had the bene- "fit of his share of it, he could not recover "his share of the estate without refunding "his share of the purchase-money. So, if it "be proved that the sale was effected for the "purpose of paying off a valid incumbrance "on the estate which was binding upon the "son, and the purchase-money was applied "in freeing the estate from the incumbrance, "the purchaser would be entitled to stand in "the place of the incumbrancer notwithstand- "ing the incumbrance might be such that "the incumbrancer could not have compelled "immediate discharge of it, and the decree "for the recovery by the son of the ancestral "property or of his share of it, as the case "might be, would be good, but should be "subject to the right of the purchaser to "stand in the place of the incumbrancer." The Court then goes on to say that the onus lies upon the purchaser in such cases to show that the money was so applied.

In the case reported in 12th Weekly Reporter, page 1, Full Bench Rulings, two questions were put to the Full Bench. The first is immaterial to the present suit. The second question was—"Bhugwan Lall in his "life-time executed an ordinary zur-i-peshgee "mortgage in respect of his undivided share "in a portion of the joint family property in "order to raise money on his own account

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" and not for the benefit of the family. Can " the nephew of Bhugwan Lall recover from " the mortgagee, without redeeming the " same, possession of the mortgaged share " or any portion of it?" The Full Bench held that " upon the simple fact stated in the " second question, Bhugwan Lall had no au- " thority, without the consent of his co- " sharers, to mortgage his undivided share in " a portion of the joint family property in " order to raise money on his own account " and not for the benefit of the family. The " facts are not sufficiently stated to enable " this Bench to say whether the nephew of " Bhugwan Lall can recover from the mort- " gagee, without redeeming the same, pos- " session of the mortgaged share or any por- " tion of it."

In the case of Nuthoo Lall Chowdhry disposed of by a Division Bench of this Court (Kemp and Glover, J. J.) reported in XII Weekly Reporter, page 447, the question now before us was disposed of on the authority of the Full Bench Ruling in the case of Sudaburt Pershad Sahoo *versus* Phoolbas Kooer reported at XII Weekly Reporter, page 1. The learned Judges say :—" Nor can he (the " purchaser) retain possession of Nirbhoy's " share, nor get back such portion of the " money as would be represented by that " share, inasmuch as the estate being joint " and undivided, Nirbhoy had no right to " burthen or alienate even his own share " without the consent of all his co-sharers ;" and the Court accordingly set aside the order of the Additional Judge regarding the retention by the defendant of Nirbhoy's share and the refund of purchase-money by Chedee.

We have carefully considered the Full Bench Ruling referred to in the above judgment, and are obliged to come to a different opinion from the learned Judges who passed that decision as to the extent of the ruling come to by the Full Bench. The Full Bench certainly determined that a member of a joint Hindoo family could not alienate his undivided share in the joint family property in order to raise money on his own account and not for the benefit of the family ; but they abstained from answering the second part of the question, *viz.*, whether the legal heir could recover the whole or any portion thereof, giving as a reason for so doing that the facts were not sufficiently stated to enable the Bench to come to an opinion on the point. Differing therefore as we do from the learned Judges who passed the decision in the case of Nuthoo Chowdhry, as to the extent of the Full Bench judgment in the case of Sudaburt Pershad Sahoo, and considering the question before us to be one of very great importance to the public, we submit the following question for the decision of a Full Bench. Under the Mitakshara Law when a son sues to set aside an alienation made by his father of joint ancestral property on the ground that there was no legal necessity to justify the alienation, and it be proved that no legal necessity for such alienation existed, is the son entitled to recover his own share of the property only, or the whole, and on what terms ?

It appears to us that some consideration is due to the purchaser, and that it is scarcely equitable to apply to him the rule of " caveat emptor." If the son, in an action against the purchaser in which his own father is necessarily made a defendant, succeed in having the sale made by his father declared illegal and recover the whole property without recouping the purchaser, then the father, as a member of a joint Hindoo family, recovers his interest in the property and can immediately demand a partition, and, on its being made, will enjoy possession of his share of the property in spite of the purchaser whose money he has taken and spent. The father who is a defendant in the case will in fact get a joint decree with his son who is the plaintiff, inasmuch as the property being restored to the joint possession of the family, consisting in the present case of father and son, the interest of the father as a member of the undivided family revives.

The following are the judgments of the Full Bench :—

Norman, C. J.—(Bayley, Kemp, L. S. Jackson, and Mitter, J. J. concurring)—In this case the question referred for the decision of the Full Bench was this :—" Whe- " ther under the Mitakshara Law when a " son sues to set aside an alienation made by " his father of joint ancestral property on " the ground that there was no legal neces- " sity to justify the alienation, and it is " proved that no legal necessity for such " alienation existed, is the son entitled to re- " cover his own share of the property only, " or the whole, and on what terms ?"

It appears to us that this question has been decided in the Full Bench decision to which reference is made in the order of the referring Judges. Sudaburt Pershad's case adopts the rule laid down in the Mitakshara

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that the sale or mortgage of joint undivided property is invalid if made without the consent of all the co-sharers, and not valid even for the seller's own share when undivided.

The argument which has been addressed to us would tend to show that, if alienation is made by a father of joint ancestral property in a case in which no legal necessity exists, it might be treated as an alienation of the father's separate share.

But the Full Bench case reported in 12 Weekly Reporter, page 1, Full Bench Rulings, shows that, even if so construed, that alienation is invalid as against the joint family. A son, therefore, suing to set aside such alienation, is entitled not only to a declaration that the alienation is void as an alienation of the entire estate, but void altogether even to the extent of the share as to which the alienation is considered to be established. As a consequence of that declaration, the son suing on behalf of the family may be entitled to a decree for possession. Upon what terms that decree should be made, will, according to the decision of the Full Bench, 9 Weekly Reporter, page 511, depend on the equity which the purchaser may have to a refund of the purchase-money, or to be placed in the position of an incumbrancer as against the joint family in the particular case.

It appears to me that there is no question raised on this reference which has not substantially been disposed of in the two cases already decided.

Loch, J.—I accept the conclusion come to by the majority of the Judges who compose the Full Bench, that the question asked in the reference has already been disposed of in the Full Bench judgments mentioned in the judgment now delivered by the Full Bench.

The 23rd May 1871.

Present :

The Hon'ble J. P. Norman, *Officiating Chief Justice,* and the Hon'ble G. Loch, F. B. Kemp, L. S. Jackson and G. C. Paul, *Judges.*

Arbitration award—Judgment—Appeal—Section 327 Act VIII of 1859.

Case No. 741 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 14th February 1870, *reversing a decision of the Moonsiff of Sewan, dated the 13th August* 1869.

Lalla Ishuree Pershad and others (Plaintiffs) *Appellants,*

versus

Hur Bhunjun Tewaree and others (Defendants) *Respondents.*

Baboo Kishen Succa Mookerjee for Appellants.

Baboo Debendro Narain Bose for Respondents.

Case No. 868 of 1870.

Special Appeal from a decision passed by the Officiating Subordinate Judge of Jessore, dated the 17th February 1870, *affirming a decision of the Moonsiff of that District, dated the 29th September* 1869.

Sustee Churn Chuckerbutty (Defendant) *Appellant,*

versus

Taruck Chunder Chatterjee (Plaintiff) *Respondent.*

Baboo Kashee Kant Sein for Appellant.

Baboo Bhowanee Churn Dutt for Respondent.

An award having been made upon a reference to arbitration without the intervention of the Court, the plaintiffs applied to the Moonsiff, in accordance with the terms of Section 327 Act VIII of 1859, to be allowed to file the award in Court. The application was at first refused on the ground that the award had not determined all the matters referred for arbitration; but, on review, the Moonsiff having considered all the objections taken to the award,—the main one being that before the award was made the defendants had revoked their authority to the arbitrators,—decided that there was no valid ground for not enforcing the award and accordingly upheld it.

HELD by *Norman, C. J. and Jackson, J. (Paul, J., contra)* that an appeal lay from the decision of the Moonsiff.

Per Norman, C. J., and Jackson, J.—It is open to an appellant to show that a paper which has been

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filed is not an award; but if it be an award, and judgment be given in accordance with such award under the provisions of Section 327, such judgment is final.

Per Paul, J.—When an award has been filed and judgment entered according to the award, such judgment is final.

Per Loch and Kemp, J. J.—A judgment drawn up in conformity with an award is final, but a judgment of that kind cannot be made when the fact of the award having been made with the consent of parties is disputed; and in such a case the Court should refer the petitioner to a regular suit to try the validity of the award. If the Court proceed to try the whole cause on its merits an appeal lies. If the Court reject objections to the filing of the award, and judgment be drawn up in conformity with the award, such judgment is final.

The first case above-mentioned was referred to the Full Bench by Loch and Hobhouse, J. J., with the following remarks:—

Loch, J.—This is a case brought to enforce a private award under the provisions of Section 327 Act VIII of 1859. The Court after calling upon the parties to show cause why the award should not be filed, and disposing of the objection that was raised, directed that the award should be filed *and enforced as an award made under the provisions of Chapter VI of the Code of Civil Procedure*, and passed judgment in accordance with the terms of the award.

We think that this case must be referred to the decision of a Full Bench, because we find that there are conflicting decisions as to whether in such cases any appeal can be preferred from the judgment of the first Court. On the one side, we find a case reported in the Gap Number of the Weekly Reporter, page 33, Miscellaneous Rulings one in VI Weekly Reporter, page 60, and one in XII Weekly Reporter, page 50. On the other side, we find a case in page 163, Marshall's Reports, in page 140, XI Weekly Reporter, and page 85, XII Weekly Reporter.

The case reported in Marshall, page 163, is a case which was referred by Court to arbitration. But looking at the words of the law, we do not think that there is any difference between one class of cases and the other. Where a judgment is given according to the award,—whether that award be given in a case which has been referred to private arbitration, or in a case which has been referred to arbitration by order of a Court,—it appears to us that in either case no appeal will lie. Looking at the end of Section 327, we find these words:—"If no sufficient cause be "shown against the award, the award shall be "filed and may be enforced as an award "made under the provisions of this Chapter." On referring to Section 325 of that Chapter, we find—"In every case in which judgment "shall be given according to the award, the "judgment shall be final."

It appears to us, therefore, that wherever the judgment is in conformity with the award and is not altered in any way by the Court, the judgment of the Court is final and no appeal will lie. But as there are conflicting judgments on the point, we refer the matter for the decision of a Full Bench with the following question:—

When an award has been ordered to be filed, and judgment has been given in accordance with it under the provisions of Section 327 Act VIII of 1859, is such judgment open to appeal?

The second case was referred to the Full Bench by Couch, C. J., and Mitter, J., with the following remarks:—

Couch, C. J.—In this case there having been a reference to arbitration without the intervention of a Court and an award having been made, the plaintiffs made an application under Section 327 of Act VIII of 1859 to the Moonsiff of Chowkee Magoorah that the award might be filed in Court. The application was at first refused on the ground that the award had not determined all the matters referred; but a review having been granted, the Moonsiff considered the objections which were taken to the award,—one of which was, to use the language of the Moonsiff, that before the arbitrators completed their decision they had been repudiated by the defendants, or in other words, that before the award was made the authority of the arbitrators was revoked; and having considered the objections fully, as appears in his judgment, he held that there was no valid ground for not enforcing the award, and directed "that the suit be decreed in favor of "the plaintiff; that the award of the arbitra-"tors be upheld; that the plaintiffs do get "from the defendants costs in this suit with "interest at one per cent." Upon an appeal from this decision, the Subordinate Judge held that there was no appeal and dismissed it. Hence the present special appeal.

In a case in XIII Weekly Reporter, p. 85, it was held that where the first Court gave judgment in exact accordance with a private award that judgment was final; and that the Subordinate Judge was wrong in entertaining an appeal. But in page 50 of the same Volume, it was held that under Section 325 the order for the execution of an award must be considered to be a decree of Court from which an appeal will lie. It is, however, to

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be remarked upon this case that the words in Section 325—"In every case in which judgment shall be given according to the award, the judgment shall be final," are not noticed. In VI Weekly Reporter, p. 83, Miscellaneous Rulings, it was held by a Full Bench that an order rejecting an application to file an award under Section 327 is not a decree and is therefore not appealable. An order that an award be filed is not a decree, and would seem for the same reason not to be appealable. By Section 327 the award when filed is to be enforced as an award made under the previous provisions of the Chapter, that is, enforced according to Section 325, which says that a judgment according to the award shall be final.

In this case the judgment of the Moonsiff was in accordance with the award, the objection being to the award that it was invalid and ought not to be filed. The decision on this objection was by the order that the award should be filed, and the appeal is in reality against that order. Under Section 327 there is no decree, and it would seem to follow from the decision of the Full Bench that there is no appeal. But in VI Weekly Reporter, p. 60, Civil Rulings, it is said that on the allegation of want of consent of parties, an appeal lies from an order under Section 327 directing an award to be filed and enforced. As the objection taken in the present case was want of consent at the time the award was made, it comes within that decision. I think the grounds of the decision of the Full Bench apply in the present case and that no appeal lies; but as the authority to the contrary was not noticed by the Full Bench and has not been overruled by it, I think we should refer to a Full Bench the question whether in the present case an appeal lies from the decision of the Moonsiff.

Mitter, J.—I concur in the order of reference proposed by the learned Chief Justice, but I do so upon the ground that an appeal is taken away in such cases by the express provisions of Section 325.

The following are the judgments of the Full Bench:—

Norman, C. J.—In special appeal No. 868 of 1870, there was a reference to arbitration without the intervention of a Court; and an award having been made, the successful parties applied under Section 327 of Act VIII of 1859 to the Moonsiff of Chowkee Magoora that the award be filed in Court. They also prayed at the same time that it should be enforced.

The defendants objected, amongst other things, that before the award was made the authority of the arbitrators was revoked.

The Moonsiff overruled the objection, directed the suit *to be decreed* in favor of the plaintiff, that the award should be upheld, directed that plaintiff should get costs from the defendant, and (the suit being for land) that a memorandum should be sent to the Registrar.

The defendants appealed to the Subordinate Judge, who thought that no appeal lay; and the question whether such appeal will lie has been referred to a Full Bench by Sir Richard Couch and Mr. Justice Mitter.

It seems to me material to observe that in order to set the Court in motion and to establish its jurisdiction, a party coming under Section 327 would have to show, *first*, that there has been a reference to arbitration; *secondly*, that an award has been made; *thirdly*, that his application is within six months from the date of the award.

The application would be, I suppose, by a petition verified.

A notice would then issue calling on the parties to the arbitration, other than the applicant, to show cause *why the award should not be filed.*

That cause might apparently be that there had been no consent to the reference, that no award had been made, or the like. If such party in showing cause should seek to introduce new facts and to rely on matters not appearing on the face of the petition of the applicant, he would have to bring those facts to notice by a verified petition or statement on his own part. It appears to me that if the Judge should see that there was a real and substantial contest between the parties, as to whether there had been a consent to reference or whether an award had been made, he should refuse to decide the matter on the conflicting statements or verified petitions of the parties. He ought to treat it as a sufficient cause why the award should not be filed, and leave the applicant to his remedy by suit on the award.

It seems to me that the only order which the Judge is empowered to make under Section 327 is simply an order that the award *shall be filed.* When the award is filed, it is to be enforced under the provisions of Chapter VI. Now the mode of enforcement of an award is by passing judgment and making a decree in accordance with the award. The

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judgment and decree which have been passed in the present case appear to be irregular. The conditions under which judgment on an award is to be pronounced seem to be prescribed by Section 325. It is only in case the Court shall not see cause to remit the award, and if no application has been made to set aside the award, or if such an application has been made and refused, that the Court is empowered to pass judgment on the award.

I am disposed to think that an award filed under the provisions of Section 327 stands in precisely the same position as an award submitted to the Court under Section 320. In both cases, before passing final judgment, the Court is empowered by Section 322 to modify or correct the award; by Section 323 to remit the award for re-consideration, *first*, if the award has left undetermined some of the matters referred to arbitration or determined matters not referred to arbitration; *secondly*, if it is so indefinite as to be incapable of execution; *thirdly*, if an objection to the legality of the award is apparent on the face of the award; and *lastly*, by Section 324 the Court is empowered to set the award aside in certain cases.

The judgment. if given acccording to the award, under Section 325 has a particular quality,— it is final. But it should be observed that the judgment which is to be final, is a judgment in accordance with the provisions of Section 325. Now, suppose in a case of reference by order of Court, instead of allowing the parties ten days' time in which to apply to set aside or correct the award, the Judge were forthwith without hearing objections to the award to make a decree in accordance with the award, I think there can be no doubt but that such judgment and decree would not be such as is declared by Section 325 to be final.—See XII Weekly Reporter, page 401; Sunt Lall *versus* Baboojee, S. D. A. Reports, Agra, 1863, Volume II, page 42.

In the present case, the Moonsiff who was empowered by Section 327 to make an order that the award should be filed, instead thereof at once gives judgment that the award be enforced. That judgment is apparently not such a judgment as is contemplated by Section 325. It may be suggested that although Sections 322, 323 and 324 provide ample means for checking irregularities and correcting errors in the award, there are no means of correcting the error if the Judge in dealing with an application under Section 327 comes to a wrong decision upon the question whether the parties consented to the reference.

It is clear that a judgment on an award is not one from which no appeal lies. It is only if the judgment be *in accordance with the award* that the judgment is final and cannot be disturbed. Therefore in order to make a final judgment there must be, *first*, an award; and *secondly*, a judgment in accordance with that award. It would follow that any objections which go to show that there is no award would show that the judgment is not final. I think, for instance, that the defendant might object that the award was a forgery, which is one of the objections in No. 741 of 1870: that it was made by persons other than the arbitrators named in the submission, as in the case reported in VII Weekly Reporter, page 269. In such cases there would be no award in fact.

So again, if a Judge were to treat a mere statement of account made by a person having no authority at all as an arbitrator, such for instance as an account drawn up by the servants of a mercantile firm shewing the balances due to the partners as an award, an order for the filing of such a document would not make it an award.

It seems to me to follow that if, after a valid revocation of their authority, persons who had been named as arbitrators were to pretend to make an award, it would be open to a party, against whom judgment in accordance with that paper had been pronounced, to contend by way of appeal that the paper was no award in consequence of the absence of authority on the part of the persons assuming to act as arbitrators to make any award.

For these reasons, I would answer the question proposed in the affirmative.

No. 741.—In this case the appeal to the Subordinate Judge raised three questions:— *first*, that there was no mutual submission to arbitration, inasmuch as the two documents put in as proving such submission on the part of the several parties differed in mutual point; *secondly*, that the defendant did not assent to the supposed agreement of reference; *thirdly*, that one of the arbitrators whose signature purports to appear on the award knew nothing about the award; that he had not signed it and did not know who signed his name on the award; that his signature was a forgery.

I think it clear that the objection that on these grounds there was no award, was one

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which the appellant was not precluded from taking by any thing to be found in the 325th Section.

The question put to us is in these terms—When an award has been ordered to be filed and judgment has been given in accordance with it under Section 327 of Act VIII of 1859, is such judgment open to appeal? I would answer the question thus—It is open to an appellant to show that the paper which has been filed is not an award. If it is an award, and judgment is given in accordance with such award, such judgment is final.

Jackson, J.—I agree to this answer.

Loch, J.—The question we have to determine, as put by the Judges who made the reference in case 741, is, when an award has been ordered to be filed and judgment has been given in accordance with it under the provisions of Section 327 Act VIII of 1859, is such judgment open to appeal?

It appears to me that the authority of a Civil Court under the provisions of Section 327 Act VIII of 1859 is of a very limited character; for were it otherwise, the facility given by the Legislature to parties to have private awards enforced by Courts of Justice would be open to great abuse, and parties appearing as petitioners under the above Section would be in a much better position than other suitors. No doubt the Legislature has by the provisions of Section 327 shewn great consideration to parties who, instead of coming into Court, settle their disputes by private arbitration. But the law contemplates that there has been a *bonâ fide* award which is sought to be executed, and there can be none unless the parties were consenting to it. The law gives no countenance to fraud; and yet the Civil Courts might do so were the Judges to determine under the provisions of Section 327 questions relating to the genuineness of the award, and no appeal were admissible from their decision on the matter of fact, as in other cases where a decision on the fact is open to appeal. If the Civil Court under the provisions of Section 327 can entertain as an objection to the enforcement of an alleged award any question as to its being genuine or made with the consent of parties, and on the evidence before it determine in favour of the genuineness of the award, and then draw up a judgment in conformity with that award, which judgment is final, then there is room to fear that much injury may be done without remedy. I have no doubt that a judgment drawn up in conformity with an award is final; but I think a judgment of the kind cannot be made when the fact of the award having been made with the consent of parties is disputed. The law, so it appears to me, contemplates that an award of some kind has been made with consent of parties, which one or other of them seeks to have enforced; and therefore before a Civil Court can proceed under Section 327, the fact of an award having been made must be admitted by the parties, and the objections which the Court can dispose of are objections to its being carried out as a decree of Court. When the fact of the arbitration is denied or the award is challenged as a forgery or collusive, the Court should, I think, hold its hand and refer the petitioner to a regular suit to try the validity of the award. If, however, it proceed to try the whole cause on its merits, an appeal would lie in the usual course, for the Court would in such case have tried questions which under the circumstances it had not authority to try. The objections which may be raised to the filing of the award, and can be disposed of by the Court under the provisions of Section 327, are of a kind which relate to the carrying out of the award, such as subsequent arrangement, full satisfaction, payment, and the like; and if these objections be rejected and a judgment be drawn up in conformity with the award, such judgment would, I apprehend, be final.

Kemp, J.—I am of the same opinion.

Paul, J.—No. 868.—This was an application under Section 327 of Act VIII of 1859 to enforce an award made under a reference to arbitration out of Court. According to Section 327, an application of this kind is required to be numbered and registered as a suit; and this requisition having been duly observed, a notice was served upon the defendants requiring them to show cause within a specified time why the award should not be filed in Court. The defendants appeared to show cause. They apparently admitted the submission to arbitration, but objected to the award on several grounds. Some of these grounds were highly technical and frivolous, and were very properly disposed of by the Moonsiff as untenable. The remaining grounds were levelled at the validity of the award, and in consequence thereof three issues were fixed for trial :—

1st.—Whether the award was liable to be set aside on the ground of misconduct of the arbitrators?

2nd.—Whether it was true that the arbitrators pronounced their decision after a repudiation of further proceeding by the defendants?

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3rd.—Assuming that this was so, whether sufficient grounds existed for the repudiation of the arbitrators?

The second and third issues in reality resolve themselves into the first issue, as they equally with the first issue relate to misconduct imputed to the arbitrators. It may be observed in passing that the ground of misconduct as vitiating an award is expressly recognized in Section 324. The Moonsiff duly tried the above issues, and deciding them against the defendant upheld the award and decreed the suit in favor of the plaintiff. It would have been more regular to have followed the course of procedure indicated in Section 327, namely, on deeming the cause shown insufficient to have ordered the award to be filed; then to have pronounced judgment in terms of the award and to have drawn up a decree accordingly. The single order passed in the case is substantially composed of the order, judgment, and decree which I have just mentioned as contemplated by the Code of Procedure. From this decision of the Moonsiff an appeal was preferred to the Officiating Subordinate Judge, who, on the case coming on before him, held that no appeal lay and consequently dismissed it. From this decision an appeal was preferred to the High Court. This appeal came on to be heard before the Chief Justice and Mr. Justice Dwarkanath Mitter. Both their Lordships were clearly of opinion that no appeal lay from the decision of the Moonsiff to the Subordinate Judge; but they were induced to refer the question whether an appeal lies or not in consequence of a decision pronounced by a Division Bench of the High Court (Steer and L. S. Jackson, Judges, presiding), and reported in VI Volume, Weekly Reporter, Civil Rulings, page 60, not having been noticed in nor overruled by a decision of the Full Bench reported in VI Volume, Weekly Reporter, Miscellaneous Rulings, page 83. This reference, therefore, clearly raises the question whether the decisions in VI Volume, Weekly Reporter, page 60, and in XII Weekly Reporter, page 85, are correct or erroneous.

In order to answer the question, it is necessary to consider the various proceedings which are to be taken before an award made under a reference out of Court can be enforced. As previously remarked, an application to have the award filed in Court must be first made. On this application, notice issues to the parties against whom it is intended to enforce the award, calling upon them to show cause against the filing of the award. On cause being shown, a decision must be come to in one of two ways; either that the cause shown is sufficient, in which case the award cannot be enforced in a summary manner; or that the cause shewn is insufficient, and the application to have the award filed is granted. The decision must conclude with an order either refusing or granting the filing of the award. It appears to me that an order directing the filing of an award is not a decree in its ordinary signification; and being in its nature a proceeding ancillary to the passing of judgment and decree, it is an order made in the course of a suit (commenced by an application) and relating thereto prior to decree. Consequently, under the terms of Section 363 of Act VIII of 1859, no appeal lies from such an order or from the decision of the Moonsiff on which it is based. It is, however, contended on the authority of the case in XII Weekly Reporter, page 50, that an order of this description is in reality a decree. If this were so, no further decree would be necessary under the provisions of Sections 327 and 325; but it appears clear that unless an order directing an award to be filed is followed up by judgment and decree, no execution can issue. If the Legislature intended to attribute to such an order the efficacy and force of a decree, the latter part of Section 327 would have been worded differently; it would have run thus—If no sufficient cause has been shown against the award, the award shall be filed and enforced *as an ordinary decree under the* provisions of this Act. This, however, is not the language of the Section; and I have already shown that the order for filing an award is not a decree.

The decision of the Division Bench reported in Volume VI, Weekly Reporter, page 60, is mainly rested on an earlier decision of the same Division Bench, and on a more recent decision of a Division Bench, consisting of the late Chief Justice and Mr. Justice L. S. Jackson therein referred to. The latter authority, *i. e.*, the more recent decision, is of little or no weight with reference to the question submitted to us, as in that case the appeal was dismissed on the ground that in the circumstances attending it no appeal lay.

The former authority, namely, the earlier decision, has not been shown us. I am therefore ignorant of the reasoning contained in it, and cannot test its *ratio decidendi*.

The decision in VI Weekly Reporter, page 60, considered independently of the reasoning which led to it, must be taken to have ruled that an appeal lies from an order deciding against the want of consent to the agreement

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of reference raised by the defendant. I can find nothing in the proceedings prescribed by Act VIII of 1859 for the enforcement of an award made on a reference to arbitration out of Court, which warrants the conclusion arrived at by their Lordships in the case last cited. I must confess, however, that I entertain grave doubts as to whether Section 327 intended to provide for the enforcement of an award, when the order of reference under which the same is based is disputed by the defendant. That Section seems to take for granted two things, namely, that the matter has been referred to arbitration and an award has been made, and then provides for the enforcement of such an award. I should say that the denial of an order of reference by the defendant ought to be considered "sufficient cause" shewn against the award within the meaning of Section 327. The Judges of the Courts at Westminster frequently refuse applications by way of motion for the enforcement of the terms of an award, when the points raised against the validity of an award are nice and difficult, leaving the party applying to his remedy by action (*see* instances 18 L. J. Ex., 29, and 3 Meeson and Welsby, p.722). I do not see why, when serious questions of fact which go to the root of the award arise, or when difficult questions of law arise as to the validity or construction of an award, such matters should not be held to amount to sufficient cause within the meaning of Section 327. I do not think when under Section 326 an application to file an agreement to refer to arbitration is met, on showing cause, by the statement of the defendant that the agreement is a forgery, the Civil Court would entertain and try the preliminary question of forgery so raised between the parties. The Civil Court would be quite justified in holding, and would doubtless hold, the denial of the defendant to be sufficient cause against the agreement, and leave the party applying to his legal remedy. If this be so, there is no reason for holding that the cause to be shown against an award made on an agreement to refer out of Court, which may traverse (amongst other matters) the making of the agreement to refer, should, so far as this traverse or denial is concerned, be different to and of wider operation (so as to necessitate the raising and trial of an issue thereon), than the cause which may be shown under Section 306 as regards the same traverse or denial. Moreover, our Indian Legislature, which guards most carefully the interests of the revenue in matters of litigation, could hardly have intended that the right to recover possession of landed property of great value under a disputed award should, with all the intricate issues of law and fact relating thereto, be tried in a summary manner upon and pursuant to an application engrossed on a stamp of 8 annas. Unless such a construction be put on the terms of Section 327 as would exclude the trial of all sorts of difficult questions of law and fact which would arise in an action upon an award disputed by the defendant, and would limit the operation of that Section as far as judicial decision is concerned to the determination of causes and matters specified in Sections 324 and 325, the decision of Subordinate Courts pronounced in the course of summary proceedings on matters arising out of a contested award would stand on a different footing from decisions of the same Court in regular suits and relating to the same matters,—the former being conclusive and final, and the latter inconclusive and open to appeal. This anomalous state of things furnishes an additional and forcible argument in support of the contention suggested with reference to the words "sufficient cause" in Section 327 and generally to the terms of that Section.

Having regard to the appeal addressed to us, in the interests of justice, by the pleaders who have argued the affirmative of the question submitted, against the inexpediency and injustice of laying down a rule of law which would hold as conclusive a single judgment in matters of vital importance, bearing in mind that it was assumed in the case in VI Weekly Reporter, page 60, that a Subordinate Court was competent to decide in a proceeding under Section 327 the issue of agreement or no agreement to refer to arbi-

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tration arranged out of Court but disputed in Court, and believing it possible that on the basis of this assumption the argument against the injustice of concluding parties by a single judgment might have prevailed so to have led to the decision in that case, I have been in a manner forced to consider what construction should be put on Section 327. I trust the construction I have suggested, and the consideration I have bestowed on Section 327, will have the effect of eliminating what I may be permitted to designate the disturbing element already adverted to as existing in the case in Volume VI Weekly Reporter, page 60, and of allaying the contentious anxiety felt in the cause of justice and expressed in the course of the argument adduced in support of the right of appeal against which I am about to decide. On the whole, then, for the reasons I have given, as well as for the reasons advanced by both their Lordships the Chief Justice and Mr. Justice Dwarkanath Mitter, I am of opinion that the decisions in Volume XII, Weekly Reporter, and Volume VI, Weekly Reporter, so far as they are relevant to the question before the Court, should be expressly overruled, and the question submitted should be answered in the negative.

No. 741.—The question submitted in this case is:—

When an award has been filed, and judgment given in accordance with it under the provisions of Section 327 of Act VIII of 1859, is such judgment open to appeal?

Section 327 provides:—If no sufficient cause be shown against the award, the award shall be filed and enforced as an award made under the provisions of this Chapter.

The provision for passing judgment is contained in Section 325, which in substance states that if the award be upheld, the Court shall proceed to pass judgment according to the award. The same Section further enacts that in every case in which judgment shall be given according to the award, the judgment shall be final. In the present case, judgment was given according to the award; it is therefore final. If this was the only point intended to be referred, it is wholly unnecessary to discuss any decisions on the subject, as the words of the law are perfectly clear. My answer, therefore, to the question submitted is, that the judgment given according to the award is final and not open to appeal.

If it was intended to submit in this case, for the consideration of a Full Bench, the question referred in special appeal No. 868, as to whether an appeal lies from the decision of a Moonsiff directing the filing of an award made under a reference out of Court. I desire to refer to my judgment in the last case in which I have considered at some length this question for the proper answer, namely, that no appeal lies.

In this case I observe that the Moonsiff, after having allowed oral evidence to be adduced on the subject of the issue whether the defendant consented or not to refer matters to arbitration, decided upon such evidence against the defendant and held that he had consented.

If the views I have expressed in the last case with reference to the meaning of Section 327 are correct, the denial by the defendant of the submission to arbitration should have been held to amount to sufficient cause shown against the award, so as to have stayed further action on the part of the Court.

As, however, no appeal lies in this case, any error which has been committed cannot be rectified by this Court sitting as a Court of appeal.

If the parties consider the position I have advanced tenable, they will probably take proper steps to have the decision of the Moonsiff set right.

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The 17th April 1871.

Present :

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, A. G. Macpherson, and Dwarkanath Mitter, *Judges*.

Reversionary interest — Execution — Section 205 Act VIII of 1859.

Case No. 407 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Mymensingh, dated the 7th December 1869, *reversing a decision of the Moonsiff of Nicklee, dated the 12th April* 1869.

Ram Chunder Tantra Doss (Plaintiff) *Appellant*,

versus

Dhurmo Narain Chuckerbutty (one of the Defendants) *Respondent*.

Baboo Hem Chunder Banerjee for Appellant.

Baboos Romesh Chunder Mitter and *Luleet Chunder Sein* for Respondent.

The interest of an heir according to Hindoo Law expectant on the death of a widow in possession is not property, but a mere expectancy, and therefore is not rendered liable to attachment and sale in execution of a decree by the 205th Section of Act VIII of 1859.

This case was referred to the Full Bench by Phear and Mitter, J. J., with the following remarks :—

Phear, J.—If the decision of a Division Bench, reported in XII Weekly Reporter, page 54, be correct, then the judgment of the Lower Appellate Court is right. But we feel ourselves unable to concur in this decision.

Speaking for myself, I have been accustomed, when sitting in the other side of the Court and there dealing with execution cases, to consider that the reversionary right of an heir to the last male holder of immoveable property expectant on the death of a Hindoo widow in possession did not constitute such property as could be attached and sold in execution of a decree. The right, such as it is, appears to us to amount to nothing more than an expectation, and to be in nowise a vested interest. We believe that there have been rulings made after argument going this length on the original side of the Court, though we are not at this moment able to lay our hands upon a report of one. Of course, if the so-called heir voluntarily sells his reversionary right on his succeeding to the property (if he does so), a Court of Equity will compel him to fulfil his contract. But such a case differs fundamentally from the one before us.

If, however, the decision referred to be correct law, then it seems that there remains at least one issue of fact necessary for the complete determination of the case between the parties which has not yet been tried by the Lower Appellate Court; and we ought therefore to send back the case for the purpose of having this tried.

Under these circumstances, we think that we are obliged to have recourse to a Full Bench for guidance; and having regard to the facts of the present case, we shall put our question into the following shape :—

A is proprietor in possession of a certain share in specified property. B is in the enjoyment of the remaining share of the estate of a Hindoo widow, *i. e*, as the widow of C, deceased, the last presiding proprietor thereof.

Would A, in the event of B dying in his life-time, be the immediate heir of C in respect of the share enjoyed by B? Does an attachment of the whole property in execution of a money decree against A, followed by sale of the rights and interests of A in that property, pass to the purchaser the expectant or so-called reversionary right of A to the share which is enjoyed by the widow, and give him a good title to possession of it on the occurrence of the death of the widow?

The judgment of the Full Bench was delivered as follows by—

Norman, C. J.—We are all of opinion that the interest of an heir, according to Hindoo Law, expectant on the death of a widow in possession is not property. It is a mere expectancy, and therefore not rendered liable to attachment and sale in execution of a decree by the 205th Section of Act VIII of 1859.

* 12 W. R., p. 45, overruled.

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This point was considered after very full argument in a case reported in Volume II Indian Jurist (N. S.), page 277,* (Bhoobun Mohun Banerjee *versus* Thakoor Doss Biswas) in which the Court on the original

* Ordinary Original Civil Jurisdiction.

The 24th June 1867.

Present:

The Hon'ble J. P. Norman, *Judge.*

Bhoobun Mohun Banerjee, *Plaintiff,*

versus

Thakoor Doss Biswas, *Defendant.*

The Advocate General and Hyde for the Plaintiff.

Kennedy and *Broughton* for the Defendant.

Norman, J.—MR. KENNEDY on behalf of the defendant moved to set aside an order made by this Court on the 26th of April last, prohibiting the defendant from alienating the property mentioned in the tabular statement annexed to the said order; and another order dated the 14th of May directing the Sheriff of Calcutta to sell the above-mentioned property, and that the Sheriff might be restrained from proceeding to sell the property.

The plaintiff, having obtained a decree in this suit for rupees 8,040 for debt and rupees 215-8 for costs, presented to this Court a petition under Section 213 for the attachment of a number of houses described as "belonging to the estate of the late Rasmoney Dossee" and obtained an order for their attachment under Section 235, prohibiting the defendant from alienating the same. The schedule annexed to that order described the property attached as "the reversionary right of the defendant in the following properties," mentioning the houses in detail.

The inventory does not contain a specification *of the defendant's share or interest therein to the best of the applicant's belief and so far as he has been able to ascertain the same*, as required by Section 213 This is a grave irregularity. A debtor whose property may be sold under a loose description of this sort might sustain great injury by it. If an application had been made to stay the sale on account of this defect in the proceeding, I should probably have acceded to it, and compelled the plaintiff to pay any costs of or occasioned by the application.

The nature of the interest which the plaintiff seeks to bring to sale is set out in the plaintiff's petition. From this it appears that Raj Chunder Doss died, leaving as his heiress his widow Rasmoney Dossee. He also left four daughters, of whom two afterwards died in the life-time of their mother, each leaving one son.

On the death of Rasmoney, she was succeeded by Sreemutty Puddomoney Dossee and Sreemutty Juggodumba Dossee, the serviving daughters of Raj Chunder Doss.

Takoor Doss Biswas is one of the sons of Juggodumba Dossee by her husband Mothoor Mohun Biswas. After the death of his mother and aunt, he will apparently be entitled to succeed to the properties now in their possesion as a heir jointly with all the sons of his mother and her sisters who shall then be living.

Mr. Kennedy contended that the so-called reversionary interest of Takoor Doss was a mere expectancy, and as such could not be attached in execution of a decree; and he referred to a case decided by Mr. Justice Macpherson,—Koraj Koonwar *versus* Kemul Koonwar, VI Weekly Reporter, p. 34.

The Advocate General contended that the defendant has property in the houses mentioned in the inventory, which, under the 201st and 205th Sections, is liable to attachment and sale in execution of the decree. The Advocate General also took a preliminary objection that the defendant had no interest in the question and no right to object to the attachment; that if the sale took place and the attachment and sale were not warranted by Act VIII, nothing would pass and his interest would not be affected.

I think that there is nothing whatever in the second point. If the defendant's interests were now sold, it would only realize a very small sum. Even if there were no chance of a surplus, he would have an interest in seeing that the property was sold in such a manner as to pay his debts. On that ground in Pinches *versus* Harvey, I Queen's Bench Reports, p. 868, it was held that a defendant against whom a fiat in bankruptcy had issued was not disqualified by want of interest from moving to set aside an execution on a judgment regularly entered upon a warrant of attorney on the ground of bad faith. But there is another ground on which I think he is at liberty to come in and object to the attachment. It appears to me that if he allowed the execution to go on without taking any objection to it, and permitted his creditor to get satisfaction by a sale, it might hereafter be fairly contended that he was precluded from objecting that nothing passed under a sale which he had tacitly allowed, and of which he had elected to take the benefit.

I now come to the main point in the case. Daughters take the inheritance in default of male issue,—Colebrooke's Digest, Book V, Sections 419 and 420. Generally speaking, no doubt, a daughter has no power to alienate property which she takes by descent from her father to the detriment of the other heirs of her father—See Macnaghten's Hindoo Law, Volume 2, pages 224 and 232; Mussamut Gyan Koonwur *versus* Dookhun Singh, 4 Select Reports, page 330. But it is expressly laid down that she may make a gift (of a limited portion of the property) to a son on account of his filial piety—Colebrooke's Digest, Book V, Section 353 and notes to Section 360. She has also apparently a power similar to that of a widow to sell or charge the property in case of necessity for the payment of the debts of her father, the performance of her funeral rites, the support of his relatives or her own maintenance. In Strange's Hindoo Law, Volume I, page 140, the power of a daughter is treated as larger than that of a widow. It is in fact cut down by treating the texts relating to the duties and powers of a widow in this respect as applying generally to the case of women who take property (other than stridhun) by inheritance.—See Dyabhaga Chapter XI, Section 2, verse 31, and the opinions of the pundits in the case last above cited. The daughter's estate cannot be said to be a mere life estate, as it has been treated by Sir F. Macnaghten's Consideration on Hindoo Law, page 67. As heiress for the time being in possession, the daughter represents the entire estate. Her position appears to be strictly analogous to that of a widow. Now, it has been determined that a Hindoo widow has not a mere life interest, that the whole estate is for the time vested in her, absolutely for some purposes, though in some respects for a qualified interest—See Sreemutty Jadoomoney Dabee *versus* Saroda Prosonno Mookerjee, I Boulnois, p. 128; Judgment of Sir James Colvile Doedem Goluckmoney Dabee *versus* Degumbur Dey, II Boulnois, pp. 193 and 198; Cossinath Bysack *versus* Hurrosoonduree Dossee, Clarke's Additional Cases, p. 91; Katama Natchiar *versus* the Rajah of Shivagunga,* IX Moore's Indian Appeals, pp. 539-606. In Hurry Doss Dutt *versus* S. M. Upoorna Dossee, VI

* 2 W, R., P. C., p. 31.

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side followed a previous decision of Mr. Justice Campbell and Mr. Justice Macpherson to be found in Volume VI, Weekly Reporter, page 34.

The case will go back to the Division Bench for trial.

Moore's Indian Appeals, pp. 433-445 the Privy Council held that whether or not daughters stand in the same situation as a widow with regard to the right of disposition of the property, they at all events stand in the same situation as to their right of administration and right of enjoyment of the property for their own lives; and on that ground the Court refused to act upon the principles which are applied in Courts of Equity in England for securing in the public funds property to which one person is entitled in possession and another in remainder.

Until the death of a daughter it is not known who will suceed her. In the case now before me the defendant is not the immediate heir in expectancy of either his mother or his aunt. The whole property will go in the first instance to the sister who shall survive. After the death of such surviving sister, if the sisters were married when the property devolved on them the surviving sons of all the sisters will take equally *per capita*. Those to whom the property may go will take as heirs of their grandfather. Till the event happens on which the property devolves, the several sisters' sons are merely expectant heirs. Ordinarily the possibility of succeeding in a mere expectant heir is no property; and that is so here unless the peculiar inchoate interest by birth of an heir according to Hindoo Law is a present interest which places him in a position different from that of the heir of an estate tail according to English Law. Hindoo Jurists, whose opinions are received as law in Bengal, lay down that the expectant interest of a son, in other words what has been called the inchoate right of inheritance by birth, is not property—*See* Dyabhaga, Chapter I, Sections 13, 14, 15, 18, 19, 26, 30-38, 39, 42. In these passages it is distinctly declared that property is not vested in sons while the father lives: they have *no ownership* while their father is living.

The case of Upoorna Dossee in fact goes a long way to show that daughters' sons have no property in the ancestral estate while the daughters are alive. They cannot interfere, or call on the Court to interfere, with the management of the property by the daughter, unless there is manifest danger to the estate from the mode in which the daughter is dealing with it. It is clear that if acting within the limits of her authority, a widow thinks fit to alienate any particular portion of the property, she has a right to do so without the assent of the heirs. No heir, no alienee of an expectant heir, could interfere and be heard to say—"I object to your sell-"ing this house, this land, or this piece of Government "paper. Sell something else." Within the limits of their powers, whether these are exactly the same as those of the widow or not, daughters are in the same positions as the widow.

It is therefore not only a mere contingency whether the defendant will ever take as heir, but it is also uncertain what he will take if he ever does succeed as heir. The conclusion at which I arrive is that the defendant is merely an expectant heir, and that he has not any property in the ancestral estate now in the possession of his mother and aunt.

I am informed by Mr. Justice Macpherson that the case reported in the VI Weekly Reporter, p. 34, was decided after time taken by the Court and that it was very fully considered.

As I entirely agree with the view taken by the Court in it appellate branch in that case, it only remains for me to say that the attachment and order for sale must be set aside with costs and the Sheriff restrained from selling the property.

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The 17th April 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice,* and the Hon'ble G. Loch, H. V. Bayley, A. G. Macpherson, and Dwarkanath Mitter, *Judges.*

Kubooleut—Share-holders—Fractional shares.

Case No. 1798 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 7th June 1870, *reversing a decision of the Deputy Collector of that District, dated the 1st March* 1870.

Indur Chunder Doogur (Plaintiff) *Appellant,*

versus

Bindabun Beharee (Defendant) *Respondent.*

Baboos Hem Chunder Banerjee and *Debender Chunder Ghose* for Appellant.

Baboo Bama Churn Banerjee for Respondent.

In a suit in which the zemindar sought to recover possession with mesne profits, the tenant declared the land to be rent-free. The decree gained by the zemindar declared the land to be mâl, but refused to give possession and mesne profits, and it declared the defendant entitled to possession so long as he performed the service for which the land was granted, but that on his failure to do so the zemindar might resume the land. The zemindar did not resume; but the present plaintiff, who is a purchaser from the zemindar, sued for a kubooleut, from the tenant who is still in possession. HELD that the plaintiff was not entitled to a kubooleut as the tenant might be perfectly willing, so far as was known, to perform the service which he was required to render.

Per Norman, C. J.—As a general rule, the holder of a tenure cannot be sued by owners of fractional shares in the superior tenure for separate kubooleuts according to the proportions to which they allege themselves to be entitled in the superior tenure.

Per Mitter, J.—The share-holders of an undivided estate have no right to divide a holding or tenure without the consent of the tenant. The payment to each share-holder of his quota of the rent is of itself no evidence of such consent; although when coupled with other facts and circumstances, it may justify a Court of justice in coming to the conclusion that the tenant actually consented to the division of his tenure into a corresponding number of distinct holdings.

This case was referred to the Full Bench by Kemp and Glover, J. J., with the following remarks:—

Glover, J.—I DO not see how we can (under the Court's Rules of Practice) avoid sending this case to the Full Bench.

The point for decision is whether a suit by the owner of a fractional share of an undivided estate for a kubooleut will lie.

In Niddee Ram Sircar *versus* Dhunkishen Bhuttacharjee (VI Weekly Reporter, 53) it was decided by Bayley and Sumbhoonath Pundit, J. J., that such a suit could be brought.

In Soorut Soonduree Debia *versus* Messrs. R. Watson, and Co. (XI Weekly Reporter, p. 25) Norman and E. Jackson, J. J., held that nothing in Act X of 1859 gave authority to a party entitled to a fractional share of an undivided estate, though he might be receiving a definite portion of rent from the tenant, to maintain a suit for a kubooleut in respect of such undivided share.

But in Oodoy Chunder Dhur *versus* Kalee Tara Dassee (XI Weekly Reporter, p.

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393) Bayley and Dwarkanath Mitter, J. J., ruled that where no partition had been made between several landholders, no one of the co-parceners had a right to sue for a kubooleut for his own fractional share. The question, however, as to whether the tenant had been paying rent separately to the co-parcener suing for a kubooleut did not arise in this case.; and the two precedents are not therefore absolutely opposed to each other.

In the case of Gunganarain Dass *versus* Sharoda Mohun Roy (XII Weekly Reporter, page 31) Macpherson and E. Jackson, J. J., held that a suit by one of several joint proprietors to recover a certain proportion of rent said to be payable by defendants will not lie in the absence of the other joint proprietors, unless the defendants have paid their rents to the plaintiff separately or have agreed to do so.

The last reported case is Romanath Ruckhit *versus* Chand Huree Bhooya (XIV Weekly Reporter, page 432) in which the learned Judges (Bayley and Paul, J. J.,) followed the ruling in Gunganarain Dass *versus* Sharoda Mohun Roy.

They did not think it necessary to refer the point to a Full Bench, although there was a conflict of decisions on the subject, because as Mr. Justice E. Jackson had seen reason to change the opinion he had come to in the case of Soorut Soonduree Debia, the decison in that case was that of one Judge only (Mr. Justice Norman).

I do not see what difference this makes. The decision in the case of Soorut Soonduree Debia has never been re-viewed, but remains to all intents and purposes a binding decision, notwithstanding that one of the learned Judges who took part in it saw afterwards reason to change his opinion.

And so long as this decision stands, it is undoubtedly in direct conflict with the other decisions noted above, and especially with that of the 8th of December 1870 (XIV Weekly Reporter, page 432.)

Under these circumstances, I think that we ought to refer the present case to a Full Bench.

Kemp, J.—There certainly is a conflict in the decisions. I have no objection to the case being referred to the Full Bench.

The following are the judgments of the Full Bench :—

Norman, C. J.—In the present case, the defendant appears to be holding 18 beegahs of land under a tenure the conditions of which bind him to render certain services to the zemindar as a bearer. The zemindar brought a suit against the defendant who set up that he held his land as lakheraj, or rent-free. The decree of the Appellate Court declared that the mâl rights of the zemindar had been established ; that the defendant's claim to hold lakheraj should be set aside ; that the zemindar's claim for khas possession and wassilat should be dismissed ; and further declared that if the ryot, that is, the defendant in the present case, failed to perform service as a bearer, the zemindar would be at liberty to resume the land.

The present suit is brought by a person who purchased a 10 annas share of the putnee, and a one anna share of the zemindaree to which the defendant's tenure was subordinate. The suit is brought for the purpose of obtaining a kubooleut for 11 annas as his proportion of the jumma or money rent, which he supposes to be assessable on the land which was in the defendant's possession as service land, service not being now required of him.

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The point referred for our decision is this:—

"Whether a suit by the owner of a fractional share of an undivided estate for a kubooleut will lie."

A tenure is an entire thing. The obligation to pay the rent reserved upon the letting of land or in respect of the tenure of land by a ryot is either a contract or an obligation in the nature of a contract to pay the rent. The obligation is single and entire. A tenant is not liable to have an entire tenure sub-divided and split up against his own will and to his own prejudice, by any act on the part of the persons to whom he is liable to pay rent. Again, the contract or obligation to pay rent as a single sum cannot be split up and sub-divided and converted into several obligations to pay different proportionate parts of the sum to different individuals at the will of the party to whom the rent is payable. But if all the obligors to whom the entire rent is payable could not, against the will of the tenant, increase the burden of the obligation by compelling the ryot to pay to several persons at different places and in separate proportions, much less can one share-holder, who could not in absence of the others even sue alone to enforce the original obligation, maintain a suit to compel the ryot to pay him a proportion of the debt. If such a suit could be maintained, the greatest injustice would be done to ryots. A ryot's undertaking is to pay his rent simply, not to pay to the several proprietors according to their shares. The ryot sued by a person who alleges himself to be entitled to a particular share of the rent has no means of knowing what are the rights of the different co-proprietors as amongst themselves. If he were sued and compelled to enter into a kubooleut for 8 annas of the rent by one co-proprietor, he might afterwards find that he had no answer when sued by another who alleged that he had a 10 annas share. I may say that since I have sat in this Court, I have seen several instances in which ryots have been compelled by proceedings of an analogous character to pay 18 annas in the rupee.

I think it clear that, as a general rule, the holder of a tenure cannot be sued by owners of fractional shares in the superior tenure for separate kubooleuts according to the proportions to which they allege themselves to be entitled in the superior tenure.

In the case before us, for aught that I know it may be that while the 11 annas share-holder represented by the plaintiff wants a money rent, the 5 annas share-holder may desire to be carried in his pulkee.

I do not mean to say that, where a fractional share of an undivided estate is held by the subordinate tenant as a separate tenure, a suit for a kubooleut in respect of such fractional share of such estate will not lie against the tenant. Nor do I contend

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that the several owners of shares in a zemindaree may not sue separately for proportions of rent payable to each of such owners in cases where the facts give rise to the presumption of an agreement by all parties that the rent should be paid in separate fractional shares to the several parties interested.

The party who caused this reference must pay two gold mohurs as costs.

Loch, J.—I desire to add a few words. It appears to me that looking at the facts of this case, as they are now disclosed to us, we ought not to answer the question which has been referred to us because it does not arise in the present case.

The zemindar sought to recover possession, with mesne profits. The tenant declared the land to be rent-free. The decree gained by the zemindar declared the land to be mâl but refused to give possession and mesne profits, and it declared the defendant entitled to possession so long as he performed the service for which the land was granted, but that on his failure to do so the zemindar might resume the land. There the matter rests. The zemindar did not resume. But the plaintiff, who is a purchaser from the zemindar, comes in and asks for a kubooleut from the tenant who is still in possession, and perfectly willing, so far as we know, to perform the service which he is required to render.

Under these circumstances, the question which has been referred to us does not arise, and I think we should decline to answer it.

Macpherson, J.—The circumstances before us are so peculiar that the general question referred to us can scarcely be said to arise at all. I therefore desire to limit my answer to the particular case which is now before us. It is clear the plaintiff cannot be entitled to a kubooleut as Mr. Justice Loch has shown.

Bayley, J.—I am of the same opinion with Mr. Justice Loch. I also think that the question referred does not arise on the facts stated in the plaint or in the decree. Upon the facts as stated by the Chief Justice, I think it clear that a suit as brought in the present case would not lie.

Mitter, J.—I concur in the opinion expressed by Mr. Justice Loch. The point referred to us does not arise on the facts admitted by the plaintiff, and I do not therefore think myself bound to express any opinion upon it. I wish to state, however, that as a matter of principle, the shareholders of an undivided estate have no right to divide a holding or tenure without the consent of the tenant. The payment to each share-holder of his quota of the rent is of itself no evidence of such consent; although when coupled with other facts and circumstances, it may justify a Court of justice in coming to the conclusion that the tenant actually consented to the division of his tenure into a corresponding number of distinct holdings.

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APPEALS FROM ORIGINAL JURISDICTION.

The 24th January 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble J. B. Phear, *Judge.*

Agreement—Limitation—Clauses 10 and 16 Section 1 Act XIV of 1859.

On Appeal from the decision of the Hon'ble W. Markby, exercising the Ordinary Original Civil Jurisdiction of the High Court.

S. J. Leslie (one of the Defendants) *Appellant,*

versus

Punchanun Mitter (Plaintiff) *Respondent.*

Mr. Hyde and *Mr. Evans* for the Appellant.

Mr. Phillips for the Respondent.

The plaintiff sued under an agreement, which was executed before the Registration Law came into effect, under which he entered into the service of the defendant, an attorney, and by which he agreed, amongst other things, to advance the defendant such sums of money as he may request not exceeding 10,000 rupees at one time and not exceeding the ⅔ths value of all bills, stocks, &c., of the defendant's business, which bills, stocks, &c., the defendant was to make over to the plaintiff and his surety who were to have the custody of and a lien on all such bills, stocks, &c.; and the defendant was under the deed to pay interest at 9 per cent. per annum on all advances made to him by the plaintiff.

HELD that the suit was one for a breach of a contract in writing signed by the defendant to be bound thereby within Clause 10 Section 1 Act XIV of 1859; and as the document could not be registered at the time of its execution, the period of limitation applicable to it is 6 years under Clause 16 of that Section.

THIS was a suit by the plaintiff founded on an agreement, dated the 9th April 1864, the terms of which ran as follows:—

Articles of agreement made and entered into between Sheppard John Leslie of Calcutta, solicitor of the first part, Punchanun Mitter of Baranossey Ghose's Street in Calcutta of the second part, and Sreemutty Prosono Coomaree Dossee of Rutton Sircar's Garden Street in Calcutta, wife of Nilmoney Mullick of the third part, witnesseth

First.—That the said Punchanun Mitter shall and will employ himself for the term of twelve months from the 1st day of April 1864 as cashier and accountant to the said Sheppard John Leslie, and shall and will retain and keep under him an establishment consisting of a native cashier, two collecting sircars, and one durwan, and shall and will devote his whole time to such employment.

Second.—That the said Sreemutty Prosono Coomaree Dossee shall and will stand and be security for the Punchanun Mitter, and shall and will make good any losses sustained by the said Sheppard John Leslie on account, neglect, or default of the said Punchanun Mitter.

Third.—That the said Punchanun Mitter and Prosono Coomaree Dossee shall and will be securities for the said cash establishment of the said Punchanun Mitter, and shall make good all losses sustained by the said Sheppard John Leslie by reason of any act, default or neglect of the said cash establishment or any of them.

Fourth.—That the said Punchanun Mitter shall receive from the said Sheppard John Leslie monthly, and every month during the continuance of these presents, the sum of rupees 250 for his personal allowances and for his said cash establishment, which said salary is to be paid on the 15th of every succeeding month.

Fifth.—That such cash establishment shall be appointed by the said Punchanun Mitter with the consent of the said Sheppard John Leslie, and shall be liable to dismissal or fine at the option of the said Sheppard John Leslie, and all fines which the said Sheppard John Leslie may impose on sufficient cause being shewn shall be deducted from the said monthly sum of rupees 250.

Sixth.—That the said Punchanun Mitter and Sreemutty Prosono Coomaree Dossee shall, from time to time on requisition being made to either of them, advance to the said Sheppard John Leslie such sums of money as he may request, provided there shall be at no one time a larger sum due by the Sheppard John

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Leslie on account of such advances than three-fourths value of all bills, stocks, and other property which the said Sheppard John Leslie will make over to the said Punchanun Mitter and Sreemutty Prosono Coomaree Dossee; provided also that the said advance shall not exceed in total at one time rupees 10,000.

Seventh.—That the said Sheppard John Leslie shall pay interest on all such advances at the rate of 9 per cent. per annum, and that the said Punchanun Mitter and Sreemutty Prosono Coomaree Dossee shall have lien for all such advances on all bills, stocks, and other property of the said Sheppard John Leslie, which the said Punchanun Mitter and Sreemutty Prosono Coomaree Dossee shall have in their custody as security for such advances. The said Sheppard John Leslie will be at liberty to realize such bills and sell such stock as he shall deem necessary, provided the money will be paid to Sreemutty Prosono Coomaree Dossee and Punchanun Mitter in payment of such advances: should there be any surplus money remaining after the settlement of the account, such money will be credited to the account of the said Sheppard John Leslie.

Eighth.—That monthly accounts shall be delivered to the said Sheppard John Leslie of all bills delivered to the said Cash Department for realization, and of the amount realized and of the cash dealings and transactions of the office of the said Sheppard John Leslie. Dated this ninth day of April one thousand eight hundred and sixty-four.

S. J. LESLIE.

PUNCHANUN MITTER.

SREEMUTTY PROSONO COOMAREE DOSSEE."

The plaintiff alleged that he fulfilled the terms of the agreement in every particular, and that he advanced certain sums aggregating rupees 7,736-4-3 to the defendant in accordance with the agreement, against which he received from the defendant payments for principal and interest amounting altogether to rupees 2,200. The balance due to the plaintiff on the advances made by him and interest thereon, after giving credit for the sums received from Leslie, was rupees 8,938-12-3. The plaintiff further claimed rupees 1,754-8 for salary from April 1864 to August 1861. He accordingly sued for the total sum of rupees 1,069-4-3 under the agreement, and also as money owing to him by the defendant, for money lent to the defendant, and for work and labor done by plaintiff for the defendant Leslie at his request, and for money paid by the plaintiff to the use of the defendant at his request for interest, and for money found due by the defendant to the plaintiff upon an account stated between them.

The defendant admitted the agreement under which the plaintiff entered into his service, but alleged that the plaintiff did not fulfil several of the terms of the agreement, and that he absented himself frequently from his duties. The defendant further pleaded that the suit was barred by limitation.

The judgment of Markby, J., at the original trial was as follows:—

I think that the objection on the statute of limitation has failed. The case is one which falls under a very peculiar rule laid down in several cases which are referred to in Thomson on the Law of Limitation (page 144 of the last Edition), which lay down that as no period is fixed by Clause 10 Section 1 Act XIV of 1859 within which suits may be brought for breach of a contract, which could not be registered by any law in force at the time of its execution, the law of limitation applicable to such suits is Clause 16; and there is no contention that this is not a contract which could be registered. I therefore think that the Clause which is applicable is Clause 16. But the argument of Mr. Evans is that this is a suit not upon that written contract, because there is no express provision that the advances will be repaid, and that it must be either upon a contract implied from the agreement or from the advance itself. He contends that any stipulation which is to be implied from a written contract, is not itself a stipulation for which there is a written engagement. It has been contended that this is similar to the case of a mortgage where there is no express covenant to repay the money advanced, and that in that case if there is any implied contract it is not a specialty debt. I do not however see the analogy between the two cases. The case Mr. Evans referred to is that of Ivens *versus* Elwes, 1 Jurist N. S., page 6. That case seems to me rather to go against the view which he contends for. The question there was whether the recital under seal that the debt was due made the debt which otherwise was not due into a specialty debt. The only question which was considered by the Vice-Chancellor was what was the intention of the parties. He seems to intimate that if according to the true construction of the deed the debt could be considered to be as declared to be due, he would have so held although there was no special covenant to pay. It seems to me that

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this view is supported by the case of Wood *versus* The Governors and Company of Copper Miners in England, 17 C. B., Old Series, 906, where it was held that even in the case of specialty what must be looked to was not the particular words but the intention of the parties.

However that may be in a case in which the question arises on a deed, I have no doubt that that is so where the question arises on a written contract. Looking to the intention of the parties, I have no doubt that it was their intention, an intention which I think is clearly though not expressly stated, that the plaintiff should lend money to Mr. Leslie whenever Mr. Leslie required it up to a certain amount, that he was to repay himself from the fees as they were collected, and that Mr. Leslie should pay him the balance. I think there is no difference between an engagement which is implied from a written contract and an express written contract: an express intention and an implied intention are the same when once the intention is ascertained. The real question is what is the real intention of the parties.

In accordance therefore with the decision to which I have referred, I hold that this case falls within Clause 16 of the Limitation Act and that plaintiff had six years to sue.

As regards the salary claimed by the plaintiff, I am of opinion that there is no written engagement on the part of Mr. Leslie to pay any thing which accrued due for salary after the 31st March 1865, and if plaintiff went on after that it must be under some other authority than has been put forward in this suit. I don't read the letter of the 10th of December 1867 as containing any acknowledgment by Mr. Leslie that such salary was due. The letter seems to me to express a desire on the part of Mr. Leslie to be informed what the real nature of the claim was, and he reserved to himself the right to resist any claim which may be made.

The Court then made the usual order referring the case to Chambers for the purpose of taking the accounts between the parties. The correspondence on the pleadings was admitted on both sides. The question of costs was reserved till after the accounts were settled.

On the appeal, Hyde and Evans for the appellant contended that the case fell not under Clause 16, but under Clause 9 Section 1 Act XIV of 1859. As to whether a debt was a specialty debt or not, they cited Wynch and Grant, 2 Dreury, 312; Adey and Arnold, 2 De Gex Macnaghten and Gordon, 432; and Ivens and Elwes, 1 Jurist, N. S., 6.

Phillips for the respondent was not called upon.

The judgment of the Appellate Court was delivered as follows by

Norman, C. J.—This is a suit by Punchanun Mitter against Sheppard John Leslie, who is an attorney of this Court, to recover rupees 8,938-12-3 for monies lent, and rupees 1,754-8 for salary. The salary appears to be barred by limitation, but Mr. Justice Markby has made a decree in favor of the plaintiff for the amount of monies advanced to Mr. Leslie, subject to an account. From that decision Mr. Leslie has appealed, and I propose to state very shortly the facts on which the question raised by the appeal turns, *viz.*, whether the claim of the plaintiff for monies advanced by him is barred by limitation.

On the 9th April 1864, Mr. Leslie entered into an agreement with the plaintiff Punchanun Mitter and one Sreemutty Prosono Coomaree Dossee, by which Punchanun Mitter engaged to employ himself as cashier and accountant of Mr. Leslie, to keep under him an establishment consisting of a native cashier, 2 collecting sircars, and one durwan, and to devote his whole time to such employment. Prosono Coomaree Dossee was to be the surety for Punchanun Mitter. Punchanun Mitter and Prosono Coomaree Dossee further engaged that they would from time to time, on requisition made to either of them, pay to Mr. Leslie such sums of money as he might request, subject to the following provisions:—"There "shall be at no one time a larger sum due "by Mr. Sheppard John Leslie on account of "such advances then three-fourths value "of all bills, stocks, and other property, "which the said Sheppard John Leslie "will make over to the said Punchanun "Mitter and Sreemutty Prosono Coomaree "Dossee. Provided also that the said *advance* "*shall not exceed in total at one time rupees* "*ten thousand.*" There was also an agreement that Mr. Leslie should pay interest on all advances at the rate of 9 per cent., and that Punchanun Mitter and Prosono Coomaree Dossee "shall have a lien for all "such advances on all bills, stocks and other "property of the said Sheppard John Leslie, "which the said Punchanun Mitter and "Sreemutty Prosono Coomaree Dossee shall "have in their custody as security for such "advances. The said Sheppard John Leslie "will be at liberty to realize such bills and

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"sell such stock as he shall deem neces-
"sary, provided the money will be paid to
"Sreemutty Prosono Coomaree Dossee and
"Punchanun Mitter in payment of such ad-
"vances: should there be any surplus money
"remaining after the settlement of the ac-
"count, such money will be credited to the
"account of the said Sheppard John Leslie."

That agreement was made on the 9th of April 1864 before the Registration Act of 1864 came into operation. The last items in the account are in December 1864. The suit was brought on the 22nd February 1870, nearly six years after the cause of action arose. The appellant contends that the suit is barred under the 9th and 10th Clauses of Section I of Act XIV of 1859. We must therefore see whether the suit is for the breach of any contract in writing signed by the party to be bound thereby. The money is due under a contract by Mr. Leslie. Was that contract in writing? The money was advanced under a contract, and that contract contains a condition or agreement for the re-payment of the same by Mr. Leslie. Now on looking at the contract between the parties as reduced into writing, the first thing which it is necessary to observe is this, that Punchanun Mitter and Prosono Coomaree Dossee are to *advance*, that is to say, to place in Mr. Leslie's hands money which Mr. Leslie is to *hold upon the terms of a loan*; that is to say, subject to a condition for re-payment on demand. The next point is that while that money is forborne to Mr. Leslie by Punchanun Mitter, it is to be forborne on terms which expressly stipulated it is to be forborne on the terms of carrying interest at 9 per cent. to be paid by Mr. Leslie to Punchanun Mitter. Thirdly, the money is to be held by Mr. Leslie on condition that Punchanun Mitter and Prosono Coomaree Dossee are to have a lien, for the re-payment of it, on all bills, stocks, and other property of Mr. Leslie, which Punchanun Mitter and Prosono Coomaree Dossee should have in their custody as security for the advances; and lastly, it is provided that Leslie may himself realize such bills and sell such stocks as may be necessary, provided the money be paid to Punchanun Mitter and Prosono Coomaree Dossee in payment of such advances. Now it is not necessary in order to constitute an agreement in writing that that agreement in writing should be expressed in a particular form of words In order to make an agreement, it is not necessary to use the words "I agree" or "I promise" or "I stipulate". If the agreement can be collected from the written instrument and if it can be gathered that the party has bound himself by such instrument *that*, if the instrument is under seal, amounts to a covenant, or, if the instrument is not under seal, to an agreement.

There are two old cases which illustrate this. One is in Carthew's Reports, p 135. The case there was this. There the plaintiff lessor demised a house to the defendant for years yield-
"ing and paying a certain rent, free and clear
"from all manner of taxes, charges, and im-
"positions whatsoever," and it was held that the words "yielding and paying," &c., made a covenant, and that the lessor was discharged from payment of all taxes imposed by Act of Parliament and long after the commencement of the lease, and that the lessee was bound to pay the whole rent without any deduction for any old or new charge or imposition whatsoever. Several similar cases are quoted in Comyn's Digest, Title Covenant, A 4. In the Duke of St. Albans *vs.* Ellis, 16 East, 352, it was held that "under a covenant by the lessee to plough the premises in a due course of husbandry, *except* the rabbit warren and sheep walk, an implied covenant *not* to plough those portions arises."

Now I think it impossible to doubt that when Mr. Leslie executed this instrument as he did, he agreed that the money paid by Punchanun Mitter and Prosono Coomaree Dossee to him should be received by him as an advance; that until re-payment was made he should be liable to pay for the use of the money on the forbearance of the creditor interest at 9 per cent.; that he bound himself to hold the money as a person to whom money is lent holds it, namely, on condition of re-payment on demand. I think that the case falls within the meaning of the words in Clause 10 Section 1, and that there was a contract in writing signed by the party to be bound thereby, of which there has been a breach, and as this written contract could not be registered at the time it was entered into, I think that

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Mr. Justice Markby was right in holding that the period of limitation applicable to it is 6 years.

The effect will be that the appeal will be dismissed with costs.

The 30th January 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble J. B. Phear, *Judge*.

Decree-holder—Release—Adjustment of Decree—Section 206 Act VIII of 1859.

On Appeal from an order of the Hon'ble W. Markby, exercising the Ordinary Original Civil Jurisdiction of the High Court.

Bhoobun Mohun Banerjee (Plaintiff) *Decree-holder,*

versus

Sadhoo Churn Sircar (Defendant) *Judgment debtor.*

Mr. Kennedy for the Appellant.

The Respondent appeared in person.

The Plaintiff, decree-holder, realized from the judgment-debtor a portion of his decree through the Court, and subsequently gave the judgment-debtor a letter in which he stated that he released him from the balance.

Held that this letter having been given without consideration and purely from motives of compassion did not amount to a release. The only way in which an adjustment of a decree can be effected is through the Court under Section 206 Act VIII of 1859, and the mere fact that the plaintiff admits that he told the defendant that he would not execute the rest of the decree is not the certification of an adjustment of the decree.

The plaintiff obtained a decree in this case on the 15th of July 1867, for the sum of rupees 5,102-5-6 with interest, and costs of suit which were taxed by the Taxing Officer of this Court at rupees 581-3. By an order of this Court he received rupees 1,833-13-9 in part satisfaction of his decree, and in June 1870 he applied that notice under Section 216 of Act VIII of 1859 be served on the defendants to show cause why the decree should not be executed against them

The defendant Sadhoo Churn Sircar accordingly showed cause and put in an affidavit in which he admitted the decree, but he set out in that affidavit a letter, by which, he contended, the plaintiff had promised not to take out further execution against him. That letter was in the following terms:—

"Sree Sadhoo Churn Sircar!

"You will learn by this letter that on the money which you borrowed from me and with which you opened a shop in Calcutta in the name of Doorgadoss Sircar becoming due, I instituted a suit against you and Doorgadoss Sircar and obtained a decree for the sum: after deducting what was realized, the balance which is due from your share, I release you from: you will never have to give the said balance. If to this I or any of my heirs ever raise any objections or claim, it shall be inadmissible: it cannot be realized. 3rd Bysack 1275."

The application of the plaintiff for execution was refused with liberty to him to apply again. Plaintiff accordingly renewed his application on the 15th July 1870, when he urged that he did not at the time of his giving the defendant Sadhoo Churn Sircar the letter on which the latter relied, or at any other time either before or since the giving of such letter, receive any consideration for the same either from the defendant Sadhoo Churn Sircar or from any person or persons whomsoever on his behalf. He further said that subsequent to the date of the letter he personally frequently applied to the defendant Sadhoo Churn Sircar for payment on account of the decree, and that on all such occasions the defendant stated that he was unable to comply with the plaintiff's request.

The defendant showed cause once more, and Markby, J., on the 29th August 1870, refused the plaintiff's application or the following grounds:—

There being in this case a formal release from the debt as formal (as far as I am aware) as could be given according to the custom of Hindoos, I think I ought not to allow execution to issue, and treat that release as a nullity merely upon the statement that no consideration passed. My present opinion is that even if that be so, the release would not be inoperative. The application is dismissed with costs.

The plaintiff appealed from the above order on the grounds that the learned Judge was mistaken in holding that the letter in question was a good and binding release to the defendant and that it was a bar to any further execution in this suit against the defendant, and he contended that it was not of any effect whatever to prevent the issue of execution as no consideration had been given therefor.

The judgment of Appellate Bench was delivered as follows by

Norman, C. J.—In this case the plaintiff obtained a decree for 5,102 rupees odd

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annas with costs, amounting to rupees 581-3-0, against Sadhoo Churn Sircar, Ram Lall Mitter, and Doorgadoss Sircar, described as carrying on business as marine store dealers under the style or firm of Doorgadoss Sircar and Company. The decree was dated the 2nd August 1867. On the 13th May 1867, the Sheriff attached certain property of the defendants. After decree the Sheriff was directed to sell the property which he had attached. He did so and brought the money into Court, and by an order of Court, dated 19th November 1867, the plaintiff received from the Comptroller General of Accounts the sum of rupees 1833-13-9 on account and in part satisfaction of his decree. On the 3rd Bysack 1276, 15th April 1868, plaintiff at the request of the defendant Sadhoo Churn Sircar gave him a letter in Bengallee, of which the following is a translation:—"You "will learn by this letter that on the money "which you borrowed from me and with "which you opened a shop in Calcutta in the "name of Doorgadoss Sircar becoming due, "I instituted a suit against you and Doorga-"doss Sircar and obtained a decree for the "sum: after deducting what was realized, the "balance which is due from your share I "release you from: you will never have to "give the said balance. If to this I or any "of my heirs ever raise any objection or "claim, it shall be inadmissible: it cannot be "realized. 3rd Bysack 1275." Now it seems clear that there was no consideration whatever for the writing of this letter by plaintiff. It was given freely, voluntarily, a gratuitous act, the plaintiff being influenced at the time it was written, according to the statement of defendant himself, by motives of compassion. The plaintiff afterwards applied to this Court for execution of his decree against the defendant, Sadhoo Churn Sircar, without making any mention of the letter which he had written to him. The decree being more than a year old, the defendant had an opportunity of showing cause why the decree should not be executed against him; and by a verified petition he stated that this letter had been written. The application for execution, which was made before me, was then refused upon the ground that it was the duty of the plaintiff to disclose to the Court fully all the circumstances which he knew which could have any influence on the mind of the Court in determining whether execution should issue. Leave was given to the plaintiff to renew his application, which he did; and upon that application Mr. Justice Markby refused leave to plaintiff to execute his decree, treating the letter of the 3rd Bysack 1275 as a release. From that refusal the plaintiff has appealed.

We are of opinion that the letter in question was not in effect a release. In the first place, there is no consideration of any sort or kind for giving up the debt. If it had been that in consideration of the defendant's going among his friends and raising money to pay part of the decree, the plaintiff gave up the remainder of the decree, I am of opinion that that would have been binding on the plaintiff, and he could not now execute the decree. But as I have already said that is not the character of the transaction. Whatever had been realized from the defendant had been taken out of Court many months before the date of the letter. It could only operate if some effect could be given to it analogous to that of a release under seal. The mode in which an adjustment of a decree can be made is pointed out by Section 206 Act VIII of 1859. Now Section 206 say that "no adjustment "of a decree in part or in whole shall be "recognized by the Court unless such ad-"justment be made through the Court." I think if the plaintiff had come before the Court and said that he was satisfied with half of the amount of the decree and requested that satisfaction should be entered as to the remainder, or asked that it should be noted that he had agreed not to take further proceedings as to the residue, it would have been sufficient. The adjustment made through the Court or recorded in Court might have had the effect of a release. The Section proceeds:—"Or be certified to the Court by the person in "whose favor the decree has been made or to "whom it has been transferred." If a binding agreement had been certified to the Court, I think that it would have been enough. But the mere fact that the plaintiff admits that he told the defendant that he would not execute the rest of the decree is not the certification of an adjustment of the decree. The plaintiff at the same time says that he makes the admission—"I am not legally "bound by my promise. I do not admit that "the decree is adjusted or settled." In my opinion the letter in this case did not operate as a release to the defendant.

The result will be that the order of the first Court will be reversed and execution will issue. The costs of the application to Mr. Justice Markby as an ordinary application will be allowed, but there will be no costs of this appeal as the plaintiff has brought himself into the difficulty by writing the letter.

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The 2nd February 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. C. Paul, *Judge.*

Title—Separate property—Joint family.

On appeal from the judgment of the Hon'ble J. B. Phear, exercising the Ordinary Original Civil Jurisdiction of the High Court.

Sreenarain Chuckerbutty (Plaintiff) *Appellant,*

versus

A. B. Miller, Official Assignee (Defendant) *Respondent.*

Messrs. *Graham and Marindin* for the Appellant.

Messrs. *Kennedy and Evans* for the Respondent.

The Official Assignee having attached certain immoveable property as the exclusive property of A., the judgment-debtor of an estate represented by him, the plaintiff (one of the brothers of A), unsuccessfully claimed the property under Section 246 Act VIII of 1859, and subsequently brought the present suit against the Official Assignee for a declaration of his right to the property on the ground that it was his own and self-acquired property, of which he had been in separate possession. The plaintiff and his witnesses were examined in support of his case, but the Official Assignee adduced no evidence whatever.

Held by Phear, J., in the Original Court, that the plaintiff was bound to prove the specific title which he set up, and that, as the evidence on his side was untrustworthy, his suit should be dismissed *in toto*, even though it appeared that the plaintiff had some interest in the property as a member of a joint Hindoo family, as such interest could not be ascertained in the present suit in which the plaintiff claimed the property as his sole and exclusive property.

The judgment of Phear, J., confirmed in appeal by Norman, C. J., (Paul, J., dissenting) without prejudice to the right of the plaintiff and his brothers to bring another suit to establish their right to their shares in this property as being joint family property.

THE allegations of the plaintiff in this suit were as follow. He stated that he is one of the sons of Suroop Chunder Chuckerbutty, who shortly before his death made a partition of his estate. The share of plaintiff, who was then a minor, together with the share of two other minor brothers, Trilochun and Rashbeharee, was made over to Rajcoomaree Dabee, their mother, who retained possession thereof. The plaintiff and his two minor brothers lived with their mother, separate in estate, food, and worship from the other five sons of Suroop Chunder Chuckerbutty. The plaintiff, Trilochun, and Rashbeharee, received their shares of the property from their mother, and remained joint in estate, food, and worship until the death of Rashbeharee, and then of Trilochun. In the year 1834, and subsequent to the partition, the plaintiff advanced monies to Rajnarain Bose and three others, who were unable to re-pay the same; and in consideration of the advances so made, they conveyed to Trilochun and Rashbeharee—benamee for the plaintiff—two houses in Calcutta, the monies advanced being the sole property of the plaintiff. The plaintiff continued in undisturbed possession of the said premises from the date of the purchase till the 7th of September 1869, when the premises were attached by the defendant in this suit in execution of a decree obtained by Thomas and Co. against Mirtunjoy Chuckerbutty, brother of the plaintiff and one of the eight sons of Suroop Chunder Chuckerbutty. By another order of September 1869, the High Court ordered the sale of the said property, and the plaintiff accordingly brought this suit against the defendant, as the Official Assignee and Assignee of the estate of Thomas & Co., for a declaration that he is entitled to the property in suit and that he has an absolute interest in the same. He also asked for an injunction to restrain the defendant from selling the premises, or any part thereof, and from in any way interfering with the same.

The defendant alleged that the plaintiff is one of the younger brothers of Mirtunjoy Chuckerbutty, against whom Thomas & Co., whose estate the defendant now represented, obtained a decree for rupees 23,324-10-8 on the 16th of June 1865 with costs. In execution of that decree, certain immoveable property of the judgment-debtor, Mirtunjoy Chuckerbutty in Moorshedabad, was attached on three several occasions; but those attachments came to nothing, as the decree-holders either withdrew or did not prosecute the attachment, on objections made by Mirtunjoy Chuckerbutty. In September 1869 the property, subject-matter of this suit—being two houses in Calcutta—were attached by the defendant as the property of Mirtunjoy Chuckerbutty, when the plaintiff filed a claim

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under Section 246 Act VIII of 1859, claiming the houses as his own absolute property. The claim was investigated by the High Court on the 18th February 1870 and was dismissed with costs. The defendant then went on to refer to another suit in which Mr. Cochrane, as Assignee of the estate of Hickey Bailey & Co., obtained a decree in 1849 against the same judgment-debtor for one lac of rupees, and to the ineffectual attempts which were made to execute that decree. The present defendant also seized certain property in Jungypore in Moorshedabad in execution of the last mentioned decree, and the judgment-debtor's objections were dismissed although he carried those objections in appeal to the High Court. Thereupon the plaintiff and his younger brothers, Bunkobehary and Rajnarain, claimed the property as their own, but their claims were also dismissed. The plaintiff then filed a suit in Berhampore against this defendant in respect of the said property, which in the meantime was advertised for sale on the 17th January 1870. Finally, the defendant denies that the two houses for which the plaintiff's present suit is brought were ever in the plaintiff's possession, but he avers that they are the sole and absolute property of Mirtunjoy Chuckerbutty, who the defendant alleges transferred them into the names of his brother, for the express purpose of preventing the defendant from enforcing the decrees which have been obtained against him.

The judgment of the Original Court in this case was as follows:—

Phear, J.—There is no doubt that in this case the plaintiff must strictly prove his title. For the purpose of doing so, he puts forward a conveyance which does not purport to be a conveyance to him. He must very clearly make out that the ostensible vendees under this conveyance were from the beginning nothing more than his benameedars. It appears to me in the first place to be *a priori* probable, that if the vendees were benameedars at all they were benameedars for the whole family. But plaintiff undertakes to prove his case by satisfying the Court that he bought the property with his own funds, and that from the time of purchase it has been in his sole enjoyment. Of course, the first involves showing the Court the mode in which he got the funds. He says that part of the funds he inherited from his father, and part he got from a large sum which he won in a lottery. The portion which he got from his father seemed to be by virtue of some alleged partition, but there is nothing beyond his own word to support the factum of a partition. Perhaps this is not in itself very important, for if the partition did really occur it took place so many years ago, and enjoyment under it has continued so long, that possibly the documents of partition were not in any great degree to be expected to be put forward. But I think with regard to the other portion, *viz.*, the fund which he obtained from the lottery, the matter is very different. He certainly might have produced to the Court evidence of primary importance with regard to the winning of the prize. Indeed, he himself says that if the Bank of Bengal people were here with the papers, these would show he was the winner of the prize. But it lay on him to bring this circumstance before the Court. He has not done so, and as far as I understand from his testimony, notwithstanding that the title to this property has been in question on other occasions, it is only lately that he has publicly stated that he got the funds by means of this prize in the lottery. He admits that in the claim cases he did not come forward himself to support his claim by his own testimony. On the whole, I cannot avoid the conclusion that this story of the mode in which he got the money for making the purchase is not a true story.

Then as to the other branch of his title, *viz.*, that which consists of the use and enjoyment of the property by himself alone, there is here again nothing more really than his own word; for the testimony of the tenant who paid the rent from time to time, is quite as consistent with joint enjoyment by other members of the family as with sole enjoyment by himself, and the principal witness (Shamsoonder) who gives his evidence on the side of the plaintiff, if he can be relied upon at all, would certainly lead me to think that the enjoyment and management of the property was ijmalee to an extent far beyond the three brothers, *viz.*, the plaintiff and the two vendees of this property.

I do not, however, think that either the plaintiff or Shamsoonder ought to be trusted. They did not appear to me to be the honest witnesses of truth, and their testimony has not the corroboration which might be given to it if it were true.

It seems to me, therefore, that the plaintiff has not established his right to recover pos-

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session of this property. He may have had at one time, and perhaps even now has, some share in it ; but if so, I am unable to say what share ; and this besides it not the case which he comes into Court to prove. I am of opinion that I ought to dismiss the plaint with costs No. 2.

The plaintiff appealed from the above judgment on the following grounds :—

1.—For that on the evidence the plaintiff ought to have been declared entitled to the relief prayed with the usual costs of suit.

2.—For that the judgment and decree were against the weight of evidence.

3.—For that the plaintiff gave sufficient proof of his separate right and title to the property seized by the defendant, and that there was no evidence to show or to lead to the inference that Mirtunjoy Chuckerbutty, the execution-debtor, had any right or interest therein jointly with the plaintiff or otherwise.

The judgments of the Appellate Court were delivered as follow :—

Paul, J.—In this case I have formed a very clear opinion that the appeal should be allowed. I have the misfortune to differ from the Chief Justice, and I therefore express my opinion with the greatest possible distrust, but still, being clearly of opinion that the appeal should be allowed, I consider I should express it.

In this case it appears that Mr. Miller, the Official Assignee, representing the estate of Messrs. Thomas & Co., had a judgment against one Mirtunjoy Chuckerbutty. In execution of that judgment, he attached the property now in dispute as being the separate property of Mirtunjoy. Owing to that attachment, the plaintiff, who is the brother of Mirtunjoy, puts in his claim. The claim was allowed to be filed, and it came on for hearing when, as I understand, all the witnesses who were examined in the present case were examined with the exception of the plaintiff. Under Act VIII of 1859. a person who resists an attachment and a sale pursuant to attachment, is required to show he is in possession of the attached property as his own. In this the plaintiff failed. I of course cannot pronounce any opinion as to the nature of that failure, but I must take it as a fact that the plaintiff failed to satisfy the Judge that he was in possession of the property as his own. The result of that failure was the institution of the present suit. The plaintiff in his plaint and written statement claims the property which had been attached as his own property, and his claim is resisted by the defendant in his written statement on the ground that the property is not the plaintiff's property but the sole property of his brother Mirtunjoy. Act VIII of 1859 prescribes that the matter in issue shall be collected from the written statements of the parties, and the conflict which was thus raised in and by their written statements between the plaintiff and the defendant, as to whether the ownership of the property lay in the plaintiff or in Mirtunjoy, in my opinion could only lead to one issue, *viz.*, whether the property in suit belonged to Sreenarain or to Mirtunjoy. Unfortunately, in this case a very wide issue was raised, *viz.*, whether the plaintiff was entitled to recover. It is unnecessary to criticise the terms of this issue, because it is clear that it is not an issue at all. In every case a plaintiff must establish his right to recover before he can obtain judgment. But inasmuch as the parties before the lower Court probably well understood the point in dispute, it is unnecessary to make any further remarks thereon. I think it is quite clear, as was shewn by Mr. Marindin, that defendant well understood that the real issue between him and the plaintiff was whether the plaintiff or the defendant was the owner of the property which had been attached, and it was owing to this that there was no cross-examination on the other point, which is the only point now made by the respondents in answer to this appeal, that the facts and circumstances show that the property is the joint property of Sreenarain, Mirtunjoy Chuckerbutty, and their other brothers. I am quite willing to admit that if on such an issue it turned out that some other persons were entitled in the subject-matter of the suit, it might be necessary under Section 73 of Act VIII of 1859 to make them parties ; but I do not yield to the objection of the defendant that it is competent to him now to contend that the property was not the sole property of the plaintiff, but the joint property of the plaintiff and his brothers, merely on vague inferences to be drawn from the evidence of the plaintiff and the gomastah Shamsoonder, who have in their evidence here and there incidentally stated a few meagre circumstances relating to the original state of the family at the time of the death of the ancestor. I further maintain that this contention is at variance with the defendants

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written statement and the whole conduct of his defence as shown upon the cross-examination of the plaintiff's witnesses.

In this case the appellant's case presents no difficulty to my mind, but the only difficulty which is raised is that raised by the respondent to the effect that the whole of the plaintiff's case must be disbelieved without there being a single *iota* of evidence to put against it. If the plaintiff's story had been of a marvellous character, or if had been in conflict with one's ordinary experience of life, I might have been called upon to disbelieve it *in toto;* but I find it difficult to disbelieve the evidence of the several witnesses, some of whom are entirely independent witnesses, merely on suspicion and conjecture. It must not be forgotten that in this country a true case is very often exaggerated; but if, where we can separate the truth from the falsehood, we are still to dismiss the suit, the result would be that a great many plaintiffs would fail in their suit. It is an inherent defect in human nature for the parties to a suit to endeavour to prove as much as possible in support of their case and to exaggerate their own case, and consequently in dealing with the evidence of parties and partizan witnesses it is necessary to be cautious. I am quite willing to admit in favor of the respondent, that the difficulty of the Official Assignee to reach the property of Mirtunjoy ought to induce me to scrutinize the case with caution and care. Scrutinizing the evidence adduced on behalf of the plaintiff carefully, and having no evidence offered on the part of the defendant to set against it, I am of opinion that after making due allowances for exaggerations and falsehoods, there is a substantial residuum of truth contained in the plaintiff's case which is sufficient to entitle him to a verdict.

I shall now advert to the broad facts proved on behalf of the plaintiff. The plaintiff states and proves by the evidence of his servants and tenants, who are wholly disinterested persons, that he was the ostensible landlord of the premises for 12 or 14 years, and that he duly received the rents which were remitted to him to his country residence at Jungypore. The plaintiff swears that he was the real owner, having no co-sharer in the property. The title, as originally obtained in the year 1241, was taken in the name of the plaintiff's younger brothers who have since died; but in the year 1859, the plaintiff bought a portion of the neighbouring lands and took a conveyance to himself in his own name. From these circumstances, I consider it proved that for the last few years, so far as the history of the property in suit goes, the plaintiff was the recipient of the rents of the property in dispute and exercised acts of ownership with regard to it. The learned Judge seems to believe the testimony which proves that the plaintiff was regarded by the tenants as their landlord, but he counteracts the effect of it by saying that it is as consistent with the property being in plaintiff as in the joint family. There is consequently no conflict between the learned Judge and myself with respect to this evidence; we both believe it. The learned Judge of the Court below blunts the point of that evidence, by considering it in conjunction with an opinion entertained by him, that the plaintiff was a member of a joint Hindoo family possessing joint property. I look upon that evidence according to its natural and ordinary meaning and import, and I decline to consider it along with the presumption of law arising from the fact of the plaintiff being a member of a joint family, because I am of opinion, as I shall presently show, that the fact of the plaintiff being a member of a joint Hindoo family possessing joint property is not substantiated in this case, and hence no presumption of law arises to which I am called upon to subject the plain fact of a *primâ facie* ownership proved by the plaintiff. The presumption that any parcel of property is to be supposed to be purchased from joint funds depends on certain facts. Too much has been made of this presumption in our Courts. Now it is clear where A and B, members of a Hindoo family, are possessed of joint property of such character and magnitude that other property can be acquired thereout, and it is not shown that A and B have separate property, then the presumption is that property subsequently purchased by either of them was purchased from joint funds. The presumption of law as to property being joint until the contrary is proved, is not of a magical character such as is too commonly attributed to it, but it is the fair ordinary and common sense inference or presumption arising from the assumed or proved antecedent facts. Mr. Graham has cited cases in which it has been laid down that a person who relies on the presumption of law in respect of joint property must start it, and he can only start it by showing the existence of joint property out of which the disputed property could be acquired. It has been

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held in several cases that commensality is not sufficient for the purpose of raising the presumption of law in favor of joint acquisition.

Now, in this case, it was no part of defendant's case that the property was joint property—nothing was pointedly made as to that. The only evidence is the evidence of the plaintiff, who says that 50 years back his father died leaving a house and cash. Besides this there is no evidence as to ancestral assets. As to the ancestral or family dwelling-house, it is immaterial whether it has been held, occupied, and enjoyed as joint or separate property. It is only a place where the parties reside, and has not furnished nor can it well be supposed to furnish funds as a source from which subsequent purchases or accretions could arise. With regard to the cash the only evidence is that of the plaintiff, and he says he received, when he came of age about 35 year ago, rupees 3,000 or 3,500 separately as his share of the joint estate left by his father. Now, it is said that in this case I must believe that part of the plaintiff's story that there was some cash as joint property, and disbelieve the rest of his story which states that he received his share separately. Now, the story of the cash is told as it were in one sentence; namely, of the cash or personal properperty the plaintiff received as his separate share rupees 3,000 or 3,500. If this part of the plaintiff's statement is to be treated as evidence, the whole of it must be read; and though I may, if I find very cogent reasons, believe a portion and reject the rest, I must be careful neither to believe nor reject fancifully. I can find nothing in the case which enables me to accept one portion of the statement, that there was cash or joint personal property, and reject the part which states that the same was divided and the plaintiff's share handed to him; but I find in this case many circumstances which tend to show that the latter part of the plaintiff's statement is true.

I find on the evidence that the plaintiff and Mirtunjoy carried on separate silk business; that the Official Assignee in this and in other instances has seized property as the sole property of Mirtunjoy Chuckerbutty; and that Mirtunjoy was sued alone on account of his silk transactions by Hickie, Baillie and Co. These circumstances, which are undoubted facts, tend to corroborate the plaintiff's story that he was separate in estate and business; and if so the separation must have taken place some time or other. The defendant suggests no period of time, but the plaintiff swears to a particular period of time; and if I am to reject this, I can only do so fancifully and on mere conjecture and suspicion. This I cannot do. I therefore say that the plaintiff has satisfied me that there were never any joint funds out of which the property in question could have been purchased; that the plaintiff carried on separate business of his own; and that he must be considered to have purchased and to have been the owner of the property in suit from his dealing in regard to it, and his reception of the rents for the last 12 or 14 years. I arrive at these conclusions without troubling myself about the truth or otherwise of the part of the case regarding the lottery ticket—the prize of a lac of rupees obtained by the plaintiff—as to which I form no opinion on the evidence adduced.

There is one other point, *viz.*, that there were no books produced by the plaintiff. On that point there was no cross-examination, and if there had been the plaintiff might have given a reasonable explanation regarding it. The plaintiff was not bound to produce the books, which under Act II of 1855 are only corroborative evidence. But when the plaintiff shows that he began and carried on a separate business, and he actually entered into a separate transaction, as evidenced by the agreement of the Boses with him personally in the year 1241, why should I believe that the purchase of the property was a merely colorable transaction and benamee for himself and members of his family? The books further might have shewn that the collections from Calcutta were entered as received "through self," and thus the collections would not be ear-marked. If the case had been a false one, there would have been no difficulty in concocting a few books.

Then, with regard to what I said during the treat, I make no imputation on the Official Assignee; but when the Court was pressed by the respondent's counsel on the ground of hardship, thought it proper to say that the Official Assignee should be more cautious in attaching property. Here the title to possession has been negatived; and although I cannot go behind the claim case. I cannot shut my eyes to the fact that I might have decided differently, and then the present plaintiff would have been the defendant, and the Official Assignee would have been plaintiff and would have had to start

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his case. There was no evidence, it was admitted by Mr. Kennedy, on the part of the Official Assignee at the hearing before the lower Court; and it is also admitted that the Official Assignee has no evidence at the present moment. I cannot say this way of seizing property in possession of other persons is a very proper proceeding; and I agree with Mr. Graham that the Official Assignee must be treated as any other suitor.

The evidence of the plaintiff satisfies me that he has been in possession of these premises for 14 years. This is *primâ facie* evidence of title, and the plaintiffs' evidence is supported by the evidence of several independent persons. The plaintiff's title is not counteracted by the presumption of joint Hindoo property, which does not arise in this case; and there is no evidence whatever put forward on the part of the defendant to set against the plaintiff's case. I cannot discredit the evidence adduced by the plaintiff *en masse*. There is nothing in that evidence which is marvellous or so entirely opposed to ordinary experience as to make it unworthy of belief. There are improbabilities of an ordinary character and suspicions here and there; but I consider they are not sufficient to overthrow the case of the plaintiff. My own conviction that the plaintiff's case is substantially true, receives considerable confirmation from the fact that not a scintilla of evidence has transpired to rebut the plaintiff's case; and I feel it would be unjust to hold a view which would have the effect of causing the permanent dispossession of the plaintiff from the property in dispute, when I have not before me the smallest shadow of evidence justifying the original seizure by the Official Assignee.

I am, therefore, of opinion that the judgment of the Court below should be reversed with costs. As, however, I am the junior Judge, my opinion is unavailing under the laws on the subject of the fate of the appeal.

Norman, C. J.—I am of opinion that the decision of Mr. Justice Phear ought to be affirmed with costs. I am free to confess that the argument of the counsel for the appellant has shewn me that there is more doubt about the case than one would be at first disposed to think in readingthe judgment of the learned Judge. I may say at once that sitting here in appeal on a question of fact before I can say that the judgment of the Court below ought to be reversed, I must be satisfied very clearly that it is wrong. I have come to the conclusion, after a great deal of consideration, that the judgment of the learned Judge is not wrong but right.

The facts of the case, so far as they appear to me material, are these—The plaintiff, Sreenarain Chuckerbutty, came into Court as a claimant under Section 246 in a case of execution of a decree obtained by Messrs. Thomas & Co., of whom Mr Miller is the Assignee, against Mirtunjoy Chuckerbutty, the plaintiff's brother. He failed to show that the property attached was not in the possession of Mirtunjoy, and the claim set up by him was disallowed by Mr. Justice Macpherson. He therefore brought this suit to establish his right. I desire to say a word as to the relative position of the parties and the onus of proof in a case like the present. As far as regards Mr. Miller, though he is Official Assignee he is simply in the position of any other execution-creditor—a position in which from the nature of things he cannot be expected to possess any very precise knowledge of the title of persons interested, or supposed to be interested, in the property which he causes to be seized in execution as the property of the judgment-debtor. That knowledge is a knowledge which the owners of the property seized possess, and the history of the title must come from them. The Court has a right to expect, where a title is set up depending a transaction peculiarly within the knowledge of the claimant, that the fact should be fairly and honestly stated by him. He must stand or fall by the case he sets up. But I do not think that inferences ought to be drawn against an execution-creditor, who is under a mistake as to the true rights of persons whose property is seized, the exact particulars of which he had generally no

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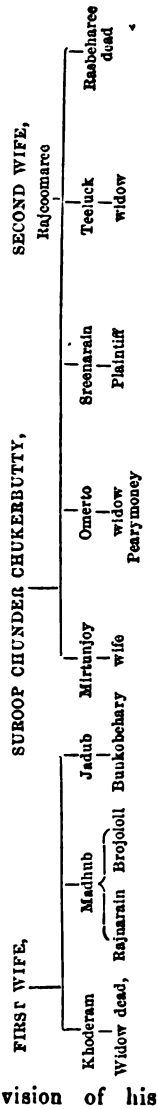
means of ascertaining. In this case certainly the execution-creditors had the means of knowing one particular fact, as to the position of Sreenarain and Mirtunjoy, which has been deposed to by Sreenarain and which has not been challenged by any evidence on the part of the Official Assignee. It is this, that within a recent period at all events Sreenarain had a distinct silk business of his own, because it appears that he, as well as Mirtunjoy, was in the habit of consigning his silk to Thomas and Co. ; and therefore that Sreenarain and Mirtunjoy, whether they are members of a joint family or not, at least each had separate property.

The plaintiff comes into Court as regards his claim to the house in dispute upon a specific allegation of title. He says that he is entitled to the house as his sole and separate property, by virtue of a purchase made many years ago out of his own money in the name of his two younger brothers, Teeluck and Rashbeharee ; and that he made the purchase in their name benamee, because he had transactions with the Boses from whom the purchase was made. It appears that an original contract for the loan of money took place in the summer of 1834, and the conveyance to the two brothers, Teeluck and Rashbeharee, was in January 1835. There is said to have been a partition ; but it may be observed that although there is a statement made by the plaintiff as to partition, to which I shall come presently, there is no statement in this case by him or his witnesses that there was a partition of the landed property. The plaintiff says there was a partition made by his elder brother Khodeeram, and on that, according to his account, the shares of himself and his two brothers were made over to his mother, Rajcoomaree. He says his mother Rajcoomaree handed over to him between 3,000 or 4,000 Rs. The narrative commences in the year 1817 with the statement that the family, as exhibited in the sketch annexed, at the death of the father, Suroop, was a joint family ; that the plaintiff was the son of Suroop ; that he had seven brothers ; three of them, *viz.*, Khodeeram Chuckerbutty, Madhub Chunder Chuckerbutty, and Jadub Chunder Chuckerbutty were the sons of the first wife of Suroop ; and five of them, *viz.*, Mirtunjoy, Omertololl, the plaintiff Sreenarain, Trilochun, and Rasbeharee were the children of Rajcoomaree, the second wife of Suroop. Suroop is said to have died in 1816 or 1817, and to have given directions that his property should be divided amongst his children. It is drawing very largely on the credulity of the Court to ask it to believe that a Hindoo father would have made such an order for the partition of his property. If it had been said that the father ordered his property to be divided in two shares between the children of his two wives, that might have been possible ; but I find it impossible to believe that a Hindoo father in the year 1816 should have given orders for a division of his property among his eight sons, several of whom were in their infancy, one of whom in fact appears to have been a posthumous son. However, the plaintiff says that the partition was made and carried out ; that Mirtunjoy separated from his own three infant uterine brothers, who remained with their mother Rajcoomaree. I may remark that the eldest of these infants, Sreenarain, was then three years old. Mirtunjoy who was older, though his exact age does not appear, must have been very young himself, not improbably very much under sixteen years of age.



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As I have said already, nothing appears to have been mentioned by plaintiff as to the partition of the real property; and when I carefully examine the evidence of the plaintiff, I find that at the present time the widows or representatives of the several sons are all to be found in the family-house at Moorshedabad, and that they all claimed their shares of the property which was seized as the property of Mirtunjoy. It also appears that the wife of Mirtunjoy is now living there with Pearymoney, the widow of Omritololl. It is said that Mirtunjoy's share has been sold to his nephew Bunkobeharee.

I start then with the proposition that the family was originally joint and that there was jont money and joint lands; and there is a statement made by the plaintiff, which Mr. Justice Phear utterly disbelieved and which I also disbelieve, that a partition took place at the death of Suroop. I come to the purchase of the property now in dispute. That took place, according to the plaintiff, in 1834, at which time he was at the outside something like 18 or 20 years old. The plaintiff says he advanced Rs. 3,800 to the Boses. Now, where did he get the 3,800 to lend, and from whence did he get the remainder of the purchase-money? He is ready with his story. He says that he commenced trading a little time before when he was 15 years of age, and that he won a lac of rupees at a Government lottery. Now, there is no doubt that there were lotteries of the East India Company formerly; and it may be that there were these lotteries in the year 1834 and that plaintiff won a lac of rupees. But what would one expect to be the language of persons speaking of a member of a joint Hindoo family, who had only a small sum of 3,000 or 4,000 rupees and who suddenly found himself with a lac of rupees. Every witness old enough to recollect the circumstance would at once say 'why this man's fortune had nothing to do with the joint funds: he started in life, it is true, with 3,000 rupees which he got from his mother, but he won a lac of rupees in a lottery.' The story would have been trumpeted out at once. But, as Mr. Justice Phear observes, this story is a late invention; it was not mentioned in the earlier claim suits. Mr. Justice Phear says it could have been corroborated by the books of the Bank of Bengal, which have not been produced; but even if the Bank books could not have been produced, at least some sort of independent evidence might have been adduced to support a story which draws so largely on our credulity. I do not believe that story. I think that if it had been true, it would have become notorious, and every witness connected, with the family who spoke of the plaintiff's separate property would have mentioned it at the earliest opportunity.

Now, I have a word to say as to the purchase itself. Does the purchase bear any resemblance to a *bonâ fide* purchase by a separated brother on his own account? The children of Rajcoomaree are five. The persons concerned in the purchase are Sreenarain in whose name the money was advanced (I may observe that it may have suited the family to have the money appear in the name of Sreenarain), and Teeluck and Rashbeharee in whose names the purchase was made. It is very singular that if the purchase by them or on their account is fictitious, the names of those two persons, who, if the plaintiff's story is false, would have been jointly interested with the plaintiff, should have been used to conceal the fact that the plaintiff was the purchaser. If it was done with a view to deceive the Boses, the purchase might have been made in the name of Sreenarain's wife, or of his Sircar or any body else. It would hardly have been made in the names of the two persons who were presumably plaintiff's co-sharers. Then it is material to see with whose aid the transaction was concluded. By the aid of a very remarkable person, Shamsoonder. The plaintiff himself says that Mirtunjoy was the kurta of his branch of the family. There is no doubt that Shamsoonder was the gomastah of Mirtunjoy. He says he was so from 1248 to 1268, meaning no doubt to exclude the period of this transaction. The plaintiff says that, except for 5 or 7 years, Shamsoonder was exclusively his gomastah; but this is contradicted by Shamsoonder. Shamsoonder, who was in the service of Suroop before his death, would no doubt continue to serve Mirtunjoy, the kurta, after the death of Suroop. In the other claim suits the plaintiff put forward several umulnamahs in his own favor, signed by Shamsoonder on behalf of Mirtunjoy. The purchase-money was paid by the hands of Shamsoonder. Therefore, we get Mirtunjoy, the kurta of the family consisting of the children of Suroop and Rajcoomaree, engaged in the purchase. The purchase was made and the money paid through a man who was really his agent. There is not, in my opinion, any credible or reliable evidence whatever that the plaintiff had, at the time of the purchase of this house, any separate pro-

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perty of his own. If the story of the prize of the lac of rupees has any truth in it, it is not impossible that it was gained for the joint family, and not for Sreenarain himself. It is not shewn that Sreenarain had any funds of his own out of which he could have or did purchase the lottery ticket. If the purchase was for the joint family—if the dead brothers were not benamee for him but trustees for themselves and members of the family—I find nothing to show that the condition of the property has been since changed. It is true that Sreenarain purchased a wall adjacent to this property, but if there was a substantial reason why the property should be held in the name of Sreenarain, and not in the name of Mirtunjoy, that is worth very little. His name may have been used in 1860 in the same way as the names of the two younger brother's were used in the matter of the original purchase.

Then there is the evidence of the payment of rent, and that rent may have been received and remitted to the plaintiff. But that is not inconsistent, as Mr. Justice Phear has observed, with the rent really belonging to Mirtunjoy and to the joint family, more specially when we remember that in 1849 a decree for a large sum, a lac of rupees, was obtained by Hickie Baillie and Co. against Mirtunjoy. Of that decree for a lac of rupees, the plaintiff has dared to say before Mr Justice Phear he knew nothing till this suit,—a decree for a lac of rupees against a brother who was probably living in the family dwelling-house till he became a fugitive,—a brother whose wife is living at the present moment in the joint family-house, and whose gomastah is also the gomastah of plaintiff and of the family. It appears to me that Mr. Justice Phear was right in saying that he could not rely on the evidence of Sreenarain and Shamsoonder. Nobody has been brought from Moorshedabad to show how money which was remitted to Sreenarain has been disposed of; and if it was not carried to a joint family account, how it was spent. It may be true that some transactions took place by which the plaintiff may have acquired Mirtunjoy's property. He may be one of 7 or 8 surviving representatives of the family. He may have some interest more or less in this property, but I think that Mr Justice Phear was quite warranted in saying that he disbelieved the evidence of those two men, Sreenarain and Shamsoonder, and that they are so utterly unreliable that he could not select bits of their evidence here and there which may be true. It appears to me that he could not have given any other decree than that which he has given,—a decree which proceeds fairly on what is really the issue in the case, *viz.*, whether the plaintiff has the right which he alleges himself to possess. If the plaintiff has any other right it cannot be decided in this suit. It can only be tried in a suit in which all the other representatives of Suroop are present. I should have been glad if that could have been settled in this suit, but as the plaintiff has put forward in this suit a specific title and has failed in proving that title, I think that the decision of Mr Justice Phear dismissing the suit should be affirmed with costs. I dismiss the suit in the belief that there is some joint interest in the family; that the money in 1834 was joint; and that being so, I think that the suit should be dismissed without prejudice to any suit which Sreenarain and his brothers or their representatives may bring to establish their right to their shares in this property as being joint family property.

I may add that it appears to me that there is some evidence on the record to show that Mirtunjoy was at one time in possession of the house in dispute. The witness made this admission distinctly, although he seems to have retracted it afterwards. I have however not based my judgment on that, as there may possibly have been some misconception with regard to it. The witness says—"Mirtunjoy used to come to this house" (meaning the house in dispute); but as I have said he afterwards seems to have retracted that statement.

[As there was a difference of opinion between the Judges of the Appellate Bench, the plaintiff appealed to the Court at large, under Section 15 of the Letters Patent of the Court, from the judgment of Norman, C. J. The appeal came on for argument on the 20th and 21st March last before a Bench consisting of Loch, L. S. Jackson, and Mitter, J. J. The Court took time to consider its judgment, which was delivered on the 24th *idem* by L. S. Jackson, J., the result being that the appeal from the judgment of the Chief Justice was dismissed with costs.]

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The 3rd February 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. C. Paul, *Judge*.

Insolvent Court—Evidence—Appeal—Jurisdiction.

On appeal from an order of the Hon'ble J. B. Phear, sitting as Commissioner in the Insolvent Court.

In the matter of

Ajoodhya Pershad and another, *Insolvents*.

Mohunt Joyram Geer, *Appellant*,

versus

A. B. Miller, Official Assignee, *Respondent*.

Mr. Graham and *Mr. Evans* for the Appellants.

Mr. Kennedy and *Mr. Leighton* for the Respondents.

In a case in which the parties omitted to have the evidence recorded as required by Section 72 of the Insolvent Act, it was held that a party appealing against the order based on the evidence is not in a position to be heard before the Appellate Court.

Per Norman, C. J., (Paul, J., dubitante).—The Insolvent Court has a discretionary power under Section 26 of the Insolvent Act, when it finds that property belonging to or a debt due to the insolvent is in the possession of another party, to make an order on such person to make over such property or debt, or any part thereof, to the Official Assignee.

THE insolvents in this case inserted the appellants in their Schedule among their debtors to the extent of Rs. 11,000 in respect of certain transactions connected with the purchase from the appellants of 1,000 bales of cotton, of which the insolvents did not take delivery, but which the appellants were desired to retain in their own hands and sell on commission on behalf of the insolvents. The appellants on such sale were to deduct the purchase-money and commission, and to account to the insolvents for the profits. The Official Assignee put in a petition bringing this fact to the notice of the Commissioner, and stating that the cotton was sold by W. Haworth and Co., and he applied for an order directing the insolvents and the now appellants, together with certain other parties, to attend before the Court with their books and accounts for the purpose of being examined in respect of the claim which the insolvents appeared to have against the appellants. An order to the effect was accordingly made, and the matter having been heard and Kissenlall Chobay, one of the gomashtas of Mohunt Joyram Geer having been examined, the Court ordered Mohunt Joyram Geer to hold and retain the 1,000 bales of cotton, or the proceeds thereof, belonging to the estate and effects of the insolvents, until the further orders of this Court; and he was further ordered to show cause why he should not deliver over the said 1,000 bales of cotton or the proceeds thereof to the Official Assignee.

Pursuant to the order so made, the Mohunt shewed cause and evidence was taken by the Court, but the parties not having requested the officer of the Court to take down the depositions of the witnesses pursuant to Section 72 of the Insolvent Act, the evidence was not recorded.

The judgment of the High Court was delivered as follows:—

Phear, J.—THE rule will be made absolute. The evidence appears to me to be entirely one-sided. All the evidence that can be relied on shows that there really was a *bonâ fide* sale of the cotton to the insolvent. I have not the slightest doubt that this was so. The two witnesses who endeavour to make out that the sale was benamee were quite unworthy of credit—they showed as much by their demeanour in Court. I think that Mr. Ingram's argument drawn from the accounts themselves was very forcible, for it is quite manifest that there were continuous dealings between the insolvents and the Mohunt's firm after the first sale of the cotton, which it is now argued had the effect of destroying their credit. I observe from the Schedule that there is a debt due by the insolvents to the Mohunt. The Mohunt will therefore be ordered to make over to the Official Assignee the proceeds of the cotton, less the amount due to him as entered in the Schedule. The Mohunt will pay the Official Assignee's cost from the time of the first rule; the insolvents' costs will be paid out of the estate. I am inclined to think that the Mohunt should pay the costs of the insolvents, but I will reserve that point.

Mohunt Joyram Geer appealed against the above judgment, and the order which was issued in accordance therewith, on the following grounds:—

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1*st*.—That the said Commissioner was in error in holding that the purchase of the said 1,000 bales of cotton in the said order mentioned was made by the appellant on behalf of the said insolvents ; whereas the said learned Commissioner ought to have held upon the evidence that the said purchase was made by the said appellant on his own account and for his own benefit, and not on account of or for the benefit of the said insolvents, and that neither the insolvents nor the said Official Assignee had any interest therein.

2*nd*.—That the said learned Commissioner was in error in ordering that the said appellant should hand over to the Official Assignee the surplus sale proceeds of the said 1,000 bales of cotton, deducting only the sum of rupees 2,216-10-6 admitted in the Schedule of the said insolvents to be due to the appellant, and the price or sum at which the said 1,000 bales had been ostensibly purchased for the insolvents; whereas the said learned Commissioner should have held, even if the said purchase was for the benefit of the insolvents, that the appellant was entitled to deduct in addition to the above sums his commission on the purchase and sale thereof.

3*rd*.—That the said learned Commissioner was wrong in ordering that the appellant should pay the costs of the said Official Assignee from the time of the first rule taken out against the appellant; whereas the said learned Commissioner ought to have directed that the appellant should have had all his costs of the said proceedings out of the estate of the said insolvents.

The following are the judgments of the Appellate Court :—

Norman, C. J.—In this case Mr. Justice Phear made an order, under the 26th Section of the Indian Insolvent Act, that Mohunt Joyram Geer do hand over to the Official Assignee the sum of rupees 9,087-5-6 pie being the balance due from Mohunt Joyram Geer to the insolvents. In the Schedule filed by the insolvents, Mohunts Poroosram Geer and Joyram Geer of Burra Bazar in Calcutta are entered as debtors for 11,000, and the particulars of that debt are as follow :—"We bought 1,000 bales of cotton at a re-sale auction at Seebpore through Bunwarryloll from these debtors : 500 bales at 15-12 per maund, and 500 bales at 16-8. We did not pay for it but instructed Mohunt Joyram Geer and Poroosram Geer to sell it for us on commission, to deduct the purchase-money and their commission, and to account to us for the profits." It appears that after the insolvency and before the insolvent obtained his discharge, the learned Judge, under the 26th Section, ordered that "Mohunt Joyram Geer should hold and retain the 1,000 bales of cotton or the proceeds thereof belonging to or forming part of the estate and effects of the said insolvents until this Court shall make further order concerning the same ;" and that Mohunt Joyram Geer should show cause why he should not deliver over the said 1,000 bales of cotton or the proceeds thereof to the Official Assignee. Cause was shown on behalf of Mohunt Joyram Geer. The insolvent was examined on behalf of the Official Assignee. An affidavit of Gobind Chunder Nauth was read, and three witnesses, *viz*., Mothoora Doss, Futteh Churn, and Mr. Carapiet were examined on behalf of the mohunt. The evidence was not however taken down in writing, as provided for by the 73rd Section of the Insolvent Act, and we have nothing before us but the judgment of Mr. Justice Phear and the order which was made upon it. The judgment is in these terms—

"The rule will be made absolute. The "evidence appears to me to be entirely one-"sided. All the evidence that can be relied "on shows that there really was a *bonâ fide* "sale of the cotton to the insolvent. I have "not the slightest doubt that this was so. "The two witnesses who endeavour to make "out that the sale was benamee were quite "unworthy of credit—they showed as much "by their demeanour in Court. I think that "Mr. Ingram's argument drawn from the "accounts themselves was very forcible, for "it is quite manifest that there were con-"tinuous dealings between the insolvents and "the Mohunts' firm after the first sale of "the cotton, which it is now argued had the "effect of destroying their credit. I observe "from the Schedule that there is a debt due "by the insolvents to the Mohunt. The "Mohunt will therefore be ordered to make "over to the Official Assignee the pro-"ceeds of the cotton, less the amount due "to him as entered in the Schedule. The "Mohunt will pay the Official Assignee's "costs from the time of the first rule. The "insolvent's costs will be paid out of the "estate. I am inclined to think that the "Mohunt should pay the costs of the insol-"vents, but I will reserve that point."

Mr. Justice Phear accordingly ordered, as I have already said, that the Mohunt should pay over as the balance Rs. 9087-5-6 pie.

From that decision there has been an appeal to this Court, and several points of

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considerable importance have been put forward by Mr. Graham and Mr. Evans on behalf of Mohunt Joyram Geer.

The first point to which I shall advert is this. Mr. Graham and Mr. Evans objected that the learned Judge had no power under the 26th Section to adjudicate and make the order that he did, and they have also taken various objections founded on the evidence to show that the decision is erroneous.

With regard to the objections on the merits, the attempt to show that decision is wrong on the facts of the case, it appears to me that the appellants have not placed themselves in a condition to be heard. The 72nd Section provides that "any person who shall be interested in any proceeding of any of the said Courts for the relief of insolvent-debtors, upon depositing with the proper officer of the Court a sum of money, of which the amount shall be fixed by the Court, may require that the whole of the evidence relating to any such proceeding may be taken down in writing by a sworn officer of the Court, and the same shall be done accordingly; and in case no appeal is presented within one calendar month, the Court is empowered to pay the reasonable costs and expenses thereof out of the money which shall have been so deposited as aforesaid, returning the surplus, if any, to the person who shall have deposited the same."

The 73rd Section which gives the appeal provides that "it shall be lawful for any person who shall think himself aggrieved by any adjudication, order, or proceeding to present within one calendar month thereafter a petition to the Supreme Court of Judicature of the Presidency; and it shall be lawful for such Court to order that the whole of the evidence, if any, which shall have been so taken down in writing as aforesaid, and the minutes and records of the proceedings of which complaint shall have been made shall be brought before it, and the said last-mentioned Court shall enquire into the matter of the petition and of such proceedings and evidence, and shall make such order thereon as to the same Court shall seem meet and just." Now, in the present case, the evidence not having been taken down and recorded as provided by the 72nd Section, we have no means whatever on the materials before us of knowing the facts on which the judgment proceeded. We must therefore take it that the evidence was such as fully to warrant the decision of the Court.

The only question then remaining is, whether the Insolvent Court had jurisdiction to entertain the question, and to make the order that the Mohunt should pay to the Official Assignee the sum he was found to be indebted to the insolvent.

The 26th Section provides that in case any person shall after any such insolvent shall have petitioned for his discharge under this Act, or have been adjudged to have committed an act of insolvency, and before the said insolvent shall have obtained his discharge in the nature of a certificate as hereinafter-mentioned, be possessed of or have under his power or control any property whatsoever of such insolvent, with the exception of certain property then therein-mentioned, or to which such insolvent may be in any way entitled, either under any trust expressed or implied, or otherwise held for his use or benefit; *or in case any such person shall be at any such period indebted to such insolvent*, it shall be lawful for the said Court upon the application of any Assignee or any creditor of such insolvent, whose debt or demand shall have been admitted or established in the matter of the said Insolvency, to cause notice to be given to such person directing him to hold and retain the said property till the said Court shall make further order concerning the same; and thereupon for such Court further to order such person to deliver over such property, and to pay such debt as aforesaid, to the Assignee or Assignees of the estate and effects of such insolvents for the general benefit of the creditors of such insolvent.

Now, I think no one can read that Section without seeing that there are many cases in which the Court is empowered to make an order that debts due to an insolvent shall be paid to the Assignee. It has been pointed out by the Chief Justice in the case of Dwarkanath Mitter,* 4 Bengal Law Reports, Original Jurisdiction, page 63, that it is discretionary

* The 13th August 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble J. B. Phear, *Judge*.

On appeal from the judgment of the Hon'ble A. G. Macpherson, sitting as Commissioner in the Insolvent Court.

In the matter of Dwarkanath Mitter, an Insolvent.

Ratnamonee Dossee and another, *Appellants*,

versus

A. B. Miller, Official Assignee, *Respondent*.

Mr. Marindin and *Mr. Cowell* for the Appellants.

Mr. Graham and *Mr. Branson* for the Respondent.

The judgment of Macpherson, J., as regards the point of jurisdiction was as follows:—

THIS is an insolvent matter, and the parties now before me appear in obedience to an order directing them

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with the Court to enter upon the trial of such question and to make the order. I think that is a correct view of the law. In the first place the language of the provision is that "it shall be lawful for the Court" to cause notice to be given, &c.; and again "it shall be lawful for the Court to order such person to pay such debts or any part thereof." It seems to follow that the Court has a discretionary power. Even where it is shown that there is a debt, the Court is *not bound* to order the whole to be paid. The Section empowers the Judge, who finds that a debt is due to the insolvent, to make an order that the whole of the debt or part thereof shall be paid; that is to say, that when the circumstances of the case render it

to attend and be examined and to produce the title-deeds and documents relating to certain real properties, which are mentioned in the order, together with all account-books and certain Government paper standing in the names of some of them. The order also calls upon them to show cause why they should not deliver up to the Official Assignee the properties and Government paper mentioned in the order and now in their possession or control. The question which I have to decide is, whether it has been proved that any of the properties or Government paper, the subjects of this inquiry, though now in the possession or control of these persons, are really the property of the insolvent Dwarkanath Mitter, so as to justify me in ordering them under Section 26 of the Insolvent Act to be delivered up to the Official Assignee.

Section 26 of the Insolvent Act is of a summary character, and is intended to apply to cases in which the insolvent is entitled, beyond all reasonable doubt, to property which has not been made over by him to the Assignee. It probably was never intended that serious questions of title should be decided in a proceeding under this Section, and it must be expressly understood that I do not consider myself to be now deciding finally any question of title one way or the other. All I have power to do when acting under this Section is to decide whether the property now claimed by the Assignee is the property (although not apparently in the possession) of the insolvent for the purposes and within the meaning of Section 26. I think the rule has been properly drawn up as relating to property now in the possession of these persons, for there can be no proceeding under Section 26 save as regards such property as is in the possession or control of the parties proceeded against at the date of the rule.

This matter commenced with the examination of the insolvent under Section 36, when he made such statements with regard to property in the possession of his wife, his son, and his son's wife, that I thought there were sufficient grounds on which to issue the rule against which these parties have now shewn cause. I confess that the proceeding has spread itself out considerably further than I contemplated when I issued the rule: for practically it has ended in my doing something very nearly tantamount to trying several actions of ejectment. I certainly have gone as far as I could well go under these Sections. It is to be regretted that so many different matters should have been mixed up together and gone into in the way in which they have been. Perhaps I might have done better if I had refused to proceed beyond the examination of these persons under Section 36, and had then left the Official Assignee to proceed in a more formal manner in the assertion of his claim. I have however gone fully into the whole matter and of course must decide upon it. But I shall not make any order under Section 26 except in instances in which I consider that there is no reasonable doubt whatever that the property is the actual property of the insolvent. It would be improper to make any such order in any instance in which there is a substantial question as to title involved.

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The following are the judgments of the Appellate Court in this case:—

Peacock, C. J.—It appears to me that there is no ground for interfering with this order. Putting out of consideration altogether the deposition of Anund Chunder Mitter, there is ample evidence in the testimony given by Ruttun Money Dossee and Buddinauth Mitter to show that the properties in dispute were held benames for the insolvent. The only question on which I had any doubt was the one which I suggested to Mr. Marindin at the close of his argument, as to whether Section 26 of the 11th Vic., p. 21, authorized the Insolvent Court to make an order for the delivery of property, or for the payment of a debt alleged to the property of the insolvent, or to be due to him when the title or debt was a matter in dispute. But looking to the words of the Section, it appears to me that they are too strong to have any other interpretation put upon them than that the Insolvent Court has the power to order any person, who has the possession of or has under his power or control any property of the insolvent, to deliver over such property to the Assignee. The words "it shall be lawful for the said Court" do not appear to me to render it compulsory on the Court in all cases to try whether the disputed property belonged to the insolvent or not, but it is discretionary with the Court to enter upon the trial of such a question and to make an order. There are many cases of fraudulent transfers of moveable property on the eve of insolvency or after it in which, unless the Insolvent Court had the power, the property might be made away with before an action could be brought and determined; and if the Court has the power, it appears to me that the present is one of those cases in which, in the exercise of its power, it ought to make an order.

[The Chief Justice then went into the facts of the case, and affirmed the order of the Insolvent Court with costs.]

Phear, J.—I agree with the Chief Justice that the 26th Section of the Act gives power to the Insolvent Court in a certain case, upon the application of the Assignee or any creditor after notice, to order a person who should be possessed of property belonging to, or be

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necessary or proper that the Court should make an order for payment, the Court has power to make such order. As I have said, we have no evidence before us to show the circumstances which induced Mr. Justice Phear to make the order for the payment of the money. In this case the Mohunt sought to escape liability by alleging that the papers and documents relating to the transaction were in fictitious names. These papers show on the face of them, as I understand it, that the money is payable to the insolvent. The learned Judge may have exercised his discretion properly, or it may be that he ought to have left the parties to litigate the matter in a regular suit; but we are not in a condition to say any thing as to the propriety of the order, and I express no opinion on that point. All I do say is that the order of Mr. Justice Phear is or may be, so far as the materials before us go, a legal or proper order, and therefore we cannot interfere.

For these reasons, I think that the appeal should be dismissed with costs.

Paul, J.—In this case I am also of opinion that the appeal should be dismissed. The only point which has struck me during the argument is, whether the Insolvent Court had jurisdiction to try the question. On that point the case of Dwarkanath Mitter is an authority that the Court can entertain such a case. This point has not been taken in the grounds of appeal, and I do not think that the justice of the case requires that we should entertain it. When a proper case is put before the Court, it will be time enough to consider the ruling in Dwarkanath Mitter's case. In the present case no injustice has been done and I therefore concur in dismissing the appeal, though I entertain doubts as to the soundness of the opinion expressed in Dwarkanath Mitter's case.

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indebted to, the insolvent, to deliver over such property or pay such debt to the Assignee. Now, the case is thus described—If "any person shall after any such insolvent shall have petitioned for his discharge be possessed of, or have under his power or control, any property whatever of such insolvent, or to which such insolvent may be in any way entitled, &c." Certainly before making an order the Court must satisfy itself that such a case has occurred, and it can only do so by a process of judicial enquiry and upon the hearing of evidence. In other words, the Insolvent Court must be competent for the purposes of Section 26 to take evidence, and thereon to adjudicate whether or not a specified person is possessed of, or has under his power or control, any property of the insolvent, or is in any amount indebted to the insolvent. It is no doubt observable that there is not a corresponding enactment in any of the English Acts, but it seems to me that there is good reason why it should be specially introduced into an Act intended to be worked in this country. The prevelance of benamee transactions and of the enjoyment of property jointly in various shares by members of large families renders it necessary that the Insolvent Court should have extraordinary powers for the purpose of enabling the Official Assignee on behalf of the creditors to secure the property of the insolvent, and to protect it from fraudulent transfers effected for the purpose of saving the property from distribution among his creditors.

I also think with the Chief Justice that the words "it shall be lawful for the said Court" do not render it compulsory on the Court to act in all cases in which an application should be made to it by the Official Assignee or by any creditors. It appears to me, further, not difficult to say where the line should be drawn separating cases in which the Insolvent Court should take action from those in which the Official Assignee should be referred to the Civil Court. The procedure of the Insolvent Court, and the mode prescribed for an application under Section 26, are not very appropriate to an enquiry which mainly has regard to conflicting rights of property; but I see no reason at all why a determination completely satisfactory should not be come to in proceedings of this kind when the matter of enquiry is simply a matter of fact, such as those which I have just now referred to,—an enquiry whether the property is held benamee or not, or whether it is a portion of joint family property; and again there are a large class of simple debts which may be very safely enquired into and all the facts ascertained, by merely bringing the parties face to face with each other through the machinery of a simple notice or order *nisi*, such as that prescribed by this Section.

Moreover, I would add that it seems to me now too late to question the power of the Insolvent Court to make an order of this sort under the 26th Section of the Act, considering that at this time the act has been in operation for upwards of 20 years, and that it has been the constant practice of the Insolvent Court to make such orders during that period. At the same time I believe it has always been the practice of the Court, and I am sure it has been the practice during the period of my experience here, to abstain from making orders to deliver over goods or to pay debts when it appears that there is really a conflict of right or equity between the insolvent and the person in whose possession the goods are, or from whom payment of the debt is sought to be obtained.

As to the facts of this case, I also agree with the Chief Justice that even if the evidence of Anundo Chunder is set on one side there is amply sufficient in the testimony of the other witnesses to support the finding to which the learned Commissioner has arrived.

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RULES OF THE HIGH COURT.

Modifies the Pleadership Rules as regards natives of Assam.

The 17th January 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice* and the Hon'ble G. Loch, H. V. Bayley, and L. S. Jackson, *Judges.*

It is hereby notified that in the examination for Senior Pleadership to be held in Assam in 1872, the qualifications mentioned in Clauses 1 and 2 Rule 9 of the High Court's Rules of 2nd May 1866,* for the qualification, admission, and enrolment of pleaders, will not be required in the case of natives of that province. Any such person, however, passing the examination without those qualifications will be restricted in his practice to the Courts of that province alone.

By order, &c.,

(Sd.) F. B. PEACOCK,

Registrar.

* 5 W. R., Rules, p. 9.

Rules for the admission and enrolment of Mooktears on the Appellate Side of the High Court.

I. Persons who have hitherto practised as Mooktears on the appellate side of the High Court, and also persons desiring so to practise, may apply to be admitted and enrolled as Mooktears in the High Court.

II. No person so applying shall be admitted except he shall satisfy the Court as to his character and competency.

III. Every person so applying on being approved by the Court shall, before he is admitted and enrolled as a Mooktear, be required to give security in the sum of Rs. 2,000 for his honesty and good conduct, for his compliance with the rules and orders of the High Court, and for the faithful discharge of his duties towards the Court and towards his employers.

IV. Every person admitted and enrolled as a Mooktear of the High Court shall be at liberty—

(1.)—To instruct Counsel or Vakeel.

(2.)—To inspect the records of any Civil or Criminal case in which he is en-

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gaged as Mooktear, and, if necessary, to obtain copies of any papers or documents in order to the preparation of a brief or instructions for the Counsel or Vakeel employed or to be employed in the case.

(3.)—To deposit in the office money or securities on behalf of his clients.

(4.)—To withdraw monies or securities deposited on account of his clients.

(5.)—To receive back original or other documents filed in any case after the case shall have been completely disposed of.

(6.)—And, generally, to do all other such duties on behalf of his clients as Mooktears are now, according to the existing practice in the Court, empowered to do.

Provided that no monies, securities, or documents shall be handed out to any Mooktear, except on production of a special or general Power of Attorney, under the hand of his client and duly registered, authorizing him to receive the same.

Mooktears within the first fortnight in January in every year, or on the occasion of taking out or renewing their certificates, shall be required to satisfy the Registrar as to the state of their securities.

(Sd.) J. P. NORMAN.
„ G. LOCH.
„ H. V. BAYLEY.
„ F. B. KEMP.
„ L. S. JACKSON.
„ J. B. PHEAR.
„ E. JACKSON.
„ F. A. GLOVER.
„ D. N. MITTER.
„ W. AINSLIE.
„ G. C. PAUL.
„ O. C. MOOKERJEE.

The 19th January 1871.

VAKEELS.

1.—THE rule of the 26th of November 1862, as to the attendance of Vakeels and striking out a case for non-attendance, is hereby repealed.

2.—Every Vakeel engaged in any case shall be entitled to obtain from the Court office copies of the whole or any part of the proceedings and evidence in the case on depositing the estimated cost of such copies.

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3.—Every such copy shall be examined and certified as correct before it is issued from the office of the Court.

4.—The charge for such copies shall be one rupee per 1,440 English words, and one rupee for 2,000 words in Bengali or Urdoo.

5.—When a Vakeel retained to appear and plead for any party to a suit or appeal is prevented by sickness or engagement in another Court from appearing and conducting the case of his client, he may appoint another Vakeel to appear in his place, so that his client may not be unrepresented at the hearing; and the Court, if it see no reason to the contrary, may allow the argument to proceed in the absence of the Vakeel or Vakeels originally engaged.

6.—In any case in which the party employing a Vakeel or his Agent after due notice fails to pay the amount of the estimated costs for preparing briefs containing the papers connected with the case on appeal necessary to enable the Vakeel to conduct the case properly, the Vakeel or Vakeels after notice to such party or his Agent and by leave of the Court may withdraw from the case.

7.—A Vakeel may also, for any other sufficient cause, or after such notice to his client as may enable him to appoint another Vakeel, by leave of the Court but not otherwise, and on such terms as the Court shall order as to refunding any fees he may have received, withdraw from the further conduct of the case.

8.—A list of all appeals filed shall be made out weekly, and a copy thereof hung up in the Library.

In such list the number of the appeal, the names of the parties and of the Vakeel who filed the appeal, shall be given.

(Sd.) J. P. NORMAN.
„ G. LOCH.
„ H. V. BAYLEY.
„ F. B. KEMP.
„ L. S. JACKSON.
„ J. B. PHEAR.
„ E. JACKSON.
„ F. A. GLOVER.
„ D. N. MITTER.
„ W. AINSLIE.
„ G. C. PAUL.
„ O. C. MOOKERJEE.

The 19th January 1871.

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Rules for disposal of rent suits.

The 4th February 1871.

Rules for the prompt trial of undefended and other suits for arrears of rent in Civil Courts under Act VIII of 1869.

1.—EVERY summons in any suit for arrears of rent, not being a suit in which enhancement is sought, brought under the provisions of Act VIII of 1869, B. C., shall command the defendant to appear at the expiration of fourteen clear days after the service thereof.

2.—Every such suit entered in the Register, as directed by Section 42, shall be marked thus—"Rent Suit," "Baki Kházánár Mokuddama," "Baki Malguzari."

3.—Immediately on the return of the summons in any such "rent-suit," the suit shall be entered in a list of causes in form annexed, to be stuck up in the Court-house, specifying the day for hearing, which shall be on the day fixed for the appearance of the defendant or on the earliest day on which the Court shall sit after such day.

4.—Each such suit shall be called on in its turn at the sitting of the Court and before suits of any other description upon the day for the hearing thereof; and in every case in which it shall be shown that the defendant has been duly served with the summons in proper time to enable him to appear and defend the suit, but the defendant does not, either in person or by any authorized Agent or Pleader, appear or make answer to the suit, the case shall be forthwith taken up and heard *ex-parte*, unless in any particular case the Court, for special reasons to be recorded in the proceedings, shall think fit to order otherwise.

5.—Provided nevertheless that no suit for arrears of rent shall be called on and tried *ex-parte* when the summons shall not have been served at least fourteen clear days before the day of hearing.

6.—When it shall appear that the summons has not been duly served, or that fourteen clear days have not elapsed from the date of the due service of the summons, the case shall stand over until a day to be fixed immediately after the expiration of fourteen clear days from the date of the due service of the summons.

7.—In cases where the defendant appears and makes answer or desires to contest the claim, the case may either be taken up and tried at once, if it appear to be likely to be a short one, or may be placed in the ordinary list of defended causes, and come on in its turn, if such latter course appear to the Judge to be expedient with reference to the state of his file or the convenience of the parties.

(Sd.) F. B. PEACOCK,

Registrar.

List of Rent-Suits in the Court of the of

Number of case on the Register.	Names of parties.	Claim.	Date fixed for trial.

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RULINGS OF THE HIGH COURT IN CRIMINAL CASES.

The 7th January 1871.

Present:

The Hon'ble E. Jackson and Onookool Chunder Mookerjee, *Judges.*

Jurisdiction — Attached property — Land disputes—Section 319, Code of Criminal Procedure.

Criminal Revisional Jurisdiction.

Hurronath Chowdhry, *Petitioner,*

versus

Rajender Chunder Roy and others, *Opposite Party.*

Baboo Rajendro Nath Misser for Petitioner.

Baboos Tarruck Nath Paulit and *Khetter Nath Bose* for Opposite Party.

A Sessions Judge has no power to interfere with an order of a Magistrate attaching disputed land under Section 319 of the Code of Criminal Procedure.

Jackson, J.—The order of the Judge in this case, interfering with the decision of the Deputy Magistrate attaching the disputed land under Section 319 of the Code of Criminal Procedure, is against law. There is no power of revision in the Judge to interfere with such orders of the Deputy Magistrate. His order virtually setting aside that decision and ordering further enquiry being illegal must be set aside, and the original order of the Deputy Magistrate, dated the 4th May 1870, must be enforced, the disputed land remaining under attachment as it was there ordered.

The 14th January 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge.*

Attachment—Land disputes—Section 318, Code of Criminal Procedure.

In the matter of

J. W. Maseyk, *Petitioner.*

Mr. J. W. B. Money and *Baboo Kali Kishen Sein* for Petitioner.

The power of attaching land regarding which there is a dispute conferred on a Magistrate by Section 318 of the Code of Criminal Procedure, extends to disputes as to possession of land of which rival zemindars are in possession by their ryots.

Norman, C. J.—This is an application to the Court under Section 404 to send for the papers in a case under Sections 318 and 319 of the Code of Criminal Procedure. The facts are as follow :—A dispute appears to have arisen between the ryots of Mr. Maseyk and those of Baboo Anund Chand Lohatta, as to a considerable tract of land, about 3,007 beegahs, which the Magistrate of Maldah found on inquiry was likely to produce a breach of the peace. Mr. Maseyk claimed this land as belonging to his talooks Shabazpore and Delallpore ; Baboo Anund Chand Lohatta alleged that it was part of his putnee estate, and he calls it by the name of Koyla Dearah.

Baboo Sitakanth Mookerjee, the Deputy Magistrate, made an enquiry and visited the spot ; and he recorded that he was unable to satisfy himself as to which of the two parties was in possession of the land, portions of the land having been sown with indigo by the ryots of one zemindar, and with *kullye* by the ryots of the other. Under these circumstances, he attached the land in dispute until a competent Civil Court should have determined the rights of the parties.

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Mr. Money's objection to the order of the Deputy Magistrate is substantially this—that the disputing parties are zemindars in possession by their ryots; and he contends that Section 318 is not meant to provide for disputes as to possession of land of which the zemindars are only in possession by their ryots.

We think that there is no ground for this contention, and he is not borne out by the case to which he has referred in the 5th Volume of the Weekly Reporter. The decision of the Deputy Magistrate, whether or not it is right on the facts, is perfectly correct in law.

Mr. Money complains that his client will be liable to much injury in consequence of the loss which he will sustain by the lands remaining under attachment under the care of some officer appointed by the Magistrate.

It appears to us that this is no ground for our interference. His client has no substantial cause for complaint, because, if he is entitled to the land in dispute and was in possession of it, he will have no difficulty in bringing a civil suit praying that he may be maintained in possession or to recover possession, and for a declaration of his title; and in that civil suit an order might be made, pending the litigation, under which, if the Judge thinks fit, Mr. Money's client may be appointed Manager or Receiver on giving proper security of either the whole, or of such portions of the land as shall appear to have been sown by his ryots.

We see no ground to interfere with the order passed by the Deputy Magistrate, and we therefore decline to send for the record.

The 17th January 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Sanction of Government — Lottery office — Section 10 Act XXVII of 1870.

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Recorder of Moulmein in the case of the Government versus Nga Cho.

The sanction of the Local Government is necessary before a charge for keeping a lottery office under Section 10 Act XXVII of 1870 can be instituted.

Loch, J.—THIS case appears to have been taken up and disposed of by the Magistrate without the authority of the Local Government having been obtained to the institution of the proceedings. Now, though it be an offence under Section 10 Act XXVII of 1870, 294 A, to keep a lottery office not authorized by Government, &c., yet Section 14 of the Act provides that no charge under 294 A shall be entertained by any Court unless the prosecution be instituted by order of or under the authority from the Local Government. The proceedings in this case must consequently be set aside.

Norman, C. J.—I concur.

The 18th January 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges*.

Jurisdiction—Procedure—Chapter X, Penal Code.

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Sessions Judge of Bhaugulpore in the case of Chutoorbhooj Bharthee versus Mr. Macnaghten.

The Queen *versus* Chunder Seekhur Roy,——ruling that a Court before which an offence is committed under Chapter X of the Penal Code cannot try the case itself,—followed, notwithstanding the argument of the Sessions Judge in this case that that ruling should apply only to certain cases under Chapter X.

Reference.—THE applicant's pleader contends that under the High Court Ruling, Queen versus Chunder Seekur Roy, dated the 23rd April 1270, Vol. 13, W. R., p. 66, the Deputy Magistrate could not himself try the case.

The conviction is therefore illegal, and the sentence should be quashed.

It will be observed that this ruling affects all cases under Chapter X of the Penal Code, and virtually lays down that in a Sub-division or any station where only one Magisterial Officer is located an offence under Chapter X against the public servant in charge of the local Court would have to be prosecuted in some other station. With due deference to the Court's opinion, I would respectfully observe that it appears to

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me that as the Legislature have specially allowed the Court in which an offence under Sections 175, 176, 178, 179 and 180 are committed to dispose of the case itself, there can be no legal objection in *default of direct legal interdiction* to the Court trying other offences under Chapter X, Penal Code, committed against itself.

The interest is not a personal interest which would render the trial a scandal: it is only in cases referred to in Section 163 that the Legislature deemed the interest of such a personal character as to demand special legislation.

The High Court Circular No. 20, dated 4th October 1864, points out the distinction of public servants in their public and private capacities.

The papers of the case under reference are submitted for the orders of the High Court under Section 434, Code of Criminal Procedure, in consequence of the ruling above adverted to.

Judgment of the High Court:—

Bayley, J.—I think the ruling in the case of Queen *versus* Chundra Seekur Roy, dated 23rd April 1870, Weekly Reporter, Vol. 13, p. 66, should be followed. It is difficult to draw the distinction the Judge draws.

Mitter, J.—I concur.

The 18th January 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges*.

Procedure—Finding—Assessors.

The Queen *versus* Bhugwan Lall and four others, *Appellants*.

Committed by the Magistrate and tried by the Sessions Judge of Bhaugulpore on a charge of intentionally giving false evidence.

No legal conviction can take place unless the opinion of the Assessors is taken on the whole of the evidence in a case.

Bayley, J.—In these 5 cases, the opinion of the Assessors was taken upon the evidence of the second witness subsequently examined. The Judge gives as the reason that the second witness deposed exactly as the first. But even if he did, no legal conviction could take place without the opinion of the Assessors being recorded on the whole evidence.

We quash the proceedings of the Judge as illegal, and desire the trial be held *de novo*.

The 21st January 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

High Court—Irregularity—Charge—Chapter XIV and Section 426, Code of Criminal Procedure.

Ramdoyal Singh, *Petitioner*.

Mr. R. E. Twidale for Petitioner.

In a case under Chapter XIV of the Code of Criminal Procedure in which the accused had full opportunity given him to answer the case which was made against him, the High Court felt itself precluded by Section 426 of the Code of Criminal Procedure from interfering with the judgment of the lower Court,—even if it found that there was an irregularity in the proceedings in consequence of the absence of a formal charge.

Norman, C. J.—I THINK that we ought not to send for the proceedings in this case. It was a charge under Section 353 of the Indian Penal Code for using criminal force towards a mohurrir, who was engaged in the execution of his duty as a servant of the Joint Magistrate of Patna, and in resisting and encouraging others to resist his apprehension when his arrest was ordered by the Joint Magistrate, which was triable under the provisions of the 14th Chapter of the Code of Criminal Procedure. Mr. Twidale suggests that no charge in writing was prepared in the manner prescribed by Section 250 of that Code. The petitioner does not produce any authenticated copy of the proceedings to show that the suggestion is well founded, nor does he by a verified petition make a statement to that effect. There was an appeal from the order of the Joint Magistrate to the Judge. The petition of appeal to the Judge is not brought before us, and in the Judge's decision confirming the conviction by the Joint Magistrate no allusion was made to the want of a formal charge.

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We think, therefore, that we cannot assume that no charge was in fact drawn up as required by Section 250, more particularly as a charge is alluded to in the judgment of the Joint Magistrate. Even if there had been no charge,—although that would have been a serious irregularity,—we are far from saying that we should feel ourselves bound to reverse the decision of the Joint Magistrate; because it is clear that the defendant had a full opportunity of answering the case which was made against him, and an opportunity was also afforded him of calling his witnesses, of which he refused to avail himself. There is no doubt about the facts, and the sentence passed upon the defendant seems to be a proper one. Therefore acting under the provisions of Section 426, we should probably have felt ourselves precluded from interfering with the judgment of the Joint Magistrate, even if we had found there was an irregularity in the proceedings on the trial in consequence of the absence of a formal charge.

The application is refused.

The 21st January 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Warrant—Abduction.

Bidhoomookhee Dabee and two others, *Petitioners,*

versus

Sreenath Haldar, *Opposite Party.*

Messrs. M. M. Ghose and M. L. Sandel for Petitioners.

No one for Opposite Party.

A warrant for the arrest of a person on a charge of abduction should state the intent with which the offence was committed.

Jackson, J.—We think the warrants in this case, as they stand, are upon the face of them illegal. In the first place, there is not sufficient on the deposition of the complainant. Sreenath Haldar, to make out that any offence has taken place. In the second place, there is no such offence as abduction under the Indian Penal Code; but abduction with certain intent is an offence. The warrants for the arrest of the persons without stating the intent are accordingly bad. Lastly, we think that the orders of the Magistrate of Dacca directing the apprehension of the girl Bidhoomookhee, and that she should be made over to Sreenath Haldar, the prosecutor, her grand-uncle, are equally illegal. They seem to have been passed in great haste and without sufficient cause. There is nothing to show that Sreenath Haldar is the lady's lawful guardian. We think that the warrants, as they stand, must be set aside.

We pass no further order in the case, as we are told that no further proceedings are to be taken in the matter.

The 21st January 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Mis-carriage—Section 312, Penal Code.

The Queen *versus* Kabul Pattur and Jhumpa, *Appellants.*

Committed by the Magistrate and tried by the Sessions Judge of Cuttack on charges of attempt to cause miscarriage, &c.

The offence defined in Section 312 can only be committed when a woman is in fact pregnant.

Kemp, J.—We are of opinion that the accused Jhumpa must be acquitted.

A woman who causes herself to miscarry would come within the meaning of Section 312. But in this case it is admitted that Jhumpa was not pregnant, and the offence defined by Section 312 can only be committed where the woman is in fact pregnant.

The conviction and sentence of the accused Kabul Pattur are confirmed.

To constitute the act of abetment, it is not necessary that the act abetted should be committed. The woman failed involuntarily in causing abortion, but the prisoner Kabul Pattur instigated her to commit the offence believing her to be pregnant.

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The 21st January 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Procedure—Criminal mis-appropriation—Charge.

C. A. Chetter, *Appellant.*

Mr. C. Gregory for Appellant.

Committed by the Magistrate and tried by the Sessions Judge of Mymensingh on a chage of criminal breach of trust.

The mis-appropriation of each separate item of money with which a person is entrusted is a separate offence, and the facts connected with it should form the subject of a separate enquiry. The duty of a committing officer in such a case is to select certain distinct items to frame his charges upon them, and to adduce evidence specially upon those items.

Jackson, J.—THE prisoner, Chetter, was the Darogah of the Mymensingh jail. He has been convicted of criminal breach of trust in mis-appropriating monies received by him in the course of his duty as Darogah, and has been sentenced to 3 years' imprisonment. He has appealed from these orders, and urges that he is innocent of any offence. There is some difficulty in dealing with the case in consequence of the manner in which the charges have been framed, and because so many charges of different breaches of trust have been mixed up together in the same committal. I would point out, for the future guidance of the Magisterial authorities, that the mis-appropriation of each separate item of money with which a person is entrusted is a separate offence, and the facts connected with it should form the subject of a separate enquiry, inasmuch as it generally has to be supported by separate evidence. In the present case the prisoner, Chetter, was charged with mis-appropriating sums of money received by him—1st, as the price of rations for the prisoners; 2nd, as the salary of some of the establishment; 3rd, as the diet-money of civil prisoners; 4th, as the price of convict labour; and 5th, as the price of articles of jail manufacture sold by him; and numerous items were charged against him on each of these five separate heads of charge. There cannot be less than fifty different offences in this way mixed up together in this one case, each different item of offence requiring distinct evidence to prove it. The difficulty to any individual who has so many charges brought against him in one single commitment, in adducing his evidence upon each separate item is inconceivable. It is a hardship to which no one should be subjected. The duty of the committing officer in such a case is to select certain distinct items, and to frame his charges upon them—to adduce evidence specially upon those items—to prove that although the monies relating to them were made over to the prisoner for a certain specific purpose, he had not applied them to that purpose but had mis-appropriated them. * * * * * *.

The 21st January 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge.*

Procedure—Witnesses — Public Servant—Section 228, Penal Code.

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Officiating Sessions Judge of Nuddea.

The Queen *versus* Chota Hurry Pramanick Tantee and another.

No conviction can be had under Section 228 of the Penal Code, simply because witnesses in a case give inconsistent evidence and give their evidence reluctantly and take up the time of the Court.

Norman, C. J.—THESE two persons, witnesses in a criminal case, have been punished by the Deputy Magistrate, professing to act under Section 163 of the Code of Criminal Procedure, for alleged offences under Section 228 of the Indian Penal Code.

The Deputy Magistrate finds that they "have in their depositions spoken tissues of inconsistencies; have shown throughout a reluctance to speak the truth; and have certainly caused much interruption to the Court by taking up its valuable time for nothing." But this conduct, however reprehensible in itself, is not one of the offences pointed out in Section 228, which provides for the punishment of any person "who intentionally offers any insult or causes any interruption to any public servant, while such public servant is sitting in any stage of a judicial proceeding."

We therefore quash the conviction and direct the re-payment of the fines of rupees 10 on each prisoner, if the amount of such fines has been realized.

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The 21st January 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Unlawful assembly—Evidence—Riot—Section 54, Penal Code.

Criminal Revisional Jurisdiction.

In the matter of

C. G. D. Betts and Mahomed Ismail Chowdhry, *Petitioners.*

Mr. R. T. Allan and *Baboo Mohinee Mohun Roy* for the Petitioners.

Baboo Juggadanund Mookerjee for the Government.

Procedure to be observed in the case of a charge under Section 154, Penal Code, against the owner of land on which an unlawful assembly is held, pointed out. The record of the original riot case is no evidence in the case under Section 154.

Bayley, J.—It is clear (and the Government Advocate does not contend that it is otherwise) that the conviction in these two cases has been had on the evidence taken in the original riot case in which these petitioners were not before the Court; at any rate, they were neither convicted nor acquitted in that case.

Now, a charge under Section 154 of the Indian Penal Code ought to be a clear and distinct charge of the offence specified in that Section. After such charge the prisoner should be called on to plead, and if his plea is not guilty then legal evidence for the prosecution should be gone into. The records of another case would not of themselves be legal evidence itself for the conviction. This separate evidence in support of the charge under Section 154 being given and a *primâ facie* case being made out for the prosecution, the prisoner must then be allowed opportunity to rebut that evidence, after which judgment should be passed.

In this case, however, no such procedure has been observed, and there is no evidence to support the charge except the reference to the records of the riot case and the presumptions arising therefrom.

The proceedings of the lower Courts are set aside, and the fines ordered to be refunded.

The 21st January 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice,* and the Hon'ble G. Loch, *Judge.*

Criminal trespass—Joint family—Section 441, Penal Code.

Criminal Revisional Jurisdiction.

Prankisto Chunder and Jadub Chunder Haldar, *Petitioner,*

versus

Bissonath Chunder, *Opposite Party.*

Baboos Sham Lall Mitter and *Romesh Chunder Mitter* for Petitioners.

Baboos Ashootosh Dhur and *Nil Madhub Sein* for Opposite Party.

To bring a case under the definition of criminal trespass in Section 441 of the Penal Code, the entry must be made with the intent to commit an offence or to intimidate, insult, or annoy.

One member of a joint family commits no trespass by entering the house which forms the joint property, but he is guilty of that offence when he enters the room ordinarily occupied by another member of the family.

Norman, C. J.—This case does not appear to have been tried either by the Joint Magistrate or the Judge on appeal with a sufficiently careful advertence to the definition of criminal trespass in Section 441. Prankisto being a member of the joint family committed no trespass by entering the house, which was the joint property of himself and the complainant, Bissonath Chunder. Nor did Jadub Chunder, who entered with Prankisto and by his license, commit the offence of trespass by merely entering the joint family house.

Prankisto entered the room which was ordinarily occupied by Bissonath Chunder, and that entry into Bissonath's room was, we think, rightly treated by the Joint Magistrate as a trespass. To make it a criminal trespass, the entry must have been "*with intent to commit an offence, or to intimidate, insult or annoy*" Bissonath.

The Joint Magistrate says that "there "can be no doubt that this was done with "the intention, *as legally understood,* of "annoying Bissonath." We do not understand what the Magistrate means by the qualification of the term "annoying." If he means something less than annoyance, as the term is ordinarily understood, we think it is not sufficient.

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It was contended for the defendants that they acted in good faith. If they did so act in good faith with intent to vindicate Prankisto's supposed rights or those of the ladies of his immediate family, though under a mistaken notion as to the rights of Prankisto, they certainly cannot be said to have acted with intent to annoy Bissonath. The Joint-Magistrate seems to leave out of the question the supposition that they intended "to commit an offence," which, if any thing, would, we suppose, be the offence of theft.

We notice that Jadub Chunder did not enter the room of Bissonath. If guilty at all, he can only be so as a person aiding and abetting the offence of Prankisto.

We think that there should be a new trial of the appeal before the Judge.

The 30th January 1871.

Present:

The Hon'ble L. S. Jackson and W. Ainslie, *Judges.*

Accused person—Witnesses for the defence.

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Sessions Judge of Tirhoot.

Ram Sahie Chowdhry and others versus *Sunker Bahadoor.*

An accused person is entitled to have his witnesses summoned and examined, even if those witnesses were named as implicated in the offence with which the accused is charged.

Reference.—THE facts of the case are simple.

Prisoners are charged with cutting a Government road and were punished by fine under Section 431. They denied the charge and called certain witnesses in their defence.

The Deputy Magistrate did not think it necessary to summon their witnesses, as they had been named as being implicated in the cutting.

As this is an error which vitiates the trial and an application has been made to me to refer the case under Section 434, I accordingly request that the High Court will pass such order as they may think proper.

Judgment of the High Court:—

Ainslie, J.—We concur with the Sessions Judge in thinking that the accused persons were entitled to have the witnesses named by them for their defence examined. It does not appear that the Magistrate thought it worth while to prosecute those persons as parties to the offence, even if he had grounds for so doing; and he could not legally declare before-hand that he would not believe them on their oath. We must quash the conviction.

The 24th January 1871.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Jurisdiction—Appellate Court—Enhancement of punishment—Whipping — Rigorous imprisonment — Fine—Section 419, Code of Criminal Procedure—Section 12 Act VI of 1864.

Reference to the High Court by the Sessions Judge of the 24-Pergunnahs, at the instance of the Magistrate of the District.

The Queen *versus* Bunda Ali.

A Deputy Magistrate passed a sentence of 6 months' rigorous imprisonment and whipping of 20 stripes on a person whom he convicted of house-breaking. The Sessions Judge on appeal set aside the sentence of whipping and commuted that portion of the sentence into one of rigorous imprisonment for 3 months.

HELD that the Sessions Judge acted rightly in setting aside the sentence of whipping, as the conviction was a first conviction of the offence; but that the commutation of the sentence of whipping into one of 3 months' rigorous imprisonment amounted to an enhancement of the sentence which had been passed by the Deputy Magistrate, and was therefore illegal, having regard to Section 419 of the Code of Criminal Procedure. The High Court accordingly set aside the sentence of 3 months' additional rigorous imprisonment.

Per Mitter, J.—Section 12 of the Whipping Act VI of 1864 refers to the Court by which a case is tried in the first instance, and not to a Court of appeal.

Quære.—Can a sentence of fine be substituted for one of imprisonment?

Loch, J.—IT appears to me that the view taken by the Sessions Judge is not correct, and that his order is in effect an enhancement of the sentence passed upon the prisoner by the Deputy Magistrate. The prisoner was convicted of house-breaking, and sentenced to rigorous imprisonment for six months and to be whipped. As this was a first offence of the kind, so much of the sentence as directed the prisoner to be whip-

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ped, passed by the Deputy Magistrate, was illegal, and has rightly been set aside by the Sessions Judge; but when the Sessions Judge went further and sentenced the prisoner to three months' imprisonment in addition to the six months' already given him by the Deputy Magistrate, his order was undoubtedly an enhancement of the sentence passed upon the prisoner by the Deputy Magistrate. The whipping was in addition to any other punishment to which the prisoner might be liable under the Penal Code. This additional punishment was illegal in the present case, and the Judge could not legally, as in fact he has done, commute it to further imprisonment of three months.

I think the order of the Sessions Judge, as regards the additional imprisonment for 3 months to which he has sentenced the prisoner, must be set aside.

Mitter, J.—I am of opinion that the additional sentence of 3 months rigorous imprisonment passed by the Sessions Judge in this case is contrary to law.

Section 419 of the Code of Criminal Procedure says—"The appellate Court may, "after perusing the proceedings of the lower "Court, and after hearing the plaintiff or "his Counsel or agent, reverse or *alter* the "sentence of that Court, *but not so as to* "*enhance the punishment that shall have* "*been awarded.*"

I think that the appellate Court is bound under this Section to satisfy itself beyond all reasonable doubt, that the alteration which it proposes to make in the sentence of the lower Court would not amount to an enhancement of the punishment already awarded by that Court. If the alteration is restricted merely to the *degree* of the sentence, no difficulty whatever can possibly arise. But if, on the other hand, it goes to affect the *nature* of the sentence, as in the present case, the difficulty becomes almost insurmountable. Things dissimilar in nature do not admit of any direct comparison with one another; and if there is no fixed scale or standard by which the comparison can be made, the task must be given up as a helpless one.

The learned Judge says that a sentence of rigorous imprisonment for 9 months, is equivalent to one of rigorous imprisonment for 6 months coupled with whipping. But from what materials this calculation has been made, I am wholly unable to make out. Granting that whipping is generally looked upon as a more degrading punishment than imprisonment, it does not necessarily follow that the substitution of rigorous imprisonment for whipping would not, under any circumstances, amount to enhancement of punishment. A poor wretch who has got a large family to support might prefer to be let off with a few stripes, instead of being incarcerated in jail for any lengthened period of time; and in his case at least the appellate Court is bound to show satisfactorily that it is not really *enhancing* the punishment, before it undertakes to substitute the one punishment for the other without his consent.

But be this as it may, it seems to be perfectly clear, that the Legislature has not supplied us with any data from which the comparative severity of the two sentences under our consideration can be determined; and it is therefore impossible to say how many strokes of the cat-o-nine-tails would be equivalent to a sentence of rigorous imprisonment for a given period of time. It cannot be contended for one moment that each individual Judge is at liberty, in a case of this kind, to act according to an arbitrary standard of his own. Every discretion vested in a Court of justice must be exercised in a reasonable manner and upon reasonable grounds; and the power of altering the sentence conferred upon the appellate Court by the provisions of the Section above quoted is by no means an exception to this rule. If we hold with the learned Judge that a sentence of 20 stripes is equivalent to one of rigorous imprisonment for 3 months, there seems to be no reason whatever why another Judge should not be permitted to hold that the same sentence is equivalent to one of rigorous imprisonment for as many years. An appellate Court can alter the sentence of the lower Court, it is true; but if it is not in a position to say, upon some reasonable grounds, that the alteration which it proposes to make would not amount to enhancement of punishment, it is bound to reject that alteration as contrary to the express provisions of the law.

Whether a sentence of fine can be substituted for one of imprisonment or not, is a question upon which I wish to express no opinion. The Legislature has in some cases laid down the limits within which those two punishments can be awarded in the alternative, and within those limits the appellate Court may make any alteration in the sentence of the lower Court it may

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think proper. But the case now before us stands on quite a different footing. Here there is no legal or rational standard of comparison of any kind whatever ; and in the absence of such a standard, the learned Judge had no power to take it for granted that a sentence of 20 stripes was equivalent to one of rigorous imprisonment for 3 months.

But there is another ground upon which the Judge's view appears to me to be erroneous. It is admitted on all sides that the sentence of whipping passed by the Deputy Magistrate in this case was altogether illegal. Such a sentence is, in the eye of the law, an absolute nullity, and the learned Judge ought to have, therefore, excluded it from his consideration in estimating the amount of punishment awarded by the Deputy Magistrate. That punishment was one of 6 months' rigorous imprisonment, and it was this punishment only that the learned Judge had to deal with in fixing the final sentence, the other punishment, namely, that of whipping being absolutely null and void, and therefore liable to be considered as if it had never been passed at all. If the Deputy Magistrate had not sentenced the prisoner to whipping in addition to rigorous imprisonment for 6 months, it is perfectly clear that the learned Judge could not have added a single day to the period of imprisonment. How then can it be contended that the mere fact of the Deputy Magistrate having passed the additional sentence of whipping, which sentence was wholly illegal and void, enabled the learned Judge to increase that period from six to nine months. The learned Judge admits that he did so, because he thought that 6 months' rigorous imprisonment would not be sufficient to meet the gravity of the offence committed. But if this is not tantamount to enhancement of punishment, it is difficult to say what enhancement of punishment means. It may be that the Deputy Magistrate might have sentenced the prisoner to a term of imprisonment longer than 6 months, if he had been aware of the fact that he had no power to pass the additional sentence of whipping. But all speculations of this nature are beyond the province of an appellate Court, for I see no reason whatever why that Court should be permitted upon the basis of such speculations to do what it could never have done if the lower Court had not, in passing the sentence, gone beyond the limits fixed by the law. The addition of the illegal sentence of whipping by the Deputy Magistrate could not have possibly increased the power of the learned Judge sitting as a Court of appeal ; and the prisoner was therefore entitled to stand before him as if that addition had never been made at all. To hold otherwise would be to take advantage of an illegality committed by the Deputy Magistrate, and the prisoner has therefore every right to contend that no such advantage ought to be taken against him in dealing with *his* appeal.

The case put by the learned Judge in which the sentence of the lower Court is found to be altogether illegal, stands on quite a different footing. It may be that the appellate Court may in such cases quash the sentence as absolutely null and void, and direct the lower Court to pass a new sentence according to law, or it may even pass such a sentence upon its own authority. But I do not wish to express any opinion on this point, one way or the other. It is sufficient for me to say that the 3 months of rigorous imprisonment added in this case to the 6 months already awarded by the Deputy Magistrate clearly amounted to enhancement of punishment, and that the case falls therefore within the express words used in the last portion of Section 419.

In conclusion, I have simply to observe that the argument based upon the provisions of Section 12 of the Whipping Act has no bearing upon this case. That Section refers to the Court by which the case is tried in the first instance, and not to a Court of appeal.

For the above reasons I would reduce the sentence passed by the Sessions Judge to one of rigorous imprisonment for 6 months only.

The 26th January 1871.

Present.

The Hon'ble L. S. Jackson and W. Ainslie, *Judges.*

Amends—Perjury—Section 270, Code of Criminal Procedure.

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Officiating Sessions Judge of Patna.

The Queen *versus* Roopun Rae.

A Magistrate having jurisdiction is authorized by law in making an order under Section 270, Code of Criminal Procedure, directing the complainant to make

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amends to the accused, notwithstanding that the complainant is to take his trial for perjury.

Reference.—One Roopun complained before the Assistant Magistrate of Patna that certain persons forcibly rescued some cattle that he was taking to the thannah. In his preliminary examination he stated that of these persons "Moorut struck me thrice with a lathee," but when confronted with the accused persons he subsequently deposed "Dhodhee struck me three times with a "lathee—no one else struck me. Moorut "did not strike me."

On the 18th October the Assistant Magistrate dismissed this complaint which he tried under Chapter XV, and under Section 270 ordered the complainant to pay to the three accused persons compensation amounting in the aggregate to rupees 100. Simultaneously, or I should more correctly state on the next day, the Assistant Magistrate instituted proceedings against the complainant for having intentionally given false evidence by reason of his having made these two contradictory statements, and he was committed for trial to the Court of Session.

To Dhodhee	...	40
„ Moorut	...	40
„ Megboo	...	20
	Rs.	100

I submit that inasmuch as the Assistant Magistrate had determined to prosecute Roopun Rae for having intentionally given false evidence, in that he falsely charged Dhodhee and two others, it was not competent in him to prejudge the result of the Sessions trial and award compensation, that being a point which would come before the Sessions Court for trial and on which that Court might hold a contrary opinion. Further, if it should so happen that the Sessions Court should concur with the opinion of the Assistant Magistrate, it was fully competent to the Judge to give the requisite compensation.

I also submit that the mere fact of committing the prisoner on contradictory statements, without any evidence as to the truth or falseness of either, showed that the Assistant Magistrate could not confidently state that both charges were false.

I would add, in conclusion, that Roopun was acquitted by the Sessions Court, there being no evidence forthcoming to show that the prisoner before the Court was the same man who deposed before the Committing Officer.

Jackson, J.—It appears to me that in this case the Magistrate was competent to award compensation to the persons accused by Roopun, assuming them to have been tried, and lawfully tried, under the 15th Chapter of the Criminal Procedure Code, notwithstanding that he afterwards committed, and even if he had then made up his mind to commit, Roopun to take his trial on the charge of giving false evidence.

In the first place the acquittal of Roopun (which took place in the Court of Sessions) would not establish affirmatively the truth of either of the contradictory statements which he was charged with having made, nor would it negative the finding that his complaint was frivolous and vexatious.

In the second place, if that were the result of his acquittal, I should still be of opinion that a Magistrate, having jurisdiction, would be authorized by law in making his order under Section 270, notwithstanding that the complainant was to take his trial for perjury.

It would, no doubt, be a matter of regret if the Magistrate and the Court of Sessions came to opposite conclusions upon the same question.

But a like result not unfrequently occurs in cases where the decision of a Civil suit is followed by a Criminal prosecution of one of the parties or of his witnesses; each tribunal comes to its own independent conclusion, and the two are by no means invariably indentical.

It seems to have been held by this Court in 1865 that a Magistrate might award compensation under Section 270, and also give his sanction to a prosecution under Section 211, Indian Penal Code.

Whether the Magistrate in making this order exercised a proper discretion is a different question on which, I think, we need not give an opinion.

One thing however is clear, namely, that the compensation awarded in this case was altogether unreasonable and disproportioned to the circumstances of the parties, and it is unfortunate that the law provides no means of setting the matter right in this respect. A proper measure of amends would seem to have been about one-fifth of that actually ordered.

Upon the Judge's letter of reference, I think it right to observe that it seems very doubtful whether, as he supposes, the Court of Sessions, if it convicted Roopun, could make a similar order to that made by the Magistrate. The Judge probably refers to Section

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44, Code of Criminal Procedure, but that Section apparently does not support his opinion in this case.

Again, it is stated that Roopun was acquitted on the ground that there was no evidence forthcoming to identify him with the person who had made the false or contradictory statements. It is difficult to believe that evidence upon this point could not have been easily procured if the Judge had adjourned the trial; and I conceive it would have been his duty to do so in the circumstances, unless, which appears very probable, the acquittal really proceeded on the footing that the case ought not to proceed.

Ainslie, J.—I concur.

The 31st January 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Dying Declaration—Procedure.

Revision of proceedings in the case of

Sheikh Tenoo.

Before a dying declaration can be received in evidence it must be distinctly found that the person who made the declaration knew or believed at the time he made it that he was dying or was likely to die.

Where a Sessions Judge sees from the Magistrate's record that there is evidence which could prove that the declaration was a dying declaration, he should call for that evidence. A Magistrate should, in all cases in which dying declarations are made, examine the complainant on the point, and record the question as well as the answer to it upon the record of the examination.

Jackson, J.—THE difficulty to my mind in dealing with this case is that the accused have been virtually acquitted by a Jury, and that such an acquittal is final. It is true that the Sessions Judge does not use the expression "*acquitted*," but "*discharged;*" but after the evidence for the prosecution had closed, he summed up the case to the Jury, and the Jury unanimously acquitted. The only ground upon which such a verdict can be set aside is that there had been some misdirection in the charge of the Judge to the Jury. Now in this case there was no such misdirection. The Judge told the Jury that there was no evidence to prove that the deceased man's statement was made with any knowledge or belief that he was likely to die; and in fact no such evidence had been given by any witness in the course of the trial. The Sub-Inspector of Police might have given such evidence, if he had been examined upon the point; but no question was put to him to elicit the fact from him. The Civil Surgeon might have perhaps given some evidence upon the subject, but he was not called for the prosecution. Similarly, Mr. Marcus, the House Surgeon at the Hospital, who was present when the wounded man was examined, might have given evidence, but he also was not called for the prosecution. Even the examination of the Civil Surgeon before the Magistrate was not put in as evidence for the prosecution. The Deputy Magistrate, the only witness who was called to speak to the declaration, distinctly gave his evidence that he did not know whether the wounded man at the time knew or believed that he was in danger of death.

The Sessions Judge did not put the case to the Jury until the whole of the evidence offered for the prosecution had been taken. If there was more evidence which might have been offered, it was the fault of the officer conducting the prosecution that it was not offered. The fact that such evidence existed and was not offered is no sufficient ground for setting aside a verdict of acquittal. Although I think blame is to be attributed to the officers who committed the case and who conducted the prosecution, I think that the Judge also should have seen from the Magistrate's record that evidence could have been procured which would have proved that the declaration of the wounded man

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was a dying declaration, and he should have called for that evidence.

The Judge has given it as his opinion that, even if the declaration was received in evidence, there would have been no sufficient proof of the guilt of the accused. I do not altogether agree with him. There would certainly have been evidence upon which a Jury might have convicted.

I think that this commitment was made without a proper, thorough enquiry into all the facts of the case, and without an examination of many witnesses who might have thrown light upon it. Mr. Pawsey, the Joint Magistrate, refused to examine several witnesses who had been sent in by the Police, because apparently he disbelieved what they were going to depose to. I suppose he examined them orally in the first place. I cannot understand how otherwise he could have learnt what they were going to depose to. Perhaps he may have learnt it from some Police report. However he did not examine them. He certainly should have examined them. Whether their evidence turned out to be true or false, and concocted at the instigation of the Police, they should still have been examined. It is clear that there were many witnesses who might have been examined in the case, but who were not. There were witnesses who were present when the Sub-Inspector saw marks near the accused's dwelling-house, which looked as if a body had been dragged along the ground. Those witnesses were not examined; but the Sub-Inspector's evidence to the fact was alone taken, though Mr. Pawsey held that that Sub-Inspector had been concocting false evidence against the accused. The cowherd, Balokee, might have been called, as the wife of the deceased states that he told her that the deceased's missing cow was tied up in the accused's house. But Balokee was never examined. The Civil Surgeon either should have been called as a witness, or his deposition before the Joint Magistrate offered in evidence. But neither the one nor the other course was adopted.

The circumstance that the Deputy Magistrate, who was examined by the Sessions Judge afterwards, had a stroke of paralysis, would have been no sufficient ground for admitting his examination before the Joint Magistrate as evidence in the Sessions Court. There is every reason to suppose that the Deputy Magistrate spoke truly before the Sessions Court, and that he had omitted to examine the wounded man as to whether he knew he was then dying or believed he was likely to die. Not only should all Magistrates in such cases examine a complainant on such a point, but they should always record the question as well as the answer to it upon the record of the examination. The deposition in this case is said to have been on oath, and not upon solemn affirmation as it should have been; and it is not attested as directed by law by the Deputy Magistrate, who only scribbled one or two of his initials under it. It is impossible to exaggerate the importance of seeing that every form of law is carefully attended to in taking down dying declarations, which it is expected will be required as evidence after the death of the declarant. Any mistake or error then committed cannot be rectified afterwards.

There has been no illegality in the trial before the Sessions Court, and therefore we cannot set aside the proceedings in that Court.

Mookerjee, J.—I see no reason to interfere. It is said that a dying declaration of the deceased was taken by Baboo Kalinath Ghose, Deputy Magistrate, who had been examined by the Joint Magistrate, and that this was good evidence under Section

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371 of the Procedure Code and Section 29 Act II of 1855. But, according to the former enactment, the declaration of a deceased person is only evidence when the deceased, "at the time of making such declaration, believed himself to be in danger of approaching death, although he entertained at the time of making it hopes of recovery." Section 29 of Act II also enacts that where dying declarations are evidence "they shall be received, if it *be proved* that the deceased was at the time of making the declaration, and then thought himself to be, in danger of approaching death," &c. Both these enactments, then, required that before a dying declaration is received in evidence, it should be *proved* that the person making it believed himself to be in danger of approaching death. It appears that it is only on the supposition that in this awful state, while at the confines of a future world, he is not likely to speak a falsehood, that such statement of a deceased are received in evidence; and therefore the law very properly requires that it shall be proved that the deceased did really believe that he was in this state before his statement shall be received in evidence.

In the present case, the Judge is right in stating that the Deputy Magistrate, even in his deposition before the Joint Magistrate, did not state that the deceased, Sumboo Singh, believed at the time that he made the statement to him that he, Sumboo, was in danger of approaching death. In his examination before the Sessions Court, he distinctly deposed that the deceased "did not say that he knew he was dying;" and then "I thought he would not live, but I did not say so to him;" and further on, that "I cannot swear that the man knew or believed himself to be dying." There was therefore no evidence before the Judge that the deceased, Sumboo, believed himself to be in danger of death, so as to make his declaration a dying declaration under the laws cited by the Magistrate.

"The general principle upon which," says Eyre, C. B., "evidence of this kind is admitted is, that it is of declarations made in extremity when the party is at the point of death and when every hope of this world is gone—when every motive to falsehood is silenced and the mind is induced by the most powerful consideration to speak the truth." There is nothing to show in the evidence before the Judge that the party was aware of his situation, namely, that death was impending. The Sub-Inspector of Police in his deposition before the Judge does not state that the deceased knew or expressed to him his belief that he was in danger of death. It is to be regretted that no question was asked to him while in the box, for it appears that in his evidence before the Joint Magistrate, he stated the deceased said "he would not live," and that thereupon he, the Sub-Inspector, "sent him off to Dacca." There may be cases in which although the deceased was not heard distinctly to say that he was in danger of his life and believed himself dying, but in which by the conduct of the deceased person it was evident that he believed himself at the brink of eternity,—such as settling his affairs, taking leave of his relatives, providing for his shradh, and the like. In such cases it may be held that the statement of that person is admissible as dying declaration, because the deceased was under the belief that death was approaching. There are no such circumstances in this case to show that the deceased by his conduct manifested that he was under a belief that he was on the point of death. Mr. Taylor in his Work on Evidence states (para. 648, Ed. 1868) "that it is essential to the admissi-

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bility of these declarations

"1*st*—That the declarant should have been in actual danger of death.

"2*nd*—That he should have had a full apprehension of his danger.

"3*rd*—That death should have ensued."

All these facts must be proved to the satisfaction of the Judge before the declaration can be received as evidence, which is not done in this case.

On the other point submitted in this reference, as to whether the omission to record the verdict of the Jury in the terms prescribed by the Criminal Procedure Code is or is not such an irregularity as requires the trial to be quashed and a new one ordered, we do not see that the law is so strict or distinct on the point. I would therefore not interfere in this case and will not direct a new trial.

The 4th February 1871.

Present:

The Hon'ble E. Jackson and Onooocool Chunder Mookerjee, *Judges.*

Recognizance — Bond to keep the peace—Forfeiture.

Reference to the High Court under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Dacca in the case of Jaha Bux.

Baboo Ram Churn Mitter for the petitioner.

Where the terms of a bond to keep the peace are general, the recognizances may be forfeited on any breach of the peace, whether the assault be committed against the person on whose charge the bond was originally taken or not.

Jackson, J.—In this case one Jaha Bux was called upon to give recognizance for rupees 500 that he would not break the peace for a term of 6 months. It appears that, within that time, he was charged with assault. He was fined for the assault and he was called upon to pay up the amount of the recognizances. He appealed to the Sessions Judge, and the Sessions Judge has sent the case up to this Court for revision on the ground that the breach of the peace which actually occurred, and upon which the recognizances were forfeited, was a very small matter, and that the actual applicant on the occasion when the recognizances were taken from Jaha Bux was a different person from the person who was afterwards assaulted. The Sessions Judge thinks that the recognizances to keep the peace having been obtained by one Kadir Bux they cannot be escheated if the defendant assaults some body else. There is no warrant in law, however, for any such ruling. The bond is general. It is a bond to keep the peace generally, and the amount can be escheated if the peace is broken under any circumstances.

The Sessions Judge is also wrong in saying that this bond was only taken from the defendant in consequence of one breach of the peace against Kadir Bux. It was taken in consequence of repeated breaches of the peace, and in consequence of the notorious character of the defendant as a breaker of the peace. There is no doubt that the amount of the recognizances is somewhat heavy in comparison with the actual assault which has now been committed. But it is admitted that we have no authority to interfere on that point.

We differ from the Sessions Judge and think that there is nothing wrong in law in the order of the Joint Magistrate. We therefore decline to interfere.

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The 4th February 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Procedure — Witnesses for the defence — Chapter XIV and Section 253, Code of Criminal Procedure.

Mohima Chunder Shah, *Petitioner.*

Mr. W. A. Montriou and *Baboos Sreenath Dass* and *Kalidass Bhunjee* for Petitioner.

In a case falling under Chapter XIV of the Code of Criminal Procedure, a Magistrate is bound by Section 253 to summon the witnesses for the defence even if he entertain doubts as to the value of their evidence, as it is impossible to state beforehand what credit will be given to their evidence.

Jackson, J.—THIS is an application on behalf of one Mohima Chunder Shah, who was tried by Baboo Poorno Chunder Ghose, the Deputy Magistrate of Dacca, and convicted on the 14th December 1870 under Section 342 of the Indian Penal Code and also under Section 384 of that Code, and who has been sentenced to imprisonment and fine. The charge against him was wrongfully confining the complainant and committing extortion.

It is said that a number of dependants of the applicant, Mohima Chunder Shah, and of his relation, Seeta Nauth Shah, went to the house of the complainants and forcibly seized them and carried them off to the house of the said Seeta Náuth Shah and Mohima Chunder Shah, and there confined them and extorted from them the sum of Rs. 110.

The Deputy Magistrate who tried this case, states that the witnesses for the prosecution were examined before him on the 9th and 10th of December and a portion of the 12th; and that when the case was about to close, an application was made to him on behalf of Mohima Chunder Shah, that two witnesses, who were considered by him to be important for the defence, should be summoned and examined. These two witnesses were, one a man by the name of Kali Kinkur, who had been said by the case for the prosecution to be a dependant in some way of some of the defendants, but who was stated to have been a person who interceded on behalf of the complainants and who lent them the money which was paid to the defendants and which formed the subject of the charge of extortion. The other witness was one Rai Churn Chowkedar, who was also mentioned by the witnesses for the prosecution and the complainants as having seen them being dragged to the kutcherry of the defendants. The Deputy Magistrate was of opinion that Kali Kinkur's evidence was not material, because he was not said to have been actually present when the money was paid. And as regards Rai Churn Chowkedar, the Deputy Magistrate states that he would not believe his denial, even if he gave evidence that he had not seen what the witnessess for the prosecution stated had occurred.

There was an appeal subsequently from the order of the Deputy Magistrate to the Judge; and the Judge also in passing orders in the case stated that, in his opinion, it was not necessary to call these witnesses, because as far as he could see from the case before him, even if they did give evidence for the defence, he would not believe them. The application to us has reference more especially to these applications to the lower Courts to examine these two witnesses for the defence.

The law as regards the summoning of the witnesses for the defendant in a case of this description, is to be found in Chapter XIV Section 253 Criminal Procedure Code. It is as follows:—"The Magistrate shall summon any witness, and examine any evidence, that may be offered in behalf of the accused person to answer or disprove the evidence against him, and may, for this purpose, at his discretion, adjourn the trial from time to time as may be necessary." The first question then for the Magistrate to consider was, whether these witnesses were, upon the facts stated for the prosecution, important witnesses upon the trial and such as the defendant was entitled to have summoned, and their evidence taken, in order to disprove the evidence offered against him. There can be doubt, upon the evidence for the prosecution, that these witnesses were, if the story for the prosecution is true, eye-witnesses of the offence which was alleged against the defendant. It is impossible to state beforehand what credit will be given to the evidence of the witnesses.

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We think therefore that under the law, the Magistrate was bound to summon these two witnesses for the defence and to have them examined. He has a discretion to adjourn the trial from time to time, as may be necessary for the summoning of such witnesses; but if those witnesses are really witnesses who can speak in any way to the facts of the case, and who may be material for the defence, the Magistrate should exercise that discretion and should summon them.

The Sessions Judge was also, we think, wrong in law in rejecting the application of the defendant that these two witnesses should be examined. The Appellate Court has power under the law to order that further evidence shall be taken, if it is necessary. And we think that our proper course in this case is to order the Appellate Court to send down direction to the Magistrate to have the evidence of these two witnesses taken in the presence of the defendant, and to have their evidence sent up to the Appellate Court, and that the Appellate Court, after considering that evidence as well as the rest of the evidence in the case, will record a fresh judgment and decision as regards the defendant Mohima Chunder Shah.

I may add that although in this case there has been already a conviction, and to some extent an opinion given by the Judge that he would not believe the evidence of these two witnesses whatever they may say, I have no doubt whatever that the Sessions Judge will notwithstanding give a full and fair consideration to whatever evidence may be given by these witnesses; and after taking their evidence into proper consideration will pass fresh orders upon the appeal of the defendant.

As regards the remaining defendants, although no application has been made before us, the learned Counsel for the defendant Mohima Chunder Shah, has pressed upon the Court that the further trial as regards them should also be allowed before the Appellate Court. We think it is not necessary at present to pass any order as regards them. Should the result of this further trial before the Appellate Court be that Mohima Chunder Shah is held to be guiltless, it may possibly be that that may have some effect upon the case as against the other defendants. If so, their case can be taken into consideration when any application is made on their behalf. But it by no means follows that even if Mohima Chunder Shah is guiltless all the other defendants are innocent.

Mohima Chunder Shah will remain upon the bail which has been already ordered, until the Appellate Court has decided the case as regards him.

Mookerjee, J.—I concur.

The 10th February 1871.

Present:

The Hon'ble L. S. Jackson and W. Ainslie, *Judges.*

Sessions record — Defence—Sections 372, 373 and 374, Code of Criminal Procedure.

Reference under Section 380 *of the Code of Criminal Procedure for confirmation by the High Court of the sentence of death passed by the Sessions Judge of Patna on Gopal Hajjam and others.*

A Sessions nuthee should contain the record of the defence set up by the prisoners in the Sessions Court. Points out how such record is to be made up with reference to Sections 372, 373, and 374 of the Code of Criminal Procedure.

Ainslie, J.—THE prisoners have been convicted of murder by the unanimous verdict of a Jury and sentenced to death by the Sessions Judge.

There is no ground for interfering with the verdict which is conclusive as to the fact of the murder and the participation of all the prisoners therein. On perusing the evidence, we find that the prisoners stand convicted of the murder of a child of the age of about 6 years for the sake of his ornaments, and that all appear to have been present when the murder was committed, four of them actually taking part therein, while the fifth, in whose house the murder was committed, was standing by, and immediately after the death of the child joined in the theft of the ornaments which were found in his house and in taking steps to conceal the corpse. It is impossible to draw any distinction as to the degree in which they are guilty, and we, therefore, confirm the

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sentence of death passed by the Sessions Judge.

We observe that the Sessions Judge has not made any record of the defence set up by the prisoners in his Court. Under Section 372 of the Criminal Procedure Code, the accused is to be called on to enter upon his defence and to produce his evidence. If he makes any statement in defence it ought to be recorded: if he does not voluntarily make any statement, and declines to answer any question put by the Court under Section 373, the fact should be noted; and when there is nothing else to show the nature of the defence, a note of the address to the Court (if any) under Section 374 should be recorded. The record is not complete unless it shows the nature of the defence set up.

As this trial was held before a Jury, the omission to make any note of the defence set up by the prisoners is not a defect by which they have been prejudiced. The Sessions Judge records that the accused severally addressed the Jury, and we have no doubt that the case was fully tried.

The 11th February 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Police Officer — Public servant — Section 29 Act V of 1861—Section 218, Penal Code.

Reference to the High Court under Section 434 of the Code of Criminal Procedure, by the Officiating Sessions Judge of Backergunge, in the case of Boroda Kant Mookhopadhya.

A Police Officer negligently or improperly submitting an incorrect report of a local investigation may be punished under Section 29 of Act V of 1861 in cases where the proof is insufficient to bring the case under Section 218 of the Penal Code.

Norman, C. J.—In this case a Head Constable has been convicted, under Section 29 of Act V of 1861, of neglect of duty in submitting an incorrect plan and an untrue report of the results of a local investigation, and sentenced to a fine of 30 rupees by the Deputy Magistrate of Burrisal in Zillah Backergunge.

The Judge sends up the conviction under Section 434, thinking that the offence is one cognizable only under Section 218 of the Penal Code, which provides for the punishment of a public servant framing a record or writing in a manner which he knows to be incorrect with intent to cause loss or injury to the public, &c., or to save any person from legal punishment, &c. Under this Section the offender is liable to imprisonment which may extend to three years.

We think, however, that a Police Officer negligently or improperly submitting an incorrect report of a local investigation may be punished under Section 29 of Act V of 1861 in cases where the proof is insufficient to bring the case under Section 218. We decline to interfere with the order of the Deputy Magistrate.

The 11th February 1871.

Present:

The Hon'ble Dwarkanath Mitter and W. Ainslie, *Judges*.

Jury—Summing up—Culpable Homicide — Punishment — Section 304, Penal Code.

The Queen *versus* Kalichurn Dass and others, *Appellants*.

Committed by the Magistrate and tried by the Sessions Judge of Nuddea on a charge of culpable homicide not amounting to murder.

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Baboos Mohinee Mohun Roy and *Biprodass Mookerjee* for Appellants.

Where a Sessions Judge in charging a Jury in a case of culpable homicide not amounting to murder omitted to draw their attention to the two classes of culpable homicide mentioned in Section 304 of the Penal Code, the High Court considered that the accused were found guilty of the lighter description, and sentenced the accused to the punishment for such lighter description.

Mitter, J.—THE prisoners in this case were found guilty by a Jury of culpable homicide not amounting to murder, and sentenced by the Judge to transportation for life under the provisions of Section 304 of the Indian Penal Code. It appears, however, that the Judge in charging the Jury did not ask them to find specifically whether the prisoners had done the act with the intention of causing such bodily injury as was likely to cause death, or whether they had done it simply with the knowledge that it was likely to cause death but without any intention to cause death or to cause such bodily injury as was likely to cause death. Section 304 evidently draws a distinction between these two classes of culpable homicide, for in the one case the offender is liable to be sentenced to transportation for life, whereas the maximum punishment that can be inflicted in the other is a sentence of rigorous imprisonment for 10 years.

Under these circumstances, it is quite clear that it was the duty of the Judge to point out this distinction to the Jury; and as that has not been done in this case, we must take it for granted that the prisoners have been found guilty of the lighter description of culpable homicide not amounting to murder. This view is supported by a decision of this Court reported in XII Weekly Reporter, page 35, Criminal Rulings; and we therefore reduce the sentence passed on each and all of the prisoners to one of rigorous imprisonment for 10 (ten) years. We see no reason to mitigate the sentence any further.

Ainslie, J.—I concur.

The 13th February 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge.*

Breach of the peace—Recognizance—Sections 281 and 290, Code of Criminal Procedure.

Reference to the High Court under Section 434 of the Code of Criminal Procedure, from the Officiating Sessions Judge of Backergunge in the case of Kalinath Biswas.

Where *A* has been bound over to keep the peace under Section 281 of the Code of Criminal Procedure at the instance of *B*, a Deputy Magistrate is not competent to order him to enter into fresh recognizances to keep the peace on account of fresh disputes with *C*, but should refer the case to the Court of Sessions under Section 298 of the Code.

Norman, C. J.—KALINATH BISWAS being bound over to keep the peace under Section 281 shortly before the expiration of the recognizance was found by the Deputy Magistrate of Perozepore to be involved in fresh disputes likely to involve a breach of the peace with parties other than those in respect of disputes with whom he was already bound. The Deputy Magistrate ordered him to enter into fresh recognizances to keep the peace for one year.

The Sessions Judge, under Section 434, has sent up the order being of opinion that the Deputy Magistrate had no power to make it. In that opinion we concur. We think the Magistrate finding that Kalinath was involved in fresh disputes with other persons making it necessary, with a view to securing the peace of the district, that he should be bound over for a period extending beyond one year, should have proceeded to refer the case to the Court of Session under the provisions of the 298th Section.

We quash the order of the Deputy Magistrate.

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The 18th February 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Counterfeiting a device or mark—Document — Sections 467 and 475, Penal Code.

The Queen *versus* Rughoonundun Puttronuvees, *Appellant.*

Committed by the Magistrate and tried by the Sessions Judge of West Burdwan, on a charge of possessing counterfeit materials for the purpose of authenticating documents, &c.

Baboo Juggadanund Mookerjee for the Government.

Baboo Petamber Chatterjee for the Appellant.

In order to a conviction under Section 475 of the Penal Code, the document which the accused has in his possession must have some counterfeit device or mark upon it, and it must be proved that the accused has the document in his possession with the intent of using such device or mark for the purpose of giving the appearance of authenticity to the document. The document must be of the nature mentioned in Section 467 of the Penal Code.

Kemp, J.—THE prisoner, Rughoonundun Puttronuvees, has been convicted under Section 475 of the Indian Penal Code, and sentenced to 4 years' rigorous imprisonment. The first information obtained against this prisoner was from one Benee Madhub Hazaree, the head ghatwal of the village of Telyshaer of the Bishtopore Thannah. It appears that this party went to the Court Inspector, Ram Chunder Deechcheet, and stated that he could give information against the prisoner and his brother who are represented to be "notorious, habitual and professional forgers of documents, and as keeping seals and other instruments of forgery, and also stamps of old date." Upon this the Inspector told him, that if he would depose to the same he would take him to the Magistrate. He was taken to the Magistrate, and Benee Madhub Hazaree then made a statement to the effect that the prisoner and his brother were notorious forgers, that he had been aware of this fact for the last two years, but that he had hitherto refrained from giving information, not being able to furnish any proof, but that lately the two brothers had become very bold and open in their work, that he had become convinced, and determined to give information. Upon this a search warrant was addressed to Ram Chunder Deechcheet, who was directed to search the house of the prisoner "with the view to the finding of forged documents, counterfeit seals, and other instruments of forgery, including blank stamp papers." On receiving this warrant the Inspector, on the pretence, as he says, that he was going to take leave, went to his house, and afterwards to the house of Modhoosoodun Ugnihuttree, one of the principal ghatwals of the village in which the prisoner resides. He appears to have put up in that house for the night, and before searching the house of the prisoner to have sent a man obtained by him from Modhoosoodun to ascertain what the prisoner was doing. This man, the witness Nudya Chand Tantee, says that he went to the prisoner's house: that he found him sitting in a verandah with a box before him and a piece of stamp paper on the box, upon which he was writing; that the prisoner on seeing Nudya Chand covered the stamp paper with a cloth and asked Nudya Chand to have a smoke; that Nudya after smoking returned and informed the Inspector of what he had seen; that upon this the Inspector collected a body of ghatwals, Police Constables, and others, and searched the house of the prisoner. It is said by the Inspector in his evidence that some 12 or 14 respectable inhabitants of the village were sent for and were present at the search, but we may remark that none of these were examined. Of those present at the search who have been examined, the ghatwals of the village and the Court Inspector himself have alone been examined. In the house of the prisoner four or five boxes were found, one of which was a small box which was locked. It is said by the Inspector that the prisoner produced the key of this box and on opening it certain documents were found. Afterwards, on the information of Modhoosoodun Ugnihuttree, a bundle of papers belonging to the prisoner is said to have been found in the house of the woman Nundee Goalinee. Subsequently another bundle is said to have been found in a gullee which runs to the

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south of the prisoner's house, and divides the prisoner's house from that of Siboo Hattee, also a ghatwal, who was examined in this case. Subsequently another bundle of papers is said to have been found in a small tâl tree hid in the branches of the tree. One of the assessors, Baboo Kasheenath Banerjee seems to have been satisfied with the evidence with reference to the finding of the box; but he was of opinion that there was no evidence of a reliable nature to trace the other properties found to the prisoner. That Assessor held that the documents found in the box came within the purview of Section 475, and he therefore found the prisoner guilty. The other Assessor appears to have believed the whole of the case, and the Judge agreed with that Assessor.

We take the box part of the case first, because on that part of the case there is the evidence of the Inspector that he found this box in the prisoner's house, and that the prisoner delivered up the key of the box to him and that these documents were found in that box. Now Section 475 under which the prisoner has been convicted in the latter portion of it, says that whoever with such intent, that is to say, with the intent that such counterfeited device or mark shall be used for the purpose of giving the appearance of authenticity to any document then forged or thereafter to be forged on such material, has in his possession any material upon or in the substance of which any such device or mark has been counterfeited, is guilty of the offence described in that Section. Taking the documents found in the box seriatim, the first document marked A is a blank stamp paper of the value of 2 annas with the signature of one Dole Gobindo Baboo. The endorsement on the back of that paper by the stamp vendor shows that it was bought for the purpose of enabling Dole Gobindo Baboo to borrow money from one Doollubh Kobeeraj. Now with reference to this document we may observe that no device or mark appears to be counterfeited upon this document, and that there is nothing to show that the prisoner with the intent of using such device or mark for the purpose of giving the appearance of authenticity to this document had it in his possession. This document, moreover, is not a document which comes under the terms of Section 467 of the Indian Penal Code. It is not a will; it is not an authority to adopt a son; it is not a document which purports to give authority to any person to make or transfer any valuable security, &c.; and it is not a valuable security, as it is not a document whereby any legal right is created, extended, transferred, restricted, extinguished or released, as described in Section 30 of the Code, or whereby any person acknowledges that he lies under legal liability or has not a certain legal right. Moreover it appears from the evidence of the son of Dole Gobindo Baboo who has been examined, that the signature on this document is the signature of his father; and it also appears from the evidence of Doollubh Kobeeraj who has likewise been examined in this case, that there was a talk of a loan being taken from him by Dole Gobindo Baboo; that Dole Gobindo was in the habit of taking loans by sending blank stamp papers signed by him; that the contemplated transaction ultimately fell through; and that this stamp paper found in the prisoner's box is the stamp which Dole Gobindo Baboo sent to him with his signature on it.

The next paper marked B is a blank stamp paper, and this paper was purchased, as shown by the stamp vendor's endorsement, for the purpose of borrowing money from the prisoner himself by a third party. Probably the transaction fell through and the paper remained with the prisoner; but be that as it may, it is not a paper which comes within the meaning of Section 475 of the Code.

"C" is an old bond of the year 1256. This is not addressed to the prisoner at all; it is signed by one Nufur Bagtee and addressed to Chundee Churn Chuckerbutty; it is for a sum of rupees 17-2 annas; and two cows are pledged as security. That bond is an instrument upon which, looking to the statute of limitations, no money could be recovered, and which could not be made use of for any purpose whatever; and there is nothing on the face of it to show that it comes in any way within the purview of Section 475.

The next is a blank paper marked "D" and the remarks already made with reference to paper B apply to this paper. The other papers found in the box are pieces of plain country paper without any writing upon them, and therefore clearly they cannot come under Section 475. Admitting therefore that this box was found in the prisoner's house, and that the evidence of the Court Inspector Ram Chunder Deechcheet is to be depended upon as to the finding of this

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box, no offence has been proved against the prisoner under Section 475.

With regard to the remaining part of the case, namely, the finding of the other papers, we are of opinion with the Assessor Kasheenath Banerjee that there is no evidence of any reliable nature to trace these papers to the possession of the prisoner. As to the bundle of papers said to have been found in the house of Nundee Goalinee, it is said that she got these papers from one Kheeree, a maid-servant of the prisoner's house who had obtained them from Troyluckko, the brother of the prisoner; but this is denied by Kheeree and the evidence of the woman is very conflicting. There is also a very suspicious circumstance about this part of the case, namely, that the party who was instrumental in tracing these papers to the prisoner is Modhoosoodun Ugneehuttree, a man admittedly in enmity with the prisoner and a sirdar ghatwal. It is proved on the record that there was a village feud in which the ghatwals were on one side and the prisoner at the head of the other party. The finding of the bundle in the gullee also appears to us to be very suspicious, to say the least of it. The guards who were placed at each end of the gullee were ghatwals, enemies of the prisoner—and none of the respectable neighbours who are said to have been present at the time were called and examined; and although the two ghatwals say that they saw the prisoner go into the gullee, and some time after saw this bundle lying amongst the *ole catchoo* plants close to the house of the ghatwal Shiboo Hattee, there is no evidence that they attempted to prevent the prisoner from going into the gullee, and they seem to have contented themselves with giving information to the Police Inspector about the papers. As to the finding of the other bundle in the tâl tree, we utterly disbelieve that part of the case. The story of the prosecution as to the finding of this bundle is wholly improbable, and there is no evidence of any reliable nature to support it.

On the whole of the case we are of opinion that there is nothing to bring home to him the offence with which he has been charged under Section 475 of the Indian Penal Code. We therefore acquit him and direct his immediate release.

The 18th February 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Contraband Salt—Confiscation—Act VII, B. C., of 1864.

Revision of proceedings under Section 404 *of the Code of Criminal Procedure, in the case of the Government of Bengal, Petitioner,* versus *Akatoollah and others, Opposite Party.*

Baboo Juggadanund Mookerjee for the Government.

If salt exceeding 5 seers is found within the limits prescribed by Section 12 Act VII, B. C., of 1864 unprotected by a rowannah, as required under Sections 13 and 15, the salt must be held as contraband under Section 16. The power of a Magistrate under Section 29 to confiscate Salt not protected by a rowannah in a prohibited district, is not affected because there was no attempt or intention to sell the salt within the prohibited district.

Mookerjee, J.—This case comes before us merely for an expression of our opinion, as to the correctness or otherwise of the view of the law taken by the Sessions Judge of Tipperah in setting aside the conviction of the prisoners, and the release of the salt confiscated by the Deputy Magistrate under Section 16 of Act VII of 1864, B. C. It appears from the finding of both the Courts below, that the prisoners, with the two boats

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of salt, were found within the boundary of the Noakhally district ; that in order to pass through that district it is requisite under the law to have a rowannah, and that the prisoners had none. The only question before us is whether such salt shall or shall not be considered contraband, and, therefore, confiscated to Government, and the persons in charge thereof held liable to punishment under Section 16 of the enactment in question.

Looking to the stringent provision of the law, Sections 15 and 16 of Act VII of 1864, B. C., I am of opinion that if salt exceeding 5 seers is found within the limits prescribed by Section 12, unprotected by a rowannah required under Sections 13 and 15, that salt must be held as contraband under Section 16 of Act VII of 1864. Under Section 29 the Magistrate is empowered to examine into the cause of the seizure and to adjudge the salt to be confiscated. I apprehend that under this latter Section, a Magistrate is not legally competent to say that though salt is found in a prohibited district unprotected by any rowannah, and therefore the offence under Section 16 is committed, that he cannot convict the persons found transporting the salt, or confiscate the salt merely because there was no attempt or intention to sell the salt within that prohibited district. But the Magistrate, I think, is quite competent to decide whether the offence has been committed or not, and, therefore, to enquire into the cause of the seizure of the salt. If he be of opinion that the salt was not found as a fact within the prohibited district, he would be quite competent to acquit the prisoner though the police officer may maintain to the contrary.

In this case the Courts below found, as a fact, that the salt was within the limits of the district of Noakhally, where a rowannah is required for the transport of salt above five seers. The prisoners also admit that they passed though that district, and the direction of their master was to sell the salt wherever they could dispose the same to advantage. They do not deny that a rowannah was required to pass through Noakhally, but they plead that they were ignorant of the law and had taken the route through Noakhally, because it was a highway and was a shorter cut to Tipperah, where they intended ultimately to transport the salt, if the same could not be sold to advantage elsewhere.

The Judge on appeal reversed this order of the Magistrate —

1*st*.—Because it is not proved that there was any attempt to sell the salt at Noakhally.

2*nd*.—Because 8 of them were boatmen and therefore not responsible for the cargo.

3*rd*.—Because the river was a highway by water and was a shorter route.

4*th*.—Because the boat was found within the very precinct of the prohibited district.

5*th*.—Because the proceedings of the Magistrate were injudicious and harsh.

Now, as regards the 1st, I have to observe that the law does not require any such attempt or intention to be proved before a conviction can be had under Section 16 ; the mere fact of the salt being found within the prohibited district is sufficient to constitute an offence. The law may be very severe and harsh, but that is no reason why Courts which are required to give effect to them should refuse to carry them out. We cannot assume the functions of the Legislature, and make or amend laws merely because we think they are harsh and inequitable.

As regards the 2nd ground, Section 16 of the law provides that "any person possessing or transporting or attempting to "transport such salt shall be liable to a fine, "&c." The prisoners were no doubt transporting the salt which is contraband, and I think therefore the Magistrate was right in convicting them under the above Section.

The 3rd ground appears to me to be no valid ground at all. If the prisoners had a desire to transport the salt by the shortest route, they ought to have applied for a rowannah and then taken the salt by this route. They cannot of their own choice select a route which the Executive Government had thought fit, under the powers vested in it by the law, to prohibit a passage through except under a rowannah.

With reference to the 4th objection, I do not see that it makes any difference whatsoever as to where the boats of salt were found, *i. e.*, whether at a short distance from the confines of the prohibited district or in the far interior of it. The prisoners, as I said before, admit that they have passed through the district of Noakhally.

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The 5th ground is a matter in which the Judge might interfere if the law allows him to do so on appeal, but is not *ipso facto* a ground to set aside the conviction at once.

Under these circumstances, and keeping in view the provisions and terms of the law, I can come to no other conclusion than that the Judge has taken a wrong view of it. He must have seen that the law gives him no option to confiscate the salt or not, if the circumstances of the seizure are found to be exactly those which are contemplated in Section 16, and the prisoners are found transporting salt which is contraband. Section 39 of this Act, however, gives a power to the Board of Revenue to mitigate penalties which the Magistrate may inflict under the previous Section, if they shall see cause to do so. They may also direct the seizure or any part thereof to be restored. We are not asked by the petitioners to pass any order affecting the release of the salt in this particular instance, nor are we asked to interfere with the order passed by the Judge discharging the prisoners. We therefore do not interfere with the order passed by the Judge in this case.

Jackson, J.—The charge is not pressed against the defendants, but we are asked to state whether the Judge is right in the law which he has laid down in this case. I would point out to the Judge, that the fact of the salt being found within the particular district unprotected by the rowannah is made an offence under the law. The intention of the law is not only to punish those who are actually smuggling salt, but also those who give an opportunity to others to smuggle salt. Persons who trade in salt doubtlessly thoroughly know the salt regulations. They know, as the prisoners in all probability knew, that they were not allowed to take the salt into this prohibited district without a rowannah. They admit they were selling the salt when they could, and there was of course great opportunity for them to purchase smuggled salt in place of what they sold.

The 24th February 1871.

Present:

The Hon'ble L. S. Jackson and W. Ainslie, *Judges.*

Procedure—Evidence—Cross-examination—Witnesses for defence—Previous statements—Section 34 Act II of 1855.

Reference to the High Court under Section 434 *of the Code of Criminal Procedure, by the Officiating Sessions Judge of Tirhoot, in the case of Tukheya Rai* versus *Tupsee Koer.*

Following the Queen *vs.* Gora Chand Gope, the Court set aside an order of acquittal passed by a Deputy Magistrate in a case which he tried, not on evidence taken before himself in the case, but entirely on evidence in another case before another Officer (the Joint Magistrate).

The complainant's pleader was at liberty before the Deputy Magistrate to cross-examine the witnesses for the defence on points respecting which they had made statements before the Joint Magistrate, and he might do so, as regards previous statements which were reduced to writing, without showing the writing.—Section 34 Act II of 1855 explained.

Ainslie, J.—This case comes before us on a reference by the Officiating Sessions Judge of Tirhoot.

The facts are as follows:—

One Tupsee Koer charged Tukheya Rai with having rooted up certain crops belonging to him, and also with having inflicted a wound on his arm with a gondasa.

The Joint Magistrate dismissed the complaint. The accused then applied for leave to prosecute the complainant under Section 211 of the Penal Code, but this application was rejected.

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Tukheya Rai then applied to the Sessions Judge, who thought that the charge under Section 211 ought to be investigated and made an order accordingly.

The hearing of this charge was referred to the Deputy Magistrate, Mr. H. Davies. This officer eventually acquitted Tupsee Koer.

Tukheya Rai thereon again applied to the Judge, who has forwarded the proceedings with a view to getting the order of acquittal set aside, and the case remanded for a proper finding on the evidence.

The Sessions Judge cites the case of Gora Chand Gope, 5 Weekly Reporter, Criminal Rulings, page 45, as authority for the reference, and proceeds to show that the Deputy Magistrate has tried the charge before him wholly on the evidence recorded in the first trial before the Joint Magistrate, and without adverting in any way to the evidence taken before himself, which latter he excluded from consideration under a misconception of the purport of a passage in Mayne's Commentary on the Indian Penal Code set out in his judgment.

The Deputy Magistrate has submitted an explanation in which he admits that he had misunderstood the quotation made by himself. He further states as follows:—"I came to a conclusion in the case now referred with due regard to both cases. Much has not been said on this matter in my decision, because the additional evidence elicited by Mr. Lingham, pleader for prosecutor, was obtained by putting leading questions to Messrs. Boileau and Blechynden."

We entirely concur with the Sessions Judge in thinking that the Deputy Magistrate's judgment was based solely on the evidence recorded by the Joint Magistrate in the original trial. The Deputy Magistrate in opening his judgment, after a brief recital of the orders of the Joint Magistrate and Judge, says—"It now remains for the Court to determine from the evidence given in the case, out of which the present one arises, whether the charge is false or otherwise." He further on says—"The Court can only judge from the record before it, as it had not the advantage of seeing the witnesses delivering their testimony." He then reviews the evidence of each witness as recorded by the Joint Magistrate, and the only allusion in the judgment to the evidence recorded by himself is in the passage in which he gives reasons for excluding certain statements made by Messrs. Boileau and Blechynden before himself, which do not appear in their depositions before the Joint Magistrate.

There can be no doubt that this is a case to which the precedent cited by the Sessions Judge applies.

The Deputy Magistrate has not tried the charge before himself on the evidence in the case, but entirely on evidence in another case before another Magistrate. Such a trial is altogether informal, and must be quashed together with the judgment recorded in it, and the case must be remanded for a proper trial and finding on the evidence on the record of this case.

We observe that the Deputy Magistrate was altogether wrong in refusing to allow the complainant's pleader in cross-examination to question the witnesses for the defence on points respecting which they had made statements before the Joint Magistrate. He was at liberty to examine on all the facts of the case, as much as if the matter had then been before the Court for the first time.

He was moreover at liberty to cross-examine the witnesses, as to previous statements made by them and reduced to writing, without showing the writing. Section 34 Act II of 1855 does not say, as the Deputy Magistrate seems to think, that the writing must be shown before the cross-examination; but that if it is intended to put in such writing to contradict a witness, his attention must be called to those parts which are to be used for the purpose of so contradicting him.

This is, not that he is to be allowed to study his former statement and frame his answers accordingly, but that if his answers have differed from his previous statements reduced to writing, and the contradiction is intended to be used as evidence in the case, the witness must be allowed an opportunity of explaining or reconciling his statements, if he can do so; and if this opportunity is not given to him, the contradictory writing cannot be placed on the record as evidence. We may also note that the proper way to exclude evidence obtained by leading questions is to disallow the questions.

We quash the judgment of the Deputy Magistrate of Tirhoot, dated 28th November 1870, and remand the case for re-trial and for a proper finding on such evidence as may now be, or may be brought, on the record of this case.

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The 25th February 1871.

Present :

The Hon'ble J. P. Norman, *Officiating Chief Justice,* and the Hon'ble H. V. Bayley, *Judge.*

Procedure — Trial by Assessors — Summing up — Treason — Waging war against the Queen—Evidence—Government Gazettes—Documentary evidence — Section 121, Penal Code—Sections 6, 8, and 28 Act II of 1855—Section 200, Code of Criminal Procedure.

The Queen *versus* Ameeroddeen, *Appellant.*

Committed by the Magistrate and tried by the Sessions Judge of Dinagepore on a charge of abetting the waging of war against the Queen, &c., &c.

Mr. J. Graham (Standing Counsel) and *Mr. Bell (Legal Remembrancer) for the Government.*

Mr. Munmomohun Ghose and *Baboo Amerendronath Chatterjee* for Appellant.

Although the Code of Criminal Procedure does not expressly provide for a summing up of the evidence in trials with the aid of Assessors, there is nothing in the Code to prevent a Judge from summing up the evidence, which is in fact only a mode of going through and discussing it with the Assessors.

The real object of appointing Assessors is to assist the Court, and the discussion and statement of points by a Judge sitting with Assessors cannot be said to be otherwise than in furtherance of the object of getting the best assistance for the proper adjudication of the case.

The special limitation of the period for prosecution (three years) in cases of treason and misprision of treason under Stat. 7, Wm. III, Cap. 3, Section 5, is an exception to the general rule in criminal cases; and in enacting Section 121 of the Indian Penal Code, the Legislature has not thought fit to limit in any way the period within which a prosecution for an offence against that enactment may be commenced, and consequently such limitation does not form part of the Penal Code.

In a case in which the accused was charged with abetting the waging of war against the Queen under Section 121 of the Penal Code, it was held that the Calcutta Gazette and the Gazette of India were admissible in evidence, under Section 8 of Act II of 1855, to prove the proclamation and official communications of the Government relating to the war.

A printed official letter from the Secretary of the Government of the Punjab to the Secretary of the Government of India was held to be admissible in evidence under Section 6 Act II of 1855.

Section 200 relates only to the oral evidence of witnesses. As to documentary evidence, although a prisoner has a right to have all or any part of any document used on his trial translated or interpreted to him, yet where a document is put in for the purpose of merely giving formal proof of that which is an incontestable fact, it is not necessary to interpret it at length. It would be sufficient if the prisoner was made to understand what the document was, and for what purpose it was used.

Quære. whether with reference to the 28th Section of Act II of 1855, a prisoner charged with treason can be convicted on the evidence of a single witness?

Norman, C. J.—THE prisoner has been convicted, by the Judge of Dinagepore concurring with the Assessors, on charges under Section 121 of the Indian Penal Code of abetting the waging of war against the Queen, and sentenced to transportation for life and forfeiture of all his property. He has been found guilty on twelve charges. But for our present purpose it is sufficient to consider four only of these, to which in fact the others are subordinate.

The 6th, that he abetted the waging of war against the Queen, by engaging in a conspiracy with Ibrahim Mundle of Islampore, Abdullah of Patna, and others; and for the purpose of waging such war, and in pursuance of such conspiracy, at divers times and places instigated divers persons, *viz.*, Murtaza, Manoolla, Baboo Shaik, to the waging of such war, &c.

The 13th, that in or about the years 1862, 1863, 1864, 1866, and 1868, he abetted the waging of war against the Queen, by entering into a conspiracy with Ibrahim Mundle of Islampore, Abdullah of Patna, and others, for the purpose of waging such war, and in pursuance of such conspiracy at divers times procured divers persons, *viz.*, Shekee Mundle, Shareatoollah, Inayutoollah, Adalut Mundle, Salim Mundle, to contribute money in order to the waging of such war.

The 14th, that he, in or about the year 1865, at Kamlabaree, abetted the waging of war against the Queen, by entering into a conspiracy with Ibrahim Mundle of Islampore, Abdullah of Patna, and others, for the purpose of waging such war, and in pursuance of such conspiracy forwarding money to Ibrahim Mundle in order to the waging of such war.

The 15th, that he, in or about the year 1868, at or near Narsinpoor, abetted the waging of war by entering into a conspiracy with Ibrahim Mundle of Islampore, Abdullah of Patna, and others, for the purpose of waging

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such war, and in pursuance of such conspiracy collecting property for defraying the expenses of such war in order to the waging of such war, &c.

Mr. Monomohun Ghose, as Counsel for the prisoner, after making an objection to the validity of the conviction on the ground of alleged irregularity in the conduct of the trial, and contending that certain classes of evidence admitted by the Judge had been improperly received, went into a most elaborate and careful examination of the evidence, both oral and documentary, in detail.

The first point raised by him was that the trial was not conducted in accordance with the provisions of the Code of Criminal Procedure, inasmuch as it appears that the Judge, at the conclusion of the reply of the Government prosecutor, and before calling upon the Assessors to give their opinions, summed up the case to the Assessors.

No statement as to the terms on which the Judge summed up appears on the record.

Mr. Ghose pointed out that while by Section 379 in trials by Jury the Code requires the Judge to sum up the evidence, no such provision is made for the case of trials by the Court of Sessions with the aid of Assessors. He referred to some observations of Mr. Justice L. S. Jackson in the Queen *versus* Poly, II W. R., 39, where this distinction is adverted to.

We may observe that although the Code of Criminal Procedure does not expressly provide for a summing up of the evidence in trials with the aid of Assessors, there is nothing in the Code to prevent a Judge from summing up the evidence which is in fact only a mode of going through and discussing it with the Assessors. In a case like the present, where a prisoner was being tried on seventeen charges, where the evidence was very voluminous—fifty-five witnesses having been examined for the prosecution, and upwards of thirty for the defence—we think that a Judge sitting with Assessors would have failed in his duty, or at least shewed a want of sound discretion, if he had not indicated the matters necessary to be established by proof in order to convict the prisoner of the offence or offences charged. With full notes of the evidence and all the documents before him, we should have been surprised if we had found that the Judge had failed to assist the Assessors by reminding them of the result of the evidence, and pointing out the bearing of the several parts of such evidence on the questions to be considered.

In cases of trial by Jury, the summing up is all important, because there is no appeal from the decision of a Jury. In order to know what is the proposition which the Jury have affirmed —what it is that they have really decided in finding a verdict of guilty—it is generally necessary to look to the questions left to them by the Judge in summing up. And therefore in order that it might appear whether the conviction is legal and proper, it was necessary in the Code of Criminal Procedure to provide that in trials by Jury a statement of the Judge's direction should form part of the record. A provision to that effect is contained in Section 379. In trials before a Judge sitting with Assessors there is an appeal on the facts. The Appellate Court can examine the grounds of the finding of the Judge and Assessors. It is therefore not necessary to preserve any record of the discussion between the Judge and the Assessors. But because the Code is silent as to such discussion, it does not follow that nothing of the sort is to take place. Mr. Ghose urged that the object of appointing Assessors was to assist the Judge—not for the Judge to assist, or by such assistance to influence the Assessors. But the real object of appointing Assessors is to assist the Court, and the discussion and statement of points by a Judge sitting with Assessors cannot be said to be otherwise than in furtherance of the object of getting the best assistance for the proper adjudication of the case.

Mr. Ghose next contended that as there is no record of the Judge's summing up to the Assessors, the Court is not in a position to know how far the Assessors may have been influenced by the Judge's observations; and that therefore less weight is to be attributed in this case than in ordinary cases to the fact that the Assessors have concurred with the Judge in finding the prisoner guilty.

Mr. Ghose further contended that the Assessors had given no reasons for their opinion. The last observation is not quite well-founded. The Assessors do not merely find the prisoner guilty. The first Assessor, with whom the other concurs, says—"he thinks it proved that a "war was waged against the Queen, that there "was a conspiracy to carry on that war, and "that the prisoner is guilty of all the acts "charged." It is clear then that the Assessors knew what were the points which they had to consider, and there is nothing on the record to lead us to think that they did not form an independent judgment on the evidence.

Mr. Ghose next pointed out that all the acts with which the prisoner is charged took

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place more than three years ago. He contended that by English Law, as embodied in Statute 7, Wm. III. Cap. 3, Section 5, no person can be indicted or prosecuted for treason unless within three years after the commission of the offence. He argued that this law had been introduced as part of the law of England, at least as regards persons liable to be tried in the High Court in its Original Criminal Jurisdiction, by the Charters, and that before the passing of the Penal Code the English law of treason was applicable to offences committed against the sovereign by natives of India otherwise than within the limits of the Town of Calcutta; that if this provision was in force at the time of the passing of the Penal Code, it has not been repealed by any thing in that Code.

The answer to this argument is that the offences with which the prisoner stands charged are not treason or misprision of treason to which alone the provisions of the 7 Wm. III, Cap. 3, Section 5, are alone applicable, but offences against the Penal Code.

In taking upon itself the administration of criminal justice in Bengal, Behar and Orissa, the English Government, so far from abrogating the existing law of the land and introducing English Criminal Law, undertook to administer the law as it stood; that is, the Mahomedan criminal law, subject to such modifications as might be found necessary. Accordingly we find that crimes committed by natives of India against the State—as by levying war against the Crown and the like—outside the Town of Calcutta, were formerly punished, not as treason under English Law, but as offences against the law of the land, *i. e.*, Mahomedan Law, after taking the futwas of the Mahomedan Law Officers.—See the case of Meerza Beg, declared liable to *tazeer* at the discretion of the ruler of the country and sentenced to death in 1799.—Harington's Analysis, Vol. I, pp. 336-340, note, Regulation IV of 1799.

The special limitation of the period of prosecution in cases of treason and misprision of treason under Stat. 7, Wm. III; Cap. 3, Section 5, is an exception to the general rule in criminal cases. And in enacting Section 121 of the Indian Penal Code, the Legislature has not thought fit to limit in any way the period within which a prosecution for an offence against that enactment may be commenced, and consequently such limitation does not form part of the Penal Code under which the prisoner has been convicted by the Session Judge and Assessors.

Mr. Ghose next objected that the Calcutta Gazette of the 16th of June 1858, and the Gazette of India of the 30th of January 1864 and the 9th of November 1868, had been improperly received in evidence.

They are, however, clearly admissible in evidence, under Section 8 of Act II of 1855, to prove the proclamation and official communications of the Government relating to the war on the frontier.

By Section 6 the Court is bound to take judicial notice of the commencement, continuation, and termination of hostilities between the British Crown and any other State, and is empowered to resort to appropriate books and documents of reference. It is to this end that the Exhibit D. 1, a printed official letter from the Secretary of the Government of the Punjab to the Secretary of the Government of India, also objected to by Mr. Ghose, is admissible in evidence. Of course, it is not evidence of the facts mentioned in detail by the writer of the letter. These several documents are evidence, and may be referred to under Section 6 Act II of 1855, as to the commencement and continuation of the war between the Government and the Mahomedan fanatics on the frontier, at Mulka, Sittana, Umbeyla, and other places.

Mr. Ghose next objected that there had been an irregularity in the trial, because the Government Gazettes, and the letter of the Secretary to the Government of the Punjab, were not read at length and interpreted to the prisoner in open Court in a language understood by him, which he contended was required by the 200th Section of the Code of Criminal Procedure.

Section 200 relates to the oral evidence of the witnesses. As to documentary evidence, we are of opinion that, although undoubtedly a prisoner has a right to have all or any part of any document used on his trial translated or interpreted to him, yet, put in as these Gazettes were, for the purpose of merely giving formal proof of that which was an incontestable fact, that the Government was issuing proclamations as to the war on the frontier, it would not be necessary to interpret them at length. It would be sufficient if the prisoner was made to understand what they were, and for what purpose they were used. To intrepret them at length from beginning to end would have been a mere useless waste of time and would have probably embarrassed the prisoner; because it would be difficult or almost impossible to make him understand, that the detailed statements read to him were

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not being used against him as proof of the several detailed facts stated therein. We have no reason to believe that the prisoner was not made fully aware of their nature and of the object with which they were put in, and it is stated in the proceedings that the prosecutor addressed the Court in Oordoo, a language understood by the prisoner.

Mr. Ghose next referred to the 28th Section of Act II of 1855, and contended that the prisoner being charged with treason no offence charged against him could be proved by the evidence of a single witness. It is not necessary to discuss or determine what rule of evidence applies to trials for offences against the State under the Penal Code. Even if the Statute 7 W. III or the earlier English Law applied, which it certainly does not, the evidence we have to deal with is sufficient in quantity to satisfy the strictest rule.

Mr. Ghose next drew the attention of the Court to a letter said by the witness Abdoollah to have been written by him for Haji Deen Mahomed as a receipt for money forwarded by Peer Mahomed from Dinapore to Rawul Pindee. The original was not produced, but notice to produce it having been served on Peer Mohamed, a prisoner confined in the Monghyr Jail, its contents were proved by witnesses. The history of the letter is very singular.

Shaik Hingun says that he and one Buddoo Khan were partners in business from 1851 to 1861. There was a balance due to Buddoo Khan on the settlement of accounts, for which he sued Hingun and got a decree for Rs. 6,000.

Buddoo Khan went into partnership with Mungloo. Mungloo having a dispute with Buddoo Khan wished Hingun to examine some papers in order that his share in some money due by certain parties should be defined. Amongst the papers Shaik Hingun says he found in an envelope a letter as follows:—

"From Bukshoolla Khan, 1st Regiment, 4 "Company Artillery, to Buddoo Khan— "Dinapore. After salaams Haji Deen Ma- "homed writes to Peer Mahomed.

"I have arrived safely. Spent Rs. 100 "on the road. The two maunds of tobacco "which I have brought have been sent to "Goolshun. When news of its receipt reaches "me I will inform you."

The witness says he knew of the Wahabee plot, and that the two maunds of tobacco mentioned in the letter signified Rs. 2,000. He says that Mungloo, Wajid, and Juggroo were present: Buddoo Khan was sent for and made aware of the discovery; that he, Peer Mahomed, and others, endeavoured to induce the witness Hingun to give up the letter. Hingun however said to Buddoo Khan—"you have "got a decree against me for a false claim, "and I will have my revenge through this "letter at last." After some talk the witness agreed to give up the letter if the decree against him was cancelled. The arrangement was carried out and the letter given over to Peer Mahomed.

It is a remarkable circumstance that this transaction must have taken place on or just before the 1st of March 1869. The prisoner now before the Court was arrested on the 20th of March in that year.

The letter is said to have been dated in the middle of 1867. So says the witness Abdoollah, who adds that he wrote the letter for Haji Deen Mahomed who cannot write himself. This witness also says that two maunds of tobacco meant 2,000 rupees, and Goolshun meant Mulka, and that Bukshoollah was a feigned name for Haji Deen Mahomed. Looking at the circumstances under which and the critical point of time when the letter is said to have been found, and the use that was made of it, we should hesitate very much to accept it as a peice of evidence on which we could rely.

Very similar observations apply to a letter produced by Tofiloollah Shah to the Police Officer, Elahi Buksh.

Tofiloollah is the son of a person who was formerly a peer or holy man at Sundeep Narainpore, the residence of the prisoner. In consequence of a disagreement with the prisoner's father and one Abdool Rohoman, a priest who resided in a mosque belonging to him, on the subject of jehad, the father of Tofiloollah with his family was driven out of the village, and the prisoner's brother seems to have got possession of some land which was formerly occupied by Tofiloollah or his father. About fifteen years ago the dispute upon the subject of jehad, and also on certain doctrinal or ceremonial points called Ameen, Ruffadeen, were renewed; and again at the marriage of one Rohimooddeen where Ameerooddeen was preaching jehad, Tofiloollah says he interfered with him, on which Ameerooddeen told him—"If you will side with us I "will procure you the 300 Rs. a year which "your father always received from Narain- pore." One of the witnesses, Inayutoollah, says

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Tofiloollah answered that he would not consent if he got 1,000 Rs.

The letter was not produced by the witness until after an interview with Nobokisto Ghose, the Police Inspector, who asked him if he had any letters of the accused. The witness said he might have some if he searched. He professes to have found the letter in a box.

The letter begins by stating—"I have heard from many persons that you are opposed to the jehad!"

The language of the letter is such as could scarcely have been used by the prisoner to a person with whom he had so long been engaged in religious controversy on that amongst other points. The appearance of the letter is very unlike a document ten years old. The minute detail in which the witnesses speak to the exact terms of a paper which, according to their own statement, they heard read over when it was received by Tofiloollah ten years previously, is very unlike the impression which would remain on the memory after so long a lapse of time. The story of the witnesses agrees too exactly on the minute points. And the story of the black umbrella sent from the house of Goreeboollah, which is said to have accompanied the letter, is very like a circumstance got up to support a false tale.

We distrust the evidence as to the letter produced by Tofiloollah.

Our suspicions that this document may be a piece of evidence fabricated to insure the conviction of the prisoner are not weakened by finding that a letter, admittedly forged, purporting to be signed by the prisoner implicating him as a Wahabee, was found by the police in the shop of Shaik Munsum, where it had been concealed either by or with the privity of one Inayutoollah, who had laid an information in March 1869 that treasonable papers were concealed in the shop of Shaik Munsum.

Mr. Ghose argued that the discredit thrown on the evidence for the prosecution, by the falsity of this part of the case, ought to lead us to disbelieve the rest of the evidence against the prisoner.

To that there are two answers. First, that though we distrust the evidence relating to the two letters very much—though we could not rely upon it or accept it as true, it is not proved to be false. Secondly, the facts to which those letters relate are isolated and stand quite apart from the general current of the evidence. Omitting, as we have, all further allusion to the evidence of the witnesses who speak to the letters, the general case against the prisoner stands untouched.

Suppose it be true that Tofiloollah concocted the letter produced by him to ruin a man whom he considers to be his enemy, there is no ground for supposing that other witnesses wholly unconnected with him are not speaking the truth.

The existence of the war on the frontier carried on by Mahomedan Sectarians against the British Government is clearly proved. Witnesses whose credit Mr. Ghose has not attempted to impeach, Mahomed Israil, Yusuf Khan and Saligram, prove that Wilayut Ali of Patna, Inayut Ali, the brother of Wilayut, and Moulvie Abdoollah, son of Wilayut Ali, Yahiya Ali and others, whom it is not necessary that we should name, were successively leaders of these Sectarians. Mahomed Israil says that all the leaders were in Patna, or Bengal or Behar,—British subjects. He says that he was present at three battles between the fanatics and the British Government at Sittana in 1858, at Topee Meanee in 1863, and at Umbeyla in 1863.

There is evidence that after the death of Wilayut Ali he was succeeded at Patna by Yahiya Ali as chief agent of the Sectarians. Yahiya Ali has since been transported for life, convicted on a charge similar to the present.

It is proved by the evidence of one Elaht Buksh, Asmutoollah, and others, that Inayut Ali and Yahiya Ali preached jehad at Narainpore. It is proved by this Elahi Buksh that the prisoner was appointed Khalifa by Inayut Ali at the Musjid—Mosque—at Narainpore, the native village of the prisoner, and that Atin Hossein and Abdoollah who came from Patna proclaimed the fact in the mosque.

The witness Asmutoollah proves that the prisoner was going about preaching jehad with Yahiya Ali, and that Yahiya Ali proclaimed in the Sirsahee mosque that he had appointed the prisoner to collect alms for the jehad.

Asmutoollah, who himself lives at Sirsahee, proves that the prisoner preached in the mosque at Sirsahee about six or seven years ago, and asked for funds for the jehad. He says he was persuaded by the preaching and went to Ameerooddeen's house. He says that one Atar Hossein and his nephew from Patna were living at Ameerooddeen's house. They were there for the purpose of forward-

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ing men and money; that he went to join a Kafila with Rungoo and Hughutoolla. His father sent three men who brought him back. The prisoner dissuaded him from going back. He says that after this the prisoner came three or four times to Sirsahee to collect money for the jehad.

The evidence of this witness seems given very fairly, and his credit has not been shaken in any way.

Mr. Ghose called him an accomplice, but he is scarcely that. He went with the intention of joining the rebels but turned back.

The next witness to whose evidence we shall advert is Murtaza. He says that about nine years before the time when he was giving his evidence, which was in August 1870, the prisoner came to his village and preached concerning a jehad. The jehad was against infidels in general. The result was to be a conquest of all the world. The witness became the prisoner's pupil, and lived three months in his house at Narainpore. He says the prisoner persuaded him to join the jehad.

He says he was induced to join, and went with four others to Mulka in Khorasan (which means Affghanistan) about 8 years ago. The expenses of the journey were supplied by the prisoner. They went by way of Rajmahal to Futwa about three coss from Patna, and thence by Rawul Pindee to Attock and Mulka. There he found about 1,500 men under the leadership of Moulvie Abdoollah. He says he was four or five months with the crescentaders (we adopt the word as used by the Judge below). While at Mulka he heard there *had been* an attack on the British at Topee Meeanee.

The witness says that at Mulka for the first time he was aware that the jehad was against the British.

Two witnesses, Jehangeer and Shumsheer, called from Peshawur, prove that Murtaza, who was known to them by the name of Abdool Rohoman, was at Peshawur at the time stated by him. Asgur Mundle, the uncle of Murtaza, proved that the prisoner came to his village to preach, and exhorted his hearers to give money for the war in the west against the infidels; that Murtaza and two others of his nephews went to the war. The other two have not returned. The father of Murtaza, Akbar Biswas, also corroborated his statement, and proved that the prisoner told him about a year after his son's departure that he was quite well and was in the west, and suggested to him to give some money for his "well-being." He says he gave the prisoner four or five rupees. A witness named Asmutoollah proved that Murtaza went away from his village about 8 years ago, and was absent four or five years. Haroo proved that he was a fellow pupil with Murtaza for a few days at the house of the prisoner.

Mr. Ghose's chief point as to the evidence of Murtaza was, that the offence was not shewn to have taken place since the commencement of 1862, when the Penal Code came into operation. But, according to the evidence, Murtaza was only four or five months with the crescentaders, and while at Mulka he heard of the affair at Topee Meanee, which took place in 1863. Murtaza seems to have come straight from the prisoner's house. This would make it probable that it could hardly have been much earlier than the middle of 1862, when Murtaza left the prisoner's house; and that Murtaza and the witnesses are right when they put his departure from that house about 8 years before the trial, or in other words in the middle of 1862.

Mr. Ghose attempted to show that there were discrepancies in the evidence of these witnesses. But the evidence as regards Murtaza appears to us to be reliable.

Manoollah says the prisoner preached jehad at the mosque at Laghatta. He said the war was in the west against the infidels. Persuaded by the prisoner's preaching, he went with three others by Rajmahal to the house of Yahiya Ali at Patna, and thence to Mulka, where he saw about 1,000 men under Fyaz Ali and Moulvie Abdoollah. He says he saw Murtaza at Mulka. The witness does not pretend to say that the immediate cause of joining the rebels was the preaching of the prisoner.

Baboo Shaik proved that the prisoner preached jehad at Laghatta. He said that it was great merit to aid in a war against the infidels which was going on in the west. He says that with two other men he went to prisoner's house at Narainpore and remained one night. The prisoner gave them three rupees as khorakee for daily food, and told them to go to the house of Moulvie Yahiya Ali at Patna. There they got twelve rupees to carry them on, and from there they went by way of Rawul Pindee to Mulka. The witness says he was there ten or twelve days and then ran away.

Shuriatoollah lives at Laghatta. He corroborates the story of the two last witnesses

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by proving that they were away from the village—Manoollah for two years and a half, and Baboo Shaik for one year and a half—and that when they came back he heard them say they had been to the jehad in the west. The witness does not appear to be hostile to the prisoner; he says he never heard him preach jehad.

Salim gives similar evidence. Both witnesses speak to the prisoner's having preached at Laghatta.

GholamAkbar proves that the prisoner preached in the boitokhana of Mooteeoollah Moonshee that it was meritorious to join the jehad against infidels in the west; that he had conversation with certain persons and ultimately joined the jehad; that he went to Ibrahim Mundle's house at Islampore and from thence to Mulka where he saw Manoollah and Murtaze and others whom he names. Witnesses are called to prove that he was absent from his house at the time when he says he was on the frontier.

Mahomed Hossein, desiring to go to the jehad, was sent to the house of the prisoner, who gave him money for his journey, exhorted him to be faithful, and sent him to the house of Ibrahim Mundle at Islampore. Ibrahim Mundle sent him on to Patna to the house of Yahiya Ali. He says Yahiya Ali preached every day about the jehad The witness went on to Mulka where he remained about a year. After the witness came back he went with the prisoner to Bahla. He says the prisoner was preaching jehad at that time.

Atur Biswas proved that while the prisoner was preaching in the Bahla mosque on the merits of a jehad in the west against the infidels, and that it was a sure road to paradise, a son of his ran away and that he found him at the house of Ibrahim Mundle.

Shahadut Shaik and Shufoolla tell a story similar to that of Atur Biswas. The nephew of the one, Kureem Buksh, and the son of the other were traced to Ibrahim Mundle's house at Islampore. These witnesses say nothing about the prisoner. The witness Shahadut Shaik says "they told us Mahomed Hossein had taken them to go west."

Musloo corroborates the story of Mahomed Hossein by proving that he and Mahomed Hossein were fellow-students with Fuzli Ahmed Meah; that Mahomed Hossein spoke to him about a jehad and that he went with Mahomed Hossein to the house of Ameeroodeen, but that his brother Ashloo came and fetched him away.

This evidence appears to us abundantly sufficient to justify the finding of the Judge and Assessors that the prisoner is quilty on the 6th charge, *viz.*, that he abetted the waging of war against the Queen by engaging in a conspiracy with Ibrahim Mundle and others, and in pursuance of that conspiracy instigated Murtaza, Manoollah, and others to the waging of such war.

The next subject we propose to consider is the 13th charge, which relates to the collecting of money to forward the objects of the conspiracy.

Borkhoordar says that he was formerly a disciple of the prisoner—the prisoner told him there was a jehad in the west at Mulka, and that it was great merit to join in it and to send food to the brethren who were fighting for it. The witness says that Sameeroodeen, a disciple of the prisoner, collected money at the mosque where the prisoner preached. He gave two and four annas at a time and continued the payments for ten years. He gave the money especially for the jehad.

Shakee Mundle says the prisoner preached urging people to give contributions for jehad; he gave him on one occasion 8 annas, at another one rupee. Shareatoollah proves that he gave the prisoner 2 rupees 8 annas out of the *fitra* which he had collected from the villages for the jehad. Torah Biswas confirms the story of Shureatoollah. Ali Mahomed does the same.

In the evidence as printed it is made to appear that there is a discrepancy in the statements of these witnesses as to the time at which this money was given, and Mr. Ghose made a great point of this discrepancy. But on referring to the original record of the Sessions Judge, it appears that the word which has been erroneously printed "evening" in the evidence of Shureatoollah should be "morning." And thus the supposed discrepancy disappears.

Inayutoollah proved that he gave money for the jehad, 5 pice a head for his family, up to the last three or four years. This money went to the prisoner.

Ibrahim Mundle of Hanspookur proved that the prisoner preached that it was meritorious to give money for the jehad; that he gave 7 annas a year for many years up to about half a year ago.

Habool Moollah, a boatman, proved that the prisoner collected some dhan (grain) from the

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villages for the jehad in the west, and hired his boat to take about 30 maunds which had been collected to his own village. Adalut and Nazir Mistree confirm this evidence.

Salim and Tenoo Mundle proved that the prisoner preached jehad, and said it was great merit to give for the war which was against the English and the Nazarenes; but they gave nothing as they had nothing to give.

Adalut Mundle proved that the prisoner Ibrahim Mundle and Habilas Mundle came to his house in a gharee in which were two bags of rupees, which they said had been collected at three mosques. Habilas in the presence of the prisoner urged the witness to become a sirdar for the collection of funds for the jehad. The prisoner asked the witness to lay aside a handful of rice after every meal, to sell it and send the proceeds for the jehad The evidence of this witness is confirmed by his servant Daor Shaik.

The evidence seems to us full and clear. The Judge and Assessors could scarcely have come to any other conclusion than that at which they arrived, *viz.*, that the 13th and 15th charges were brought home to the prisoner.

The next witness to whose evidence I shall advert is that of Hazaree, who describes himself as having been a pupil of the prisoner five years ago, as having studied with him about eight or nine months, and during this time accompanied him to Baghari, Kumlabaree, and other places He says—"At Bag-"haree we stayed in the mosque of Shuriat-"oollah Haji fifteen or sixteen days. The "prisoner was preaching and collecting "money for jehad. He told me to take some "money which he had collected to Ibrahim "Mundle at Islampore. I and a fellow-"student, Domun, took Rs. 600 to Ibrahim "Mundle. I took 300 and Domun took 300. "The prisoner gave me the 300 I was "charged with; we delivered the money to "Ibrahim Mundle. We returned next day "and went to the prisoner who was at Hur-"reepore Chatra, from thence to Misreebooja "Kharekpore and stayed one day in Chand "Sirdar's house. Then we came to Hans-"pookur and stayed in a mosque. Then "went to Badga and stayed in Goomanee "Mundle's house. Then we returned to "Hanspookur. Then the prisoner told me "he was going to Kumlabaree. I was to go "to Musreebooja and bring whatever money "had been collected. I did so and brought "back Rs. 25, which I gave the prisoner at "Kumlabaree in the house of Asalut Mundle. "At Kumlabaree Rs. 10 were collected from "Asalut Mundle, Elahee Bukah, and Gureeb-"oollah. Then I was sent to Maldah to "fetch one Goonee. I found him. A ser-"vant of Baboo Alum Shah and he came "with me to Kumlabaree. He received Rs. "200 with instructions to take it to Ibrahim "Mundle at Islampore, after which we went "to the prisoner's house at Narainpore. I "remained there half a month—then went "home because the prisoner wished me "to go to the jehad, but I did not wish to do "so. The money that Goonee Khan took "was collected from different villages as con-"tributions for the jehad."

The prisoner has apparently attempted to deny all knowledge of Hazaree. He called many witnesses who in answer to questions by him said that they did not know any person of the name of Hazaree. One of these witnesses, Shokeadi Fakeer, said he knew Hazaree, that he was a respectable man, but that he had never seen him with the prisoner. There is however a good deal of evidence to corroborate the witness Hazaree's statement, that he was a pupil of the prisoner and was with him at the places mentioned by him. Hazaree must, no doubt, be treated as an accomplice, and there is very little to corroborate his evidence.

Elahee Buksh says he saw a bag said to contain 190 rupees, money collected for jehad, with Goonee Khan. This, he says, was in the house of Asalut Mundle. That a meeting between Goonee Khan, the prisoner, and others, said by Elahee Buksh and Hazaree to have been present, took place in the house of Asalut Mundle is confirmed by the evidence of the prisoner's witness Zohoordi Mundle. That the prisoner and his disciples went to the house of Goomanee Mundle appears from the evidence of the prisoner's witnesses Hajee Inayutoollah and Deanut-oollah.

Chand Mundle, called as a witness by the prisoner, says he does not know Hazaree and that he never gave him money. But upon one very material point he does not contradict Hazaree. He does not say that the prisoner did not preach in his mosque, though he does say that the prisoner did not preach jehad in the villages.

The evidence of Hazaree that the prisoner did preach in Chand Mundle's mosque is corroborated by Baboo Mundle.

Mr. Ghose pointed out that the witness Hazaree's evidence is in conflict with that of

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Shuriatoollah Haji as to the time at which the prisoner stayed in the mosque of Shuriatoollah,—Shuriatoollah saying that the prisoner only stayed there one night, while Hazaree says "we stayed there 15 or 16 days." The discrepancy is certainly remarkable. But I cannot say that the Judge and Assessors would not have been warranted in giving credence to the story of Hazaree. The proof that collections were being made for jehad at the mosques in different villages by and under the direction of the prisoner is abundant. The evidence of Hazaree is not the only direct proof that the prisoner was actively forwarding money for the jehad. There is that of Adalut Mundle and his servant, Daor Shaik, to which I have already alluded.

The prisoner is shewn to belong to a peculiar sect distinct from the great classes, Soonnee and Sheah, to which the Mahomedans of this country chiefly belong,—to be a religious enthusiast, a zealot who goes round from village to village telling people to fast and pray, not to commit evil, to abstain from superstitious observances, such as offerings at the tombs of saints, to give alms, to go on pilgrimage and to contribute if but a handful of rice out of each meal to the expenses of war against infidels. It cannot be supposed that a man of such character would be guilty of the dishonesty of habitually appropriating the collections so made to his own purposes. Unless we are to assume that he was guilty of embezzlement, the money collected must have been forwarded by the prisoner to the heads of the conspiracy.

I think, then, that it is impossible to say that the Judge and Assessors were not right in convicting the prisoner on the 14th charge.

It is not necessary to go into the other charges which are merely subordinate.

Great stress was laid by Mr. Ghose on the fact of the animosity or supposed enmity arising out of religious differences of certain persons named Abbas Ali, Tofiloollah, Nusr-ul Huq and Itwary.

But the evidence in the case shows graver motives than even the hot dispute on matters of ceremonial, such as "ameen," "ruffadeen," "burati khana," for the hostility which many of his neighbours may entertain towards the prisoner.

He is shewn to have worked on the feelings of young boys of fifteen or sixteen, many of whom have been enticed away from their homes and induced to join in the jehad. Some of these have been followed and have been brought back by their parents. Of those who persevered considerable numbers appear never to have returned or been heard of again. These, no doubt, if not killed in battle, have either perished from exposure or disease or fallen in conflicts with jealous or hostile tribes on the North-West frontier.

The offences of which the prisoner has been convicted are punishable under the 121st Section of the Indian Penal Code with *death or with transportation for life*, with forfeiture of property. The sentence of transportation for life with forfeiture of property appears to us to be proper.

We reject the appeal.

The 25th February 1871.

Present :

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Appellate Court—Judgment—Additional evidence—Appeal—Sections 408, 419 and 422, Code of Criminal Procedure.

Dhunobur Ghose, *Petitioner*.

Mr. Munmohun Ghose, and *Baboos Debendro Chunder Ghose* and *Grish Chunder Mookerjee* for the Petitioner.

Under Act VIII of 1869, the Appellate Courts are limited to pronouncing judgment in the manner prescribed by Section 419.

Section 408 does not apply to the case of a person whose appeal has been dismissed after additional evidence has been taken under the provisions of Section 422, and no appeal lies from a judgment upon an appeal under Section 422 Act VIII of 1869.

Norman, C. J.—We do not think it necessary to go through all the points taken by Mr. Ghose in this case ; they have been disposed of in the course of the argument. The case appears to have been in many respects very well conducted by the Assistant Magistrate, Mr. Cotton, who has shewn

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great tact and firmness in dealing with the objections taken before him, and we see no reason whatever for questioning the propriety of the sentence. which has been confirmed by the Sessions Judge.

The prisoner, Dhunobur Ghose, was convicted by Mr. Cotton, the Assistant Magistrate of Chooadangah, of criminal misappropriation, and sentenced to rigorous imprisonment for two years and a fine of 300 rupees, and in default of payment of the fine to a further imprisonment for six months. An appeal was presented by the prisoner to the Judge of Nuddea. In consequence of certain defects in the evidence, the Judge directed that additional evidence should be taken upon particular points. Certain witnesses were examined before the Assistant Magistrate, the additional evidence was certified by him to the Appellate Court, and thereupon the Sessions Judge proceeded to dispose of the appeal in pursuance of Section 422 Act VIII of 1869.

Mr. Ghose claimed a right on the part of the prisoner to appeal to this Court upon the facts, as if the prisoner had been convicted on a trial held by a Court of Session, and contended that such right was given to him by the provisions of Section 408. Under Section 422 Act XXV of 1861 if the Appellate Court ordered additional evidence to be taken, and on the result of the further enquiry additional evidence being certified to the Appellate Court, it was competent to the Appellate Court to proceed to pass such judgment, sentence, or order as to such Court might seem right. A Full Bench of this Court held that under the law as it stood before the passing of Act VIII of 1869, the sentence of the Appellate Court hearing a case on fresh evidence under Section 422 was a *new sentence*, and not a mere modification of the sentence of the Lower Court; and that the Appellate Court hearing a case on additional evidence under Section 422 had power to enhance the punishment awarded by the Lower Court. In the case of Mohesh Chunder Chatterjee and others reported in the 2nd Weekly Reporter, page 13, and in some others cases, it was held that from that conviction and sentence, so treated by the Full Bench as a new conviction and sentence, an appeal lay under Section 408.

It appears to us that whatever may have been the law under Section 422 Act XXV of 1861 from a judgment upon an appeal under Section 422 Act VII of 1869 no such appeal lies. Under Act VIII of 1869 the Appellat eCourts are limited to pronouncing judgment in the manner prescribed by Section 419. They may alter or reverse the finding and sentence or order of the inferior Courts, but not so as to enhance any punishment that has been awarded. The prisoner whose appeal is dismissed, or on whose appeal the finding and sentence of the Lower Court is modified, is not a person convicted on a trial by a Court of Session. He is merely a person who has been convicted by the first Court, and whose appeal has been disposed of by the Appellate Court.

For these reasons it appears to us that Section 408 does not apply to the case of a person whose appeal has been dismissed after additional evidence was taken under the provisions of the Section 422.

The application to hear the case on appeal is refused.

The 25th February 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Procedure — Accused — Witnesses — Cross-examination.

The Queen *versus* Ishan Dutt and others, *Appellants.*

Committed by the Magistrate and tried by the Sessions Judge of Beerbhoom on a charge of voluntarily causing grievous hurt.

Baboo Mohendro Lall Seal for Appellants.

Having regard to Section 375 of the Code of Criminal Procedure, a Magistrate is bound to take steps to procure the attendance of all the witnesses mentioned by the accused in the list delivered to the Magistrate by whom he was committed.

Per Kemp, J.—Where a witness called by one of the parties is a competent witness, the opposite party has a right to cross-examine him, though the party calling him has declined to ask a single question.

Kemp, J.—I THINK it right to remand this case to the Sessions Judge with directions to insist upon the attendance of the witness Showdaminee Napitnee. It appears on the record that this woman was named before the Magistrate by the prisoners as a witness for their defence in the Sessions

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Court. A summons was issued, but it appears from the return to that summons that the witness Showdaminee refused to accept service, and that she absconded. On this return the Magistrate passed a formal order "that it be kept with the record," and no further steps appear to have been taken by him to enforce the attendance of this witness. At the trial before the Sessions Court the prisoners through their pleader demanded as a right to have this witness summoned. I think that they were entitled to do so under Section 375 of the Code of Criminal Procedure, which enacts "that an accused person shall not be entitled of right to have any other witnesses summoned than the witnesses named in the list delivered to the Magistrate by whom he was committed." Now, it is clear that in this case this witness was named in the list delivered to the Magistrate by the accused; and therefore the prisoners as a right were entitled to have her examined. Moreover she appears to be a material witness. We cannot dispose of the case satisfactorily without her evidence being taken. The case is therefore remanded for the purpose of enforcing the attendance of Showdaminee and taking her evidence. After taking her evidence the Judge will call upon the prisoners for their defence, take a fresh opinion from the Assessors, and pass a fresh decision.

The next point taken by the pleader for the prisoners is, that the Judge is wrong in not having permitted the pleader for the prisoners to cross-examine the witness Kedarnath Mitter, Sub-Assistant Surgeon of Rampore Haut. The Judge says in his judgment "that the prisoners' pleader wished to cross-examine this witness, as to the result of any conversation he might have had with his patient, but that the Court demurred to this as the witness was only examined in chief as to his professional examination and treatment of the wounds." "Any examination," the Judge observes, "of this witness as to the facts of the case could only be carried on by the prisoners' pleader on the witness being called as a witness for the defence, and not in cross-examination of his evidence given as a medical man on behalf of the prosecution." The pleader for the prisoners in support of his contention has called our attention to several passages of Taylor on Evidence. It appears from that authority that in America a party has no right to cross-examine any witness, except as to circumstances connected with matters stated in his direct examination; and that if he wishes to examine him respecting other matters, he must do so by making him his own witness, and by calling him as such in the subsequent progress of the cause. Now in this case the Sub-Assistant Surgeon stated circumstances in his direct examination which were connected solely with the injuries inflicted upon the witness Bacharam, and the points upon which the pleader for the prisoners wished to examine the said witness Kedarnath are not connected with any circumstances stated in the direct examination of the witness; and, therefore, if we were to apply the rule which obtains in America the prisoners would have to make Kedarnath Mitter their own witness, by calling him for the defence and then examining him respecting other matters than those connected with the circumstances stated in his direct examination; but there is another passage to be found in page 1155 of the same work, which lays down that if a witness called by one of the parties is a competent witness, the opposite party has in strictness a right to cross-examine him, though the party calling him has declined to ask a single question. I think that in this case as the witness Kedarnath Mitter was a competent witness, and as he was called by the prosecution, although he was questioned by the prosecution only as to such matters as came within his professional knowledge, and he refers only to his professional examination of the wounds inflicted upon Bacharam and to their treatment, the Judge ought to have allowed the pleader for the prisoners to cross-examine that witness without making him a witness for the defence. We therefore direct that on the re-trial of the case which we have ordered with reference to the evidence of the witness Showdaminee, he will re-call the Sub-Assistant Surgeon and permit the pleader for the prisoners, or the accused themselves if no pleader should appear on their behalf, to cross-examine this witness.

Glover, J.—I entirely concur in sending back this case. The prisoners did all they were bound to do in summoning their witnesses, and if one of the most important of them evaded summons, as it appears from the Nazir's return that she did, it was the Magistrate's duty to have taken all the measures required by the Procedure Code to enforce that witness's attendance. The prisoners were in jail at the time, and are not to be supposed to have known of the return, and could not therefore have applied to the Court sooner than they did. I think that Showdaminee's evidence should be taken, and that the Sessions Judge should

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pass a fresh decision in the case after regarding the evidence.

As to the other point raised, namely, the right of the prisoners to cross-examine the Sub-Assistant Surgeon, I have some doubts as to the correctness of the objection. As, however, Mr. Justice Kemp thinks that the Sub-Assistant Surgeon might have been so cross-examined, I do not desire to object to the case being remanded on this point also.

The 4th March 1871.

Present:

The Honorable H. V. Bayley and Dwarkanath Mitter, *Judges.*

Jurisdiction—Magistrate of the District — Obstruction — Section 308, Code of Criminal Procedure.

Reference to the High Court under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Dinagepore, in the case of Grish Chunder Chuckravaty.

The Magistrate of a District can alone hold proceedings in a case (such as the removal of a thatched house) under Section 308 of the Code of Criminal Procedure. The Joint Magistrate while in charge of the Magistrate's office has no such jurisdiction.

Reference.—On the 16th January 1871 a notice was issued on the petitioner by the Joint Magistrate, Mr. E. V. Westmacott, ordering him to remove a certain thatched house on his premises within 10 days, on the ground that it was likely to occasion conflagration. The notice was served on the 26th idem.

Upon receipt of this notice, the petitioner applied to the Magistrate, Mr. J. H. Ravenshaw, on 3rd February, showing cause against the removal of the house in question, and applying for a Jury to try whether the order was reasonable and proper. This petition was presented to the Joint Magistrate who was in charge of the Magistrate's Office, the latter being absent on tour. On 6th February the Joint Magistrate passed the following order:—"The applicant is a "member of the Municipal Committee, and "it is for the Magistrate to decide whether "it is fitting that an exception should be "made in his favor, by allowing him to put "up a thatched house." This was endorsed by the Magistrate in these terms—"I have "no power to interfere against the Joint "Magistrate's order. It was passed while "he was in charge of this office. Moreover "I have been to the spot, and considering "the applicant is a member of the Com-"mitee I think his objection is a very bad "example."

I am of opinion these orders do not meet the requirements of the law and should be quashed, as they are not in conformity with the directions of Section 308, Code of Criminal Procedure, under which these proceedings have manifestly been conducted, although there is nothing in the proceedings themselves specifying the authority under which the order was issued on the petitioner.

The conservancy powers of a Magistrate, as defined in Schedule K Act VI of 1868, do not appear to embrace such a case as the present; and I think it is clear he could not require the petitioner to remove a building on any other grounds than those specified therein, and therefore, if the order is justified by any law, it must be under Section 308, Code of Criminal Procedure, under which the case seems clearly to fall.

I consider the procedure adopted bad; because in the first place it is only the Magistrate of a district or of a division of a district that can issue such an order as was served on the petitioner. The mere fact of Mr. E. V. Westmacott being in charge of the Magistrate's office does not, I think, invest him with this power.

With reference to the cause shown by the petitioner against the removal of the house, no consideration has been paid to the grounds on which it was urged. Both the orders of the Joint Magistrate and the Magistrate appear to me quite irrelevant to the matter, and as the petitioner applied for a Jury, the Magistrate was bound, I conceive, to appoint one to try the question at issue.

Judgment of the High Court:—

Mitter, J.—We concur with the Judge in thinking that the proceedings of the Joint Magistrate in charge of the Magistrate's office are illegal. The Magistrate alone in this instance could hold those proceedings, and the applicant was clearly entitled to have the matter settled by a Jury. We quash the proceedings of the Joint Magistrate as illegal.

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The 8th March 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Jury—Summing up—Approver's evidence—Corroboration—Evidence for defence—Evidence to character.

Committed by the Deputy Magistrate and tried by the Sessions Judge of Dacca, on the charges of dacoity and abetment of dacoity.

The Queen *versus* Mohima Chunder Dass and others, *Appellants.*

Mr. Munmohun Ghose, and *Baboos Nullit Chunder Sein, Hurry Mohun Chuckerbutty* and *Tarakant Chuckerbutty* for Mohima Chunder Dass.

Baboo Jogendro Nath Bose for Nagur Banshee.

Baboo Juggadanund Mookerjee for the Government.

Where a Sessions Judge in his charge to the Jury in a case in which an approver accomplice gave his evidence drew the attention of the Jury to the necessity for requiring corroboration to the approver's evidence before they could convict upon it, and the Jury notwithstanding his charge convicted upon the uncorroborated evidence of the accomplice, it was held, following a Full Bench case cited, that the High Court could not interfere with such conviction.

Where a Sessions Judge omitted in his charge to the Jury to comment on different parts of the evidence for the defence, to which he simply alluded as being unimportant, and allowed evidence as to character and hearsay evidence to go to the Jury, the High Court acquitted the prisonor, the other evidence in the case being insufficient for conviction.

Evidence as to character ought not to be laid before a Jury, but should only be taken and considered by the Sessions Judge in awarding punishment.

Jackson, J.—THESE prisoners have been convicted of several dacoities upon boats which took place on the river Pudda about the 14th or 15th Assar of last year, and have been sentenced to different terms of imprisonment. The trial was held by the Sessions Judge of Dacca with a Jury, who were unanimous in finding a verdict of guilty. The prisoners have appealed to this Court. Mr. Ghose appeared on behalf of Mohima Chunder Dass, and a Vakeel of this Court for Nagur Banshee. The remaining prisoners were unrepresented.

The verdict of the Jury is final on all questions of fact, and the only question for consideration is whether there is legally sufficient evidence to support the conviction, or whether there has been such illegality in the proceedings in the course of the trial as requires this Court to annul the conviction.

As regards some of the prisoners there is ample evidence, and there can be no doubt in the mind of any reasonable person of their guilt. The fact of the occurrence of the dacoities is clearly proved. They were reported to the Police immediately after their occurrence. There is some evidence that the prisoners were at the time associated together, being dependants and servants of the prisoner Mohima Chunder Dass ; though, upon this point, the witnesses should have been required to give more distinct exact information. An approver witness, Gobind Sircar, has given a detailed account of the manner in which the prisoners assembled and went about in a boat from place to place commiting these dacoities at night. There is corroboration of his evidence as regards several of the prisoners. There is evidence that previous to the dacoities on two boats, which were tied to the bank near each other, the prisoners Afazooddeen and Kalai went on board one of the boats on the pretence of asking for fire. They were, therefore, together on the spot about the time when the dacoities took place. There is further evidence that the day after the dacoity, the prisoners Afazooddeen, Panchoo Hajam, and Ibrahim were seen together in a boat, were observed on being hailed to throw money into the river ; that when the attention of Chowkeedars was turned to them and attempts were made to arrest them, Afazoodden and Panchoo Hajam jumped into the river and swam to the other side ; that Afazooddeen when seized admitted that he had thrown into the river money which he had obtained in the dacoity, and offered to dive for it and pick it up. The evidence of the approver is further confirmed by the admissions made by the prisoners Ibrahim, Kolai, Panchoo Hajam, Mohesh Hajaree and Nagur Banshee, not only before the Police when they each gave up a share of the money which each had obtained in the dacoity, but also before the Deputy Magistrate before whom they were taken. It is also confirmed by the discovery of a cloth in the house of Afazooddeen, which was proved to be a portion of the property stolen in one of the dacoities. As regards all these prisoners, there is therefore ample

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evidence that they were engaged in the dacoity. As against the prisoners Mohima Chunder Dass, Gooroo Churn and Dhonai, the evidence is not so clear as against the two latter. There is not that corroboration of the approver's evidence which it is the rule to require; and though there is some corroboration as against Mohima Chunder Dass, it is not of a very distinct and certain character.

The first point which Mr. Ghose argued on behalf of Mohima Chunder Dass, but which in fact affects also the cases of Gooroo Churn and Dhonai, is that the Sessions Judge did not place sufficiently strongly before the Jury the necessity for requiring corroboration to an approver's evidence before convicting upon it. The Sessions Judge stated the law to the Jury in the following terms :—"There can be no doubt that in a "case like the present, the evidence of a "pardoned accomplice requires corroboration before it can suffice to sustain a conviction. But the prosecution maintains that "this corroboration exists in the evidence of "many other witnesses, as to the acts and "circumstances related by them." The Sessions Judge details these facts, and then adds—"I do not think that corroboration "of the approver's evidence, where he "speaks of wholly innocent and legal acts, "relieves the prosecution of the *necessity* "of producing something corroborative of "the statement made by him as to the "dacoities on Kurhaie's and Dhopai's boats. "I think that the approver's evidence respecting the transactions should be corroborated by something connected with those "particular transactions." The Sessions Judge then points out against which of the prisoners there is corroboration, leaving out however one important item of the evidence; and he adds that there is some reason to doubt the whole truth of the approver's story on account of its strangeness, and finally he concludes—"You should consider "very carefully the evidence given by Gobind approver before accepting it as conclusive of the guilt of any of the prisoners." I think that in these remarks to the Jury, the Sessions Judge did distinctly point out to them that they ought to require corroboration to the approver's evidence before they convicted upon it, and that that corroboration should be upon some point relating to the dacoities, and not to other facts which were innocent and legal. This latter remark especially alluded to Mohima Chunder Dass, because the prosecution had adduced evidence to prove that about the time when the dacoities took place, the prisoner Mohima Chunder Dass was with the approver Gobind Sircar and other persons going about in a boat on the river collecting rents from his villages, and stopping at Bohor on his way to Dacca. Mr. Ghose argued that the Sessions Judge should have pointed out to the Jury that they could not convict without further corroboration. I think that he performed his duty in telling them that they ought not to convict without sufficient corroboration, and therefore upon this ground I should not have interfered with the conviction of the prisoners. The law upon the subject has been clearly laid down in the case of Elahi Buksh, W. R., Vol. 5, page 81. It was there ruled, first, "that a conviction may be legally had on uncorroborated evidence of one or more accomplices;" secondly, "that it is necessary that the evidence of accomplices should not be left to the Jury without such directions and observations from the Judge as the circumstances of the case may require."

Mr. Ghose pointed to the illustrations of the law given in pages 87 and 88 of the Report, and contended that the Sessions Judge had acted against the rules there laid down. But the Sessions Judge in this case did not tell the Jury that the evidence of the approver alone was sufficient to justify them in finding the prisoners guilty. He did advise them not to convict upon the uncorroborated evidence of a pardoned accomplice. He did not tell them that the uncorroborated evidence of an accomplice given under a tender of pardon was admissible, and that it was for them alone to form an opinion upon it; that a conviction founded upon such evidence would be legal; and that such evidence without corroboration might be acted upon with as much safety as that of any other accomplice. On the contrary, the Sessions Judge distinctly pointed out to the Jury the necessity for corroboration, and the necessity that that corroboration should be upon circumstances implicating the prisoners in the crimes charged upon them. The Sessions Judge then clearly performed his duty. If the Jury notwithstanding his charge convict upon the uncorroborated evidence of an accomplice, this Court cannot upon the view of the law laid down in the Full Bench decision referred to, interfere with that conviction. Such convictions have been held to be legal even in England, where the Jury system has been long in force. They are not illegal here.

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But Mr. Ghose on behalf of the prisoner Mohima Chunder Dass has taken further objections to the summing up of the Sessions Judge as against his client. First, he urges that the different portions of the evidence which affected his client were not distinctly stated to the Jury and observations made upon those portions of the evidence. Secondly, he points out that evidence of an inadmissible character, such as that his client was a notorious dacoit, and hearsay evidence was allowed by the Sessions Judge to be given, and no remark was made by the Sessions Judge that this should not be allowed to have any weight in the decision of the Jury. Thirdly, that the Sessions Judge omitted to point out to the Jury the evidence of the prisoner's witnesses, and passed them over with the remark that that evidence was not important, whereas it was of the most vital importance to the prisoner, proving as it did, if believed, that the prisoner could not have been present, as alleged by the approver, at the dacoities with which he was charged.

It seems to us that the evidence, as given in the trial and the summing up of the Sessions Judge, is open to these remarks. The Sessions Judge did allude to the evidence for the defence, and did pass it over with the remark that it was of no importance. The evidence was the more important because, although several of the dacoits when first arrested and taken before the Deputy Magistrate confessed their guilt and named the accomplices, they distinctly stated that the prisoner Mohima Chunder Dass had gone with them to Dacca and had left the boat there and remained at Dacca, and that the dacoities were committed after he had left the boat and on their return from Dacca. It is not as if they had merely left out his name or as if they wished to screen him, as their master, from all implication in the dacoities, because they not only mention his name, but some of them state that a portion of the plunder was set apart to be made over to him Still their statements are that he was not present at the dacoities, and so far they confirm the fact that the prisoner was at Dacca at the time the dacoities were committed. The approver Gobind Sircar is the sole individual among the dacoits who alleges that Mohima Chunder Dass was present and took part in the dacoities. The Sessions Judge should have pointed out all these facts to the Jury, and their bearing upon the evidence for the defence. Again, the Sessions Judge should not have allowed the witness Lokenath, Head Constable, to give hearsay evidence and evidence to character. He says that on the report of the dacoity, he proceeded to the spot and there he "learned that Mohima Gooroochurn, who used to be one of a noted gang of dacoits, Dhonai Khan and Panchoo Hajam had gone out together in a boat on the day before the night of the dacoity;" that he went next morning to the house of Gooroochurn and was informed that he had gone with Mohima Chunder to Dacca, and at Komerpore he was informed that Afazooddeen and Kalai had gone with Mohima;" and lastly, that he knew well that Mohima was a budmash himself and that he had taken Gooroochurn, who is a notorious dacoit, to be a ryot close to his own house. Section 57 Act II of 1855 enacts that the improper admission of evidence shall not of itself be ground for a new trial in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision. Had the Sessions Judge in his summing up pointed out that this was not proper evidence, and that the Jury in coming to their verdict must shut it out from their minds, its admission alone might have formed no ground for a new trial. But the absence of any such remarks, coupled with its improper admission, is very likely to have prejudiced the prisoner in the minds of the Jury. Coupling this with the fact that the Sessions Judge told the Jury that the evidence of the witnesses for the defence was of no importance, whereas that evidence was to some extent corroborated by other facts proved upon the trial, we are of opinion that the conviction of the prisoner upon this trial cannot stand.

Mr. Ghose has asked us to acquit the prisoner. The mode in which this Court should act upon appeal in cases of this description is laid down in the case of Elahi Buksh above alluded to. It was ruled that "this Court may in all cases in which a finding of guilty is set aside upon appeal, if it considers it necessary, order a new trial. But if the Court is satisfied that the evidence is wholly insufficient to support any conviction against the prisoner, and would upon the same evidence have reversed a conviction if the case had been tried without the intervention of a Jury, there is no necessity and it would be improper to grant a new trial. In such a case the Court having set aside the verdict

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may order the prisoner to be discharged." Now, it seems to me that upon the evidence on the record, the conviction of Mohima Chunder Doss could not be confirmed if there was an appeal before us on the facts. Independent of the corroboration to his defence which has been above alluded to, there is no trustworthy corroboration to the evidence of the approver. The evidence as to his presence with the approver when collecting rents the day after the dacoities took place, is supported by a pretended receipt for rent which is produced. The Judge seems to have placed no reliance upon the evidence on this point. He does not allude to it in his summing up. If true, it contradicts the prisoner's *alibi*, and so far is very important. But we are satisfied that no reliance can be placed upon it. It is very probable that Gobind Sircar went and gave the receipts which are ascribed to him, but the receipt in the hand-writing of the prisoner Mohima is evidently a made up document, and no inference can be drawn from it. We think then that we ought not to direct a new trial in the case of this prisoner, but should order his discharge.

The cases of Gooroochurn and Dhonai are different. They have not attempted any defence. The account of their presence at the dacoities charged has been from first to last the same, and there is no reason to doubt their having been present and having taken part in the dacoities charged. Although as regards Gooroochurn evidence has been admitted which should not have been allowed, still there can be no doubt of his guilt.

We dismiss the appeal of all the prisoners except Mohima Chunder Dass, and we direct his discharge.

The Sessions Judge is requested to point out to the Deputy Magistrate, before whom these prisoners came in the first instance and who recorded their admissions, that the record of the examination shows that such examination was, if properly conducted, not properly taken down. The questions put should have been recorded as well as the answers, and a proper certificate appended to each examination. The utter disregard of the provisions of the law upon this point, and as to the attestation of examinations evinced by some of the Deputy Magistrates in the Dacca District, is deserving of severe censure. This is not the first time we have been obliged to notice it. The result of the carelessness of the authorities on this subject is, that the confessions are open to question as evidence in consequence of the illegal manner in which they are recorded. The provisions of the law being distinct should be distinctly carried out.

Mookerjee, J.—I am of the same opinion. I think also that the Sessions Judge has properly warned the Jury, and brought to their notice the fact that the approver Gobind was an accomplice witness deposing under an offer of pardon. The Sessions Judge has therefore acted according to the directions laid down in the case of Elahi Buksh; but I quite concur with my learned colleague in holding that the Sessions Judge should have put the evidence for the defence properly before the Jury instead of saying that that evidence is not important. He was wrong in laying before them evidence to the character of the accused. The Jury might have been in all probability prejudiced against the prisoners. Evidence to character should be only taken and considered by the Sessions Judge, and should influence him in awarding punishment. If the accused are persons of notorious bad character, the Sessions Judge in passing sentence should see what punishment is adequate and sufficient. That evidence should not be laid before a Jury. If the conviction had been had by the assistance of Assessors, I would have had no hesitation in discharging the prisoner Mohima Chunder. Under the circumstance of this case, I see no reason to direct a new trial of the prisoner Mohima. I would direct his release. As regards the other prisoners, I quite agree with Mr. Justice Elphinstone Jackson in upholding the conviction and sentence.

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The 11th March 1871.

Present:

The Hon'ble J. P Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge.*

Jurisdiction — Obstructions—Section 308, Code of Criminal Procedure.

Punchanun Bose and another, *Petitioners.*

Baboos Kalee Mohun Dass and *Romanath Bose* for Petitioners.

Proceedings under Section 308 of the Code of Criminal Procedure for the removal of obstructions may be originated by a Joint Magistrate in charge of a division of a district.

Norman, C. J.—It appears to us that there is no ground for interfering with the order of Mr. Quinn, the Joint Magistrate of Jessore, in this case.

The proceedings were originated by Mr. Quinn under the 308th Section of Act VIII of 1869, and it seems to me that the papers would probably not have been sent for if it had been brought to the notice of the Court that the Joint Magistrate, Mr. Quinn, was the Magistrate "in charge of the Sudder Division of Jessore."

The facts are briefly these :—

It appears that a fisherman, Chytunno Maloo, complaining that the defendants had obstructed a road leading from the Khoolna road to the bank of the Bhyrub river at a place called Kalliaghaut, an enquiry was directed to be held by the Police; and on its appearing that a right of way over this tract had always been enjoyed by the public, the Joint Magistrate made over the case to a Subordinate Magistrate of the First Grade *to be dealt with under Section* 320. The Subordinate Magistrate, Baboo Doorga Dass Chowdhry, made an enquiry and found that the way was a public thoroughfare; that it had been obstructed by the defendants' digging ditches across it, and he directed the defendants to remove the obstruction or to appear before him to show cause why such order should not be enforced.

This order was quashed by the Judge on appeal on the ground that the Subordinate Magistrate had no power to originate a proceeding under Section 308, and that proceedings under that Section could only be originated by a Magistrate of a district or *by a Magistrate in charge of a division of a district.*

The Judge therefore on the appeal of the defendants ordered that the Joint Magistrate should call up the case to his own file in order that he might deal with the complaint under Section 308.

Upon this the Magistrate, whose proceedings are headed as under Section 308, on the 21st of November 1870 directed notice to be served on the defendants stating that a petition had been filed complaining that defendants had obstructed a road leading from the petitioner's house (and used by the public) to the river, and directing the defendants to remove the obstruction within 10 days; or if the defendants had any objection that they should file such objection before the 2nd of December.

The defendants appeared before the Joint Magistrate and evidence was gone into at great length; the result of which was that the Joint Magistrate found on the evidence before him and by personal inspection that the road was a public road; in fact, a continuation of the road crossing the Khoolna road at right angles, and called the Dossâdee road, enclosed by fences and ditches at the sides leading to the river; and that such road had been obstructed by the defendants' digging ditches in various places. The Joint Magistrate ordered that the defendants should remove the obstruction from the road described in his proceeding of the 21st November.'

It appears to me that the Joint Magistrate's proceedings were regular throughout, and that there is no ground whatever for quashing his order which was passed in regular course.

It has been objected by Baboo Kalee Mohun Dass that the Joint Magistrate, in issuing the order of the 21st November, did so without having proper materials before him for taking proceedings upon the footing that the road was apparently a public road. But that contention is not well-founded. The Joint Magistrate had before him the petition which had been presented to him by Chytunno Maloo. On that petition under his direction an enquiry had taken place before the Deputy Magistrate under Section 320 in the presence of both parties, in the course of which enquiry it was made to appear to the Deputy Magistrate, who had jurisdiction in the matter, that the road was a public road. The evidence taken in that enquiry and the finding of the Deputy Magistrate were before the Joint Magistrate.

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If the order of the Joint Magistrate had been drawn up in this wise—on reading the petition of the petitioner, and the evidence of the witnesses A, B, and C, (taken before the Deputy Magistrate) and the finding of the Deputy Magistrate, it is ordered that the obstruction be removed, or if the defendant have cause to show against this order let him do so within 10 days;—it would have been an order such as this Court is in the habit of making in the usual course, and this Court would proceed on such materials as these without the slighest hesitation.

We see no ground for questioning the legality of the Joint Magistrate's proceedings in this case, and we therefore reject the application to quash his order.

The 18th March 1871.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Procedure—Accused—Plea.

The Queen *versus* Roopa Gowalla, *Appellant.*

Committed by the Magistrate and tried by the Officiating Sessions Judge of Patna on a charge of Murder in Dacoity.

An accused should *plead* by his own mouth and not through his counsel or pleader, though his counsel or pleader may at the proper time address the Court on his behalf.

THE prisoner appeals on matters of fact alone, which, as he was tried with a Jury, the law does not allow.

The appeal it rejected.

I observe that the accused is said to have pleaded not guilty "through his pleader," which is not in conformity with law.

The accused should *plead* by his own mouth, though of course his counsel or pleader may at the proper time address the Court on his behalf.

The 18th March 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Breach of the peace—Land disputes—Police report—Evidence—Section 318, Code of Criminal Procedure.

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Officiating Sessions Judge of Rajshahye.

Obhoy Chowdhry, 1st party, and Mr. Thomas Brae, 2nd party.

Babooo Mohiny Mohun Roy for the 1st party.

Mr. J. S. Rochfort for the 2nd party.

In a proceeding under Section 318 of the Code of Criminal Procedure, the finding of the Magistrate that he believes that a dispute exists likely to induce a breach of the peace must defend upon *legal* evidence in the case which he is investigating. A Police report is *per se* no legal evidence in such a case.

Bayley, J.—WE think that in this case the order of the Magistrate is illegal and must be set aside. His proceedings should be guided by the judgment reported at page 76, Vol. III, Bengal Law Reports,* in which the other

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* The 22nd September 1869.

Present:

The Hon'ble J. P. Norman and the Hon'ble F. B. Kemp, *Judges.*

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Officiating Magistrate of Mymensingh.

Kashee Kishore Roy and another, 1st party,

versus

Tarinee Kant Lahoree, 2nd party.

Baboos Sreenath Doss and *Romesh Chunder Mitter* for the 1st party.

Baboos Nullit Chunder Sein and *Hem Chunder Banerjee* for the 2nd party.

Norman, J.—THIS is a proceeding by the Deputy Magistrate of Jumalpore in Mymensiugh, by which one Tarinee Kant Lahoree has been maintained by the Deputy Magistrate in possession of some disputed land under Section 318 of the Code of Criminal Procedure. This case has been sent up to this Court under Section 434, Code of Criminal Procedure, by the Magistrate, Mr. O'Kinealey.

Several objections are taken to the regularity of the Deputy Magistrate's proceedings. But there is one and that the first, which is fatal, showing that the Deputy Magistrate proceeded without jurisdiction and that his order cannot be sustained.

It appears that in consequence of some petition presented prior to April last, an order was issued to the Police to proceed to the mofussil and make some enqui-

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judgments of this Court on this point have been reviewed, and where the decision of the Officiating Chief Justice and Mr. Justice Kemp has been very clearly recorded in the following terms :—" We are of opinion that " there is a clear reason for requiring a dis- " tinct *adjudication* as to the existence of " a dispute likely to occasion a breach of the " peace, before the Magistrate proceeds fur- " ther." Now the term ' adjudication' in the above passage means a finding on legal evidence. The finding of the Magistrate in this case is only on a Police Report, which Mr. Rochfort for the opposite party very properly admits, and which *per se* is no legal evidence in the case. Legal evidence must be something upon oath, or something to which the Magistrate himself deposes as having seen with his own eyes; but what he has acted upon in this case is no such legal evidence, and therefore no judicial adjudication can be said to have been come to in this case.

It is pressed upon us that there are many other cases on the file showing that there were disputes with regard to this land, but those *other* cases can be no evidence of an intended breach of peace on *this* special occasion, nor was any document connected with any of those cases referred to by the Magistrate as the ground of his action. Each case must be decided upon legal evidence bearing upon its own facts and with reference to its own surrounding circumstances.

We set aside the order of the Magistrate, but we express no opinion as to any title or possession of either party under decrees or otherwise. That is a matter beyond the scope of this reference under Section 434, or motion under Section 405 of the Criminal Procedure Code.

The order of the Magistrate is set aside.

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ries as to the complaint of Kashee Kishore Roy, one of the parties to the dispute, that some men had been collected by Tarinee Kant Lahoree with a view to a serious affray and that a serious affray was likely to occur.

On the 5th of April the Police Officer made his report. He stated that on the preceding day, that is on the 4th of April, he had been to the spot in question ; that he had found no assemblage of persons, and that he had seen nothing to lead him to think that there was any dispute or likelihood of an affray.

On the 14th of April there was a further report by the Police, which after stating, as in the former report, that there was no assembly or disturbance, concludes with the statement, wholly unwarranted by anything in the report itself, that if a recognizance were not taken, a very serious riot might take place in future with respect to a boundary dispute, which might lead to violence, if not murder.

The Deputy Magistrate makes an order which is endorsed upon that paper. He does not say that he is satisfied that a dispute likely to lead to a breach of the peace existed concerning the land in dispute. He records no proceeding stating the grounds on which he is so satisfied, but he simply orders that the case be registered under Section 318, and that the 12th of May be fixed for the hearing of the several parties and he directed that notice to that effect be served on the parties. Now it has been pointed out in many cases before this Court, more particularly in the case of Dewan Elahee Newaz Khan *vs.* Suburunissa, 5 Weekly Reporter, Criminal Rulings 14; that it is a condition precedent to the powers of a Magistrate to take up and decide a case under Section 318; that he should judicially decide that he is satisfied that a dispute likely to induce a breach of the peace exists; and that he should record a proceeding stating the grounds of his being so satisfied. Unless and until he shall have decided that preliminary matter, he has no jurisdiction to take up the case and decide the question of possession under Section 318.

In the present case there has been no such decision, and certainly there is no record of the grounds upon which such decision could be based. Therefore, it is clear that the order of the Deputy Magistrate adjudicating that Tarinee Kant Lahoree is in possession, and entitled to retain possession until ousted by due course of law, is an order made without jurisdiction, and is therefore void and must be quashed.

It would be quite enough for us to say that we are bound by the many decisions of this Court on this point. But we desire to add that we are of opinion that there is a clear reason for requiring a distinct adjudication as to the existence of dispute likely to occasion a breach of the peace, before the Magistrate proceed further. It is intended to prevent the Magistrate from rashly interfering with questions of possession which should ordinarily be decided by the Civil Courts, unless in cases where a breach of the peace or the commission of a crime is apprehended, and where it is necessary for the preservation of the public order that steps be taken by the Criminal Court.

We quash the order of the Deputy Magistrate.

Kemp, J.—I am of the same opinion.

The 18th March 1871.

Present :

The Hon'ble L. S. Jackson, *Judge.*

Procedure—Summons—Breach of the peace—Recognizance.

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Officiating Sessions Judge of Tirhoot.

Koonjebhary Chowdhry *versus* Eknath Gurain.

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The summons to a person to show cause why he should not be required to furnish recognizances to keep the peace should, under Section 283, Code of Criminal Procedure, set out the substance of the information against him.

When the party summoned shows cause, the Magistrate in taking evidence should look not merely to the question of possession, but also whether he is satisfied that there was a probability of a breach of the peace.

Reference.—THIS case arose out of a report from a Police Officer in the Durbhungah Sub-division to the effect that he was apprehensive that a breach of the peace was likely to occur by one party or the other. On this the Assistant Magistrate of Durbhungah issued a summons, under Section 283, calling on both parties to show cause why they should not be bound down to keep the peace for one year in a security-bond of 5,000 rupees each. Both parties appeared and the Assistant Magistrate appears to have examined certain witnesses on the side of Koonj Behary Chowdhry, and these alone; and he recorded his opinion that such evidence clearly made Koonj Behary Chowdhry in the wrong and shewed that Eknath Gurain was in possession. He considered that Koonj Behary Chowdhry has not been dispossessed, and accordingly ordered him to give rupees 5,000 as security to keep the peace towards Eknath Gurain for one year.

Koonj Behary has now appealed to me to call for the records of the case and refer it to the High Court, alleging several irregularities and errors of procedure.

I find on examining the case that there are three distinct illegalities requiring revision; and I beg to ask the High Court to quash the order of the Assistant Magistrate and pass such order as may seem proper.

The first illegality is, as urged, that the summons does not set forth the substance of the information as required by Section 283. It merely calls upon the two parties to show cause why they should not be bound down to keep the peace, but it does not say on whose information or in reference to what cause of quarrel the bond is required.

The second illegality is that the Assistant Magistrate failed to take evidence as to the probability of a breach of the peace and to adjudicate thereupon: the evidence of the witnesses he recorded was not on that point.

The third illegality is that the Assistant Magistrate without having instituted proceedings, as required under Section 318, Criminal Procedure Code, has pronounced on the question of possession.

Under these circumstances the order is, I consider, invalid and should be referred to the High Court for reversal.

The case is not one in which any explanation from the Lower Court appears necessary.

Judgment of the High Court:—

I think this order has been irregularly made.

The first objection stated by the Judge would not lead me to this conclusion, unless it appeared that the petitioner had been prejudiced by the omission, though doubtless the direction of the law that the summons should set out the substance of the information is very important and ought to be carefully complied with.

But it nowhere appears that on the petitioner attending in obedience to the summons, the Magistrate was "satisfied that it was necessary for the preservation * * * * to take a bond" (Section 288); and the evidence taken, which was on the petitioner's side, suggests nothing of the kind.

And Section 287, Code of Criminal Procedure, directs that if the Magistrate be not satisfied, &c., he is to discharge the person summoned.

All that the Magistrate seems to have had in his mind in examining the witnesses was the question of *possession*, which he seems to decide against the petitioner, though the inquiry before him was not of the nature of a proceeding under Section 318, Code of Criminal Procedure.

The power to require recognizances and sureties of the peace is a very important one, and the Court would not desire to tie up the hands of Magistrates in exercising it; but it should be apparent that in making such an order the Magistrate should have had present to his mind the conditions under which such an order can alone be made.

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The 25th March 1871.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Procedure—Sanction to prosecute—Sections 170 and 426, Code of Criminal Procedure.

The Queen *versus* Mohima Chunder Chuckerbutty, *Appellant.*

Committed by the Magistrate and tried by the Sessions Judge of Backergunge on a charge of fraudulently using forged documents as genuine.

Baboo Juggadanund Mookerjee for the Prosecution.

Baboos Kalee Mohun Dass and *Doorga Mohun Dass* for Appellant.

Where sanction under Section 170 of the Code of Criminal Procedure to prosecute a person criminally for fabricating false evidence was not given, it was held that the error was not cured by Section 426 of that Code, and the person charged was ordered to be discharged. The sanction given by the Sessions Judge after the case was committed to him and the prisoner had pleaded to the charge is not a sanction contemplated by the law.

Loch, J.—In a suit for arrears of rent for 1271, 1272 and 1273, instituted before the Deputy Collector, Moulvie Dilwar Hossein Khan, by one Essur Chunder Roy, the defendant Mohima Chunder Chuckerbutty pleaded payment and filed six receipts. The case, however, was ultimately decreed in favor of the plaintiff. In that case there were three defendants, and no appeal was preferred from the decree passed by the Deputy Collector on the 17th June 1870. Subsequent to the making of that decree, the plaintiff, Essur Chunder Roy, applied to the Deputy Collector for permission to prosecute Gooroo Churn and Nobin Chunder criminally, and the Deputy Collector on the 30th July 1870 made this order—"The judgment shows that the da- "khillas filed by the defendant are false. "Sanction is therefore given to the petitioner "to prosecute the defendant criminally." It is clear that this petition and its sanction related only to the parties mentioned therein, namely, Gooroo Churn and Nobin Chunder.

Subsequently, on the 29th August 1870, Essur Chunder Roy presented a second petition to the Collector, praying that he might be allowed to prosecute Gooroo Churn, Nobin Chunder and Mohima Chunder, the prisoner now before us, and others, and the Collector upon that petition made the following order:—"Sanction has already been given once by "the Deputy Collector. I however have no "objection to give it a second time as peti- "tioner desires it. Sanction therefore is "hereby given to the petitioner to institute "a charge of forgery, &c. This sanction is "given under Section 170 of the Criminal "Procedure Code." It is evident that this order relates to and confirms the sanction given by the Deputy Collector on the 30th July 1870 and goes no further. The Collector merely repeats the sanction already given by the Deputy Collector, and there is nothing to show that the Collector intended to extend it to the other persons mentioned in the petition.

It has been urged before us that the error, if any, is one which can be cured by the terms of Section 426 of the Criminal Procedure Code. The words of that Section are to this effect—"No finding or sentence passed "by a Court of competent jurisdiction shall "be reversed or altered on appeal or revision, "on account of any error or defect either in "the charge or in the proceedings on the trial, "unless the accused person shall have been "sentenced to a larger amount of punish- "ment than could be awarded for the "offence,"—and so on. But the error in this case has been committed neither in the charge nor in the proceedings on the trial. The error has been committed at the commencement, and no proceedings should have taken place previous to sanction being given.

It has been further contended that as this suit was for an amount of rent above 100 rupees, the Collector's Court was not the proper Court to which application should have been made for permission to prosecute the defendants criminally; and that the proper Court is the Judge's Court to which the appeal would lie. As we think, however, that no sanction has been given as regards the prisoner now before us, it is unnecessary for us to determine that point. The sanction given by the Sessions Judge after the case had been committed and the prisoner pleaded to the charge and the trial had actually commenced, is clearly not a sanction contemplated by the law.

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Such being the case we think that the proceedings taken against the prisoner before us must be quashed and the prisoner discharged.

Macpherson, J.—I concur.

The 25th March 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Jury—Evidence.

The Queen *versus* Bahar Ali Kahar, *Appellant.*

Committed by the Magistrate and tried by the Sessions Judge of Dacca on a charge of Murder.

Conviction by a Jury set aside in a case of murder in which there was a total absence of all evidence to show that the prisoner had committed the crime.

Jackson, J.—THE prisoner, Bahar Ali, has been sentenced to transportation for life on a conviction of the offence of murder. The prisoner was tried at Dacca by the Sessions Judge with the assistance of a Jury, who returned a verdict of guilty against the prisoner.

On perusing the proceedings, the question which appears to us really to arise on the evidence given on the trial is whether there is evidence at all to connect the prisoner with the crime. If there is a total absence of all evidence to show that the prisoner had committed the crime, the conviction by the Jury cannot be allowed to stand: it will be bad in law and must be set aside. It appears to us that in this case there is a total absence of all evidence of any sort whatever to prove that the prisoner committed the murder of which he has been convicted. The evidence shows that he and his wife, a young girl of 9 or 10 years of age, were sleeping at night in their house. The other members of the family were sleeping in the same compound. The mother of the prisoner on awaking towards the morning, went, hearing a noise, to their house and found both the prisoner and his wife lying on the ground with their throats cut; the prisoner's wife was dead, and the prisoner was most severely wounded but was still alive. The prisoner was sent to the hospital at Dacca, where after several months he recovered.

The prisoner has been charged with murdering his wife. No evidence whatever is adduced to show that there was any motive whatever for his committing such a murder; there is no evidence of any quarrel; there is no evidence whatever why the prisoner should have attacked his own wife. There is no evidence whatever also to prove that the wound inflicted on the throat of the prisoner was inflicted by himself. Had it been distinctly proved that it was suicidal, that fact would have been some evidence to prove that he also cut his wife's throat. The point, however, seems to have altogether escaped the notice of the Deputy Magistrate who conducted the investigation. There seems to have been no examintion of the wounds of the prisoner, or if there has been there is no certificate or report of it upon the record, and the medical man who attended him has not been examined in any way upon the subject. This perhaps under the circumstances would have been the only piece of evidence which could have been obtained, but there has been no attempt to adduce it.

There is also some difficulty in connecting the evidence as to the finding in the prisoner's house of the *dao* with which, it is said, the murder was committed, with the position in which the prisoner was found when the murder was discovered. There is no evidence to show that the *dao* was found in any way near the prisoner. If he had inflicted upon himself the very severe wound which undoubtedly had been inflicted upon him, he could hardly have had strength sufficient after inflicting such a wound to have removed the *dao* to any great distance. It is of course possible that some of the females may have removed the *dao* afterwards; but there is no evidence to prove that the *dao* was found anywhere near the prisoner. Again there is no evidence that the murder was committed with this *dao.*

The prisoner's own account of the facts is that some person came in the middle of the night and cut his wife's and his throat and went away. The prisoner does not know or say who committed the act. It may be a true answer or it may be a false one. It may still be that the prisoner did cut his wife's throat. But there is no evidence upon which any certainty upon the point can be established against the prisoner.

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In the absence of all motive—in the absence of all evidence connecting him with the murder—and in the absence of all enquiry as to whether the wound on his own throat was suicide or not—the only conclusion at which we can arrive is that there is no evidence upon which the prisoner can be convicted of the murder with which he is charged.

This case being one of some importance, and there being some hesitation in our mind to interfere with the verdict of the Jury, we asked the learned Chief Justice to hear the case with us, and he concurs in the opinion which we take of the case and thinks that the prisoner must be acquitted. The prisoner will accordingly be acquitted, and the conviction and the sentence against him will be set aside.

The Sessions Judge does not say, as he should, whether he agreed in the verdict of the Jury.

Mookerjee, J.—I entirely concur. I think there was no evidence in this case to go to a Jury. I would acquit the prisoner and direct his immediate release.

The 25th March 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Plunder of crops—Claim of property.

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Magistrate of Monghyr.

Nassib Chowdhry *versus* Nannoo Chowdhry.

The mere assertion of a fair claim of property or right, or the mere existence of a doubt as to right is not sufficient to justify an acquittal in a case of plunder of crops. The claim to the property must be *proved* by evidence to be fair and good.

Boyley, J.—THE question before us in this reference is, whether under the facts of the case as shown by the evidence, the Sessions Judge is right in reversing the order of the Magistrate and acquitting the party defendant convicted by the Magistrate of plunder of crops.

The Judge's decision in its main point is that, "assuming the account of the complainant and of his witnesses to be correct, "the circumstances of the case show that "the appellant in taking the crops acted "under a color of right; and however ill-"founded the claim may be, still the de-"fendant is not guilty of the crime of theft "by asserting it." Again, the Sessions Judge remarks that "the Police Report "confirms the theory that though the tak-"ing might be wrongful and fraudulent, "still it was not without a color of right; "and hence a conviction for theft is bad." The Sessions Judge concluded by stating—"The rule in such cases seems to be that "if there be any fair claim of property or "right in the prisoner, or if it be brought "into doubt at all, the Court will direct an "acquittal."

Now, the rule of law is thus not quite correctly stated. The mere *assertion* of a fair claim of property or right or the mere existence of a doubt is not enough. The claim of property must be *proved* by evidence to be *fair* and *good*; and the Sessions Judge's judgment ought to have set forth fully how that proof was shewn by evidence; and especially in this case where the judgment of a Lower Court detailing in a clear and cogent manner all the bearings and force of the evidence on the record was reversed. Further, it is not correct in the Judge to say "if it *be brought into doubt at all.*" It must be shewn that there is a *reasonable doubt*, and how on the evidence on both sides the reasonableness of the doubt is supported. In this view it is here necessary to go into the facts proved in evidence to see if the law has been properly applied.

We have carefully perused all the evidence. It is proved that the complainant was in possession under a deed, such as is ordinarily on such a good deed of title. There is no reason to doubt that it was such a title as ensured or ought legally to have ensured to him quiet possession. It is shewn that the complainants sowed and tended the crops Now, on the other hand, we find that there was a report to the Police on the 16th June of intended breach of the peace. On enquiry by the Police no signs of such a state of things was found. But taking all the other facts and circumstances into consideration, we are not satisfied that the plea of right set up by the prisoner was altogether without foundation. The genuine-

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ness of the *chitti* is admitted, and there was reason for the defendant to think that coming whence it did it gave a ground of title. While therefore we express our dissent with the view of the law laid down by the Sessions Judge, we give the prisoner the benefit of our doubts on the evidence, and so far affirm the order of acquittal.

Mitter, J.—I am of the same opinion. The evidence for the prosecution is not at all sufficient to satisfy me that the prosecutor was in possession of the land; and the defendant has proved that he had a fair title to it. Under these circumstances the conviction cannot be supported; and I would therefore affirm the Judge's decision, though I entirely differ from him in the view of the law which he has taken.

The 1st April 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Procedure — Offence — Punishment—Section 4 Act XVII of 1862—Section 426, Code of Criminal Procedure.

Mohabeer Singh, *Petitioner.*

Baboo Kali Prosunno Dutt for the Petitioner.

In a case in which the accused was charged under Sections of the Penal Code of an offence which was committed before the Penal Code came into operation, it was held that, having regard to Section 4 Act XVII of 1862 and Section 426 of the Code of Criminal Procedure, the error of procedure was not sufficient to vitiate the conviction so long as the punishment awarded as under the Penal Code did not exceed that which was the legal penalty for the offence before the Penal Code became law.

Bayley, J.—We think this application under Section 404 of the Criminal Procedure Code must be rejected. The first ground taken is that the prisoner was indicted on two charges specifically made under the Sections of the Penal Code, the offence having been admittedly committed before the Penal Code came into operation. This being admitted, the only question is how to regard the matter with reference to the provisions of Section 4 Act XVII of 1862 and Section 426 of the Criminal Procedure Code. It is quite clear that whether there are defects in the procedure or not, it was never intended that an alleged offence should go unpunished so long as it was proved to be an offence against the law existing when it was committed, and so long as the punishment awarded as under the Penal Code does not exceed that which was the legal penalty for the offence before the Penal Code came into operation. We have heard the evidence read out to us, and the substance is that on a Police Officer acting in the exercise of his duty under the orders of his superior officer and acting legally, the accused attacked him with a sword and wounded him in the arm to the extent of a barleycorn in depth and two or three inches in length. This would certainly have been an assault with wounding under the Criminal Law before the passing of the Penal Code, and would have been punishable according to circumstances with imprisonment for a longer or shorter period, but certainly for a period of 9 months which is the sentence in this case. We therefore see no illegality or injustice in the orders of the Judge and the Magistrate, and we reject this application.

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The 1st April 1871.

Present:

The Hon'ble A. G. Macpherson and F. A. Glover, *Judges.*

Irregularity—Procedure—Sentence—Repealed law—Section 426, Code of Criminal Procedure.

Reference to the High Court under Section 434 *of the Code of Criminal Procedure by the Magistrate of Cuttack.*

Rughoonath Dass *versus* Chuckerdhun Raut and others.

Baboo Mohendro Lall Mitter for Rughoonath Dass.

Where a Magistrate convicted under certain repealed Sections of a law, the High Court refused to set aside the conviction having regard to Section 426, Code of Criminal Procedure, as the conviction and sentence might have been passed under Sections of the Penal Code and no substantial injury had been done to the accused.

Reference.—On the 10th December Rughoonath Dass Carjee laid information before the police that Chuckerdhur Raut and others had caused about 200 heads of cattle to trespass on his master's land, and that they did mischief to the extent of Rs. 54; that as these were being led off to the thannah, defendant and others formed an illegal assembly and released them. The police enquired into the case and sent up three men for trial under Sections 143, 144, 447 Indian Penal Code.

The case was made over for trial to the Joint Magistrate, who convicted all three accused under Section 1 Act XXII of 1861, and sentenced Chuckerdhun Raut to a fine of Rs. 50, or in default to rigorous imprisonment for one calendar month, the amount when realized to be paid to complainant. The other two accused were sentenced to a fine of Rs. 3 each, or in default one month's rigorous imprisonment, the fines when realized to be paid to Ram Behara, a ryot of complainant.

It is objected, 1st, that Sections 1, 2, 3, 4 Act XXII of 1861 have been repealed by Act XVII of 1862; 2nd, that the case was not cognizable by the police, and ought to have been instituted by petition before the Magistrate on stamp paper; 3rd, that Ram Behara was not a party to the case, never appeared in it at all, made no claim for compensation, and ought not to have been awarded any.

As regards objections 2 and 3, the Joint Magistrate could under Section 44 Act XXV of 1861, as amended by Act VIII of 1869, award compensation to any person shown to have been injured. It was shewn in the evidence that cattle had trespassed on and injured Ram Behara's field. The police also were competent to take notice of the case under Sections 143, 144, 447, and to send it up for trial. Nor was the Joint Magistrate in disposing of it bound to adhere to those Sections. I do not, therefore, think these objections of any avail. The first however is valid. Section 1 Act XXII of 1861 has been repealed by Act XVII of 1862, and the defendants have been convicted under a law which is not in existence.

The mistake is so palpable that I have not thought it neccssary to call upon the Joint Magistrate for an explanation.

The proper Sections to convict under were 426 or 427 of the Penal Code, and the mistake was purely accidental.

As however it is doubtful whether the sentence is under the circumstances legal, I refer the case for the orders of the High Court.

Judgment of the High Court:—

Macpherson, J.—Although in this case the Joint Magistrate has no doubt convicted under certain repealed Sections of Act XXII of 1861, we think it clear that he might, under Sections 426 and 427 of the Penal Code, have convicted and have passed a sentence similar to that which he has passed. Therefore, with reference to the terms of Section 426 of the Code of Criminal Procedure, no substantial injustice having been done to the persons who have been convicted, we think that we ought not to reverse or alter the finding or the sentence which has been passed.

The 6th April 1871.

Present:

The Hon'ble W. Ainslie and G. C. Paul, *Judges.*

Chemical Examiner's report — Evidence—Section 370, Code of Criminal Procedure.

Committed by the Magistrate and tried by the Sessions Judge of Beerbhoom on a charge of murder.

The Queen *versus* Bishumbhur Doss, *Appellant.*

Under Section 370 of the Code of Criminal Procedure, the original report of the Chemical Examiner bearing his signature, and not a copy of the report, should be put in evidence.

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Paul, J.—In this case it appears to us that the conviction should be affirmed. There are certain clear facts in this case which it is necessary to notice. The murdered woman, Choramonee Boishtubee, was the mistress of the prisoner. She was last seen alive on the 25th Aughran, and her body was found by the Chowkeedar Gogan on the 4th Pous in the Heera Ranchee tank. The finding of the body led to enquiries being made, which resulted in the searching of the cow-house of the prisoner and the discovery of a grave in which a dead body had evidently been interred. The earth in that grave was moist and emitted a bad smell. Some skin spoken to by the medical witness as being that of the fingers of the human hand was found in or near the grave. On the discovery having proceeded thus, the prisoner produced certain silver ornaments which he had secreted in a mulberry field; and these articles were identified by the maternal uncle of the deceased as hers.

The prisoner made a statement, which has been duly recorded, to the effect that he was present at the time the deceased woman was murdered by three other persons; that he saw the grave dug and her body interred; and that subsequently the body was taken out and thrown into the tank. The prisoner also says that the parties who murdered the woman were in the act of taking away the ornaments, but that he interfered and took them and buried them. The circumstances thus detailed make it clear that Choramonee was murdered at or about the 25th Aughran; that she was buried in the cow-house of the prisoner, and subsequently thrown into the tank where it was found by the Chowkeedar. The only question which remains is who murdered her. If we accept the prisoner's statement, it would appear that he was an accomplice to the act of murder; and he has therefore been properly convicted. Taking the prisoner's confession with the general facts of the case which have been proved, we think he took an active part in the murder of the deceased. With reference to these views, the judgment and sentence must be confirmed.

Under Section 370 of Act XXV of 1861, a report from the Chemical Examiner is evidence in a criminal trial, *if it bear the signature of the Examiner;* and according to this Section the original report bearing the signature of the Examiner should be put in evidence. On the present occasion we observe that *a copy* of the report has been sent up by the Magistrate; this is wholly irregular. In future, care should be taken that the original report be submitted.

The 14th April 1871.

Present:

The Hon'ble L. S. Jackson and A. G. Macpherson, *Judges.*

Land disputes—Order by public servant—Section 318, Code of Criminal Procedure—Section 188, Penal Code.

Abelakh Lall and others, *Petitioners,*

versus

Sirnam Singh, *Opposite Party.*

Mr. R. T. Allan and *Baboo Kishen Sucea Mookerjee* for the Petitioners.

Baboo Kali Kishen Sein for the Opposite Party.

Where an order had been made by a Magistrate under Section 318 of the Code of Criminal Procedure in favor of *A* in respect of certain land, and *D* subsequently obtained an order from the Collector declaring him entitled to the same land in persuance of which he was put into possession by an officer of the Collector; it was held that before *B* could be convicted under Section 188 of the Penal Code of disobeying an order made by a public officer, it should be proved that *B* was aware of the order under Section 318 and that having that knowledge he disobeyed it.

Jackson, J.—It seems to me that that part of the proceedings of the Magistrate confirmed on appeal by the Sessions Judge, which relates to the conviction of the petitioners under Section 188 of the Indian Penal Code, ought to be set aside. The supposed offence under Section 188 consisted in this—that whereas an order had been made at some previous time in respect of the land which was the subject of dispute by the Magistrate under Section 318 of the Code of Criminal Procedure,—and whereas the petitioners subsequently obtained a decision of the Collector (in proceeding to which both the petitioners who are prosecutors were parties), that is to say, an order or award declaring the petition-

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ers entitled to a settlement for the land in question, and were placed in possession of that land by an officer of the Collector; the Magistrate considered him to have thereby infringed the order made under Section 318, and to have committed an offence under the 188th Section of the Code.

The Sessions Judge who tried this case on appeal appears to have considered that the point for decision was whether the opposite party, having got an order under Section 318, had been subsequently ousted by due course of Law.

That however, it seems to me, is not the real point for decision. The question is whether, in the circumstances stated, the petitioner can be said to have known that by an order promulgated by a public servant, that is to say, the Deputy Magistrate, and then in force, he was directed to abstain from a certain act, that is, from acquiring and keeping possession of the land, and with that knowledge to have disobeyed that direction. Now it appears to me that when, after the passing of the order under Section 318, the Collector, assuming to act on the part of the Government and to deal with this land as being land of a khas mehal, made an award in favor of the petitioners, and placed them in possession through his own officers, he did, to say the least by such act give the petitioners cause to believe that they were thereby entitled to receive and retain possession of the land to which such award related, and consequently they could not have been said to have voluntarily committed an offence under Section 188.

Without placing the decision of the Court at all upon the ground which I am about to state, I think it may be added that, considering that the offence supposed to have been committed under Section 188 arose out of the very same act which had formed the ground of a conviction under Section 144, while I admit that the Magistrate was legally competent to convict the prisoners under both Sections, it seems to me to have been at least an unnecessary and harsh proceeding, when a severe sentence had been already passed under Section 144, to pass a further sentence of fine under Section 188.

I think the order of the Magistrate to the extent I have stated, that is to say, as regards the conviction under Section 188, must be set aside.

Macpherson, J.—I concur.

The 15th April 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Theft — Joint proprietor — Section 378, Penal Code.

Reference to the High Court under Section 434 *of the Code of Criminal Procedure by the Officiating Magistrate of Backergunge.*

Keamuddin *versus* Allah Buksh.

Section 378 of the Penal Code does not include under the offence of theft the case when one joint proprietor takes into his own sole possession property belonging to himself and his co-proprietors which had previously been in their joint custody.

Norman, C. J.—THE point in this case is as follows:—

Keamuddin, the gomashtah of a shop called the shop of Mozuffer Meah, was coming out of the Small Cause Court with some books, a khutean and a jummah khuruch account, belonging to that shop.

Allah Buksh, who had a share in that shop, took these books out of the possession of Keamuddin, and kept them against the will of Keamuddin, saying they were his.

The Deputy Magistrate says—"The fact of "Allah Buksh having a right to the papers "is not questioned in this case. He may "have every right to them; but so long as "they are legally in the possession of another "person, he cannot get possession of them "except through the Civil Court. It matters "little either whether he is any special gainer "by taking possession of the papers, when "the fact remains that he did take them—and "that against the will of the complainant."

The Deputy Magistrate found Allah Buksh guilty of theft, and sentenced him to a fine of rupees 10, and ordered the papers to be returned to the complainant.

It appears to me that this conviction cannot be sustained.

Keamuddin was the servant of the prisoner, Allah Buksh, and his partners. By Section 27 of the Indian Penal Code, it is declared

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that when property is in the possession of a person's servant, it is in that person's possession within the meaning of the Code.

The khutean and jumma khuruch account must, therefore, be taken to have been in the possession of Allah Buksh and his co-sharers at the time when Allah Buksh took them from Keamuddin.

Section 378 does not include under the offence of theft the case when one joint proprietor takes into his own sole possession property belonging to himself and his co-proprietors, which had been previously in their joint custody. If the law were as supposed by the Magistrate, no master could safely take his own property from the hand of his servant. No partner in a business could safely take a rupee from the till for the most urgent necessity.

It may be that the accused did or intended to do some wrong to his co-sharers in taking possession of the books. But, if so, the offence, if any, is not theft.

I am of opinion that the conviction and order of the Deputy Magistrate must be quashed and the fine refunded.

Loch, J.—To constitute the offence of theft, there must be not only a taking against the will of the person in possession, but a taking dishonestly. The definition of "Dishonestly," as given in Section 24 of the Penal Code, is the doing any thing with the intention of causing wrongful gain to one person or wrongful loss to another person. Did Allah Buksh take the book from the gomashtah dishonestly as defined above? He does not appear to have done so with any intent to injure his co-partners or to derive gain to himself. It is true that the gomashtah says in his examination that the papers showed an entry of rupees 500, by not showing which the accused would gain. But there is nothing to show that Allah Buksh intended to make away with these papers, and the gomashtah admits that they were heretofore in the possession of Allah Buksh and his two co-sharers. I do not think the charge of theft is made out, and I concur with the Chief Justice in quashing the conviction and directing the repayment of the fine.

The 21st April 1871.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Procedure—Flogging—Previous conviction.

The Queen *versus* Nuzee Nushyo, *Appellant.*

Committed by the Magistrate and tried by the Sessions Judge of Rungpore on a charge of theft in a building.

As a rule, before flogging is given as an additional punishment, there ought to be formal evidence upon the record of the previous convictions relied on. The conviction and identity of the prisoner ought to be proved in the regular way. A mere kyfeut is no evidence whatever.

Macpherson, J.—I see no reason to interfere, as the prisoner admitted having been twice before convicted of theft.

I desire to add, however, that, as a rule, before flogging is given as an additional punishment, there ought to be formal evidence upon the record of the previous convictions relied on. The conviction and identity of the prisoner ought to be proved in the regular way. A mere kyfeut, such as there was in this case, is no evidence whatever.

The prisoner, however, by admitting the convictions, removed all questions in this particular case.

I would dismiss the appeal.

Bayley, J.—I concur.

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The 22nd April 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Procedure—Previous conviction.

The Queen *versus* Sheikh Ramzan, *Appellant.*

Committed by the Assistant Commissioner and tried by the Deputy Commissioner of Singhbhoom on a charge of theft.

A mere kyfeut from the record office is not sufficient to prove a former conviction against a prisoner. There should be sworn testimony to the fact, and also to the identification of the prisoner with the person previously convicted.

Glover, J.—THERE can be no doubt that the prisoner has been properly convicted of theft under Section 380, Penal Code. There may be a question as to how much he stole, but it is clear that he took at least 2 rupees.

The prisoner has been sentenced to 4 years' rigorous imprisonment, apparently on account of his having been twice before convicted of theft in June 1870; but there is no evidence on the record of these convictions. It is not enough for the prosecution to file a kyfeut from the record office, setting forth the fact that one Sheikh Ramzan had been twice before convicted of theft. There should have been sworn testimony to the fact, and also to the identification of the prisoner before the Court with the Sheikh Ramzan previously convicted.

If the fact of the two previous convictions be expunged from the record, the offence of which the prisoner has been convicted does not seem to call for such a severe sentence as 4 years' rigorous imprisonment. We reduce it to two years' rigorous imprisonment.

The 24th April 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice,* and the Hon'ble W. Ainslie, *Judge.*

Procedure — Accused — Discharge — Prosecutor — Complainant — Sections 67 and 180, and Chapter XIV, Code of Criminal Procedure.

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Officiating Sessions Judge of Jessore.

Tuki Mahomed Mundul *versus* Kisto Nath Rai and others.

Where the accused, who has been duly summoned or arrested under a warrant in a case under Chapter XIV, Code of Criminal Procedure, is present to meet any charge, and no evidence is forthcoming against him owing to the absence of the prosecutor and his witnesses, if it be not shewn to the Magistrate that the case is one in which he ought to adjourn the inquiry under Section 224, the Magistrate is bound to discharge such accused person.

Section 180 of the Code of Criminal Procedure was not intended to enable a Magistrate in ordinary cases to examine witnesses in the absence of the accused. Under Section 67 of the Code of Criminal Procedure, a complainant has a right to an adjudication upon the point, whether in the judgment of the Magistrate there is sufficient ground for proceeding.

Norman, C. J.—THE point referred to the High Court in this case is, whether a Deputy Magistrate in dealing with a charge of wrongful confinement under Section 342 of the Indian Penal Code, under Chapter XIV of the Code of Criminal Procedure, has power to discharge the accused if the prosecutor and witnesses are not present on the day fixed for the hearing.

Notwithstanding the case cited from the 10th Weekly Reporter, page 31, I think that there is no doubt but that where the accused, who has been duly summoned or arrested under a warrant, is present to meet any charge and no evidence is forthcoming against him, if it be not shewn to the Magistrate that the case is one in which he ought to adjourn the inquiry under Section 224, the Magistrate is not only authorized but is empowered, and in fact required, to discharge such accused person. The case of the accused stands thus:—On the day of trial not only has no offence been proved, but there is no evidence on which a Magistrate could possibly find that an offence had been proved.

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The point, however, does not arise on the facts of the case before us. On the 28th of December a complaint appears to have been preferred by the prosecutor to the officer in charge of the Police Station, which resulted in an enquiry, which must have been by order of the Magistrate, and a report that the charge of wrongful confinement was a false one. Dissatisfied with the result of the Police inquiry on the 16th of January, the prosecutor made his complaint under Section 66 before the Joint Magistrate, Mr. * *, who examined the prosecutor on the 17th; but his only order on that complaint was—"Let this be put with the Police papers." There seems to be an order of the Joint Magistrate on the Police Report on the 16th that witnesses should be in attendance on the 21st.

On the 21st the case was adjourned to the 28th. The complainant's witnesses had been summoned,—by which authority I know not,—and were in fact then in attendance. On the 28th the case was made over to the Deputy Magistrate who, in an order stating that he had no time to take up the case on that day, fixed the 1st of February for hearing the complainant's witnesses. On the 1st of February the complainant and his witnesses not being in attendance, the case was dismissed by the Deputy Magistrate.

Down to this time no summons or warrant had issued against the defendant. The Joint Magistrate did not decide that there was no sufficient ground for proceeding. All that we know on that point is, that the Joint Magistrate and the Deputy Magistrate between them have burked the case and got rid of a troublesome complainant. I think the Joint Magistrate's proceedings were illegal and oppressive.

The law contemplates no such delays as those which the Joint Magistrate has interposed between the complaint and the adjudication upon such complaint.

I do not think that Section 180 was ever intended to enable the Magistrate in ordinary cases to examine witnesses in the absence of the accused. I do not say that a case may not be supposed in which such a course may be necessary.

On the 17th of January, with the Police report and the examination of the complainant before him, it is very difficult to see why the Joint Magistrate should not have proceeded at once to pass orders under Section 67. The reference to the Subordinate Magistrate on the 28th must have been an additional cause of vexation and expense to the unfortunate complainant.

Delay in the adjudication upon complaints in small criminal cases is a great hardship to poor people, who may be debarred from resorting to Courts of justice by finding that the remedy is an evil more grievous than the wrong.

The complainant had and has a right to an adjudication under Section 67, upon the point whether in the judgment of the Magistrate there is sufficient ground for proceeding. I think it may very well be that the complainant's absence on the day of hearing may have been caused by the utter weariness of hanging about the Police station in the first place, and the Court afterwards, with his witnesses in the hope of getting a proper hearing. I think Mr. * * should be directed to restore the case to his own file, and to do now what he ought to have done at latest within a few days after the 31st of last December.

Ainslie, J.—It appears to me that the question referred to this Court does not arise in this case. The Magistrate had not issued nor had he made any order to issue any warrant or summons to bring the accused person before the Court.

The matter was in that stage to which the provisions of Section 180 of the Criminal Procedure Code apply. By Section 249 as amended by Act VIII of 1869, the provisions of Section 180 are extended to cases triable by the Magistrate under Chapter XIV of the Code. The Magistrate had before him a report by the Police, on the charge preferred by the complainant at the Police Station to the effect that it was a false charge.

On the 16th of January 1871, he directed that a limited number of witnesses should be sent in for examination. Whether he had before him at this time the complainant's petition, which bears date 4th Magh 1277, corresponding to the 16th January 1871, is uncertain; but this is not material. When the complainant had been examined on the 17th, he made an order that his complaint should be put up with the Police papers; and as he made no further order on it, I think his order of the 16th must be taken as intended to be a sufficient order in the matter and as made under Section 180.

By the order of the 16th January, the 21st idem was fixed for proceeding with the prelimi-

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nary enquiry under Section 180. Apparently no steps were taken to bring in the witnesses, and on the 21st the Magistrate made a further order that they should be summoned to attend on the 28th.

On the 28th certain witnesses attended under the summons, and on that day the Magistrate made over the case to the Deputy Magistrate with instructions to satisfy himself by examining the witnesses whether there were sufficient grounds for proceeding further, and to go on with the case or dismiss it summarily accordingly. On the same day the Deputy Magistrate recorded an order to the effect that he was unable to proceed with the case on that day, and directed that the witnesses should be discharged on recognizances to appear again on the 1st of February. On the 1st of February the case was called on, but neither complainant nor witness were in attendance and it was dismissed on default. Such being the facts, it appears to me that the ruling quoted by the Sessions Judge reported in X, Weekly Reporter, Criminal Rulings, p. 31, does not apply. Still less does the ruling reported in XII Weekly Reporter, p. 27, Criminal Rulings, do so.

This was a case in which the complaint had not been admitted: the issue of process against the accused was dependent on the Court being satisfied of the propriety of making any order in the matter. If the complainant negligently failed to appear and satisfy the Court, there was nothing to make it incumbent on the Deputy Magistrate to proceed further with the complaint.

But under the circumstances of this case, I concur in thinking that the non-attendance of the complainant on the 1st February ought not to have been treated as a wilful act of negligence, and that the Deputy Magistrate's order of that date dismissing the complaint should be set aside.

The 24th April 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Procedure—Sanction to prosecute—Section 169, Code of Criminal Procedure.

(Miscellaneous Case.)

The Queen *versus* Rajkishore Roy and another, *Petitioners.*

Baboo Luckee Churn Bose for the Petitioners.

Where sanction to prosecute on a criminal charge under Section 169 of the Code of Criminal Procedure was given in the case of only one prisoner out of two prisoners who were tried together, the High Court directed the release of the prisoner in regard to whom such sanction was not given.

Glover, J.—THE objections urged in this application for revision of the Sessions Judge's and Magistrate's orders, under Section 404 of the Criminal Procedure Code, are—

(1) That Rajkishore Roy having been acquitted by the Deputy Magistrate, the Magistrate had no jurisdiction to take up the case again.

(2) That there was no sanction to the proceedings, as required by Section 169, Code of Criminal Procedure.

With regard to the first objection, I observe that although the order of the Deputy Magistrate is recorded on the printed "judgment of acquittal" form, it is clear from the written part of his judgment that the accused was, as a matter of fact, "discharged," and not "acquitted." The words are—"Be discharged under Section 250 of the "Criminal Procedure Code," and this Section undoubtedly refers to cases in which no charge has been drawn up, because in the Magistrate's opinion no offence has been proved. It has been argued that as some evidence was taken on behalf of the accused, the order passed was in the nature of an acquittal. If any evidence had been taken, no doubt this would be so; but there is nothing on the record to show that such was the case. One of the accused appears to have stated in his defence that their innocence would be shown from certain record,—but he did not put in this record nor call any witnesses. Moreover the Deputy Magistrate's own language makes it perfectly clear, to my mind, that he discharged the accused and did not acquit him. He refers to a case decided by the High Court, in which it was held that a person giving what afterwards turned out to be false information, without testing its correctness, was guilty of irregularity, but was not liable to be prosecuted for a false complaint; and, considering the circumstances to be similar, holds that Rajkishore was not liable to be prosecuted.

It appears to me therefore that the Magistrate had jurisdiction to take up the case *de novo.*

With regard to Rajkishore Rai, it is clear that sanction under Section 169, Code of Criminal Procedure, was given—the order is on the record.

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I do not, however, find any such sanction in the case of Ramjeebun Rai, and under the circumstances it was specially necessary to have the sanction expressly shown, inasmuch as Ramjeebun admittedly did not go to the Police Station, and there was only Rajkishore's statement to prove that the information had been supplied by his brother.

I think that the prisoner, Ramjeebun, should have the benefit of the omission by the Magistrate to sanction the prosecution against him. With the order passed on the other prisoner there seems no reason to interfere.

Kemp, J.—I concur.

The 24th April 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Procedure—Recognizance — Security — Sections 280-282, Code of Criminal Procedure.

Gobind Sooboodhee and others, *Petitioners.*

Baboo Mohendro Lall Mitter for the Petitioners.

An order calling for recognizances under Section 280, or for security under Section 281, Code of Criminal Procedure, must be passed at the time of deciding the original case If no such order is then made, subsequent proceedings must be taken under Section 282 and the parties summoned to show cause.

Glover, J—We are of opinion that an order calling for recognizances under Section 280, Criminal Procedure Code, or for security under Section 281, must be passed at the time of deciding the original case. The words "in addition" in both Sections refer to the substantive sentence passed on an accused, in consequence of which sentence, and without any further enquiry, such person is at once liable to be called on for either recognizances or security or for both.

If the order for recognizance or security is not made at the time of passing final sentence, any subsequent proceedings must, we think, be taken under Section 282, and the parties must be summoned to show cause in the usual way.

We, therefore, annul the orders of the Officiating Joint Magistrate.

The 24th April 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Procedure—Breach of the peace—Section 62, Code of Criminal Procedure.

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Sessions Judge of Mymensingh.

Kartick Chunder Bal (on the part of Dwarkanath Rai) *Petitioner,*

versus

Chunder Nath Chuckerbutty (on the part of Jannobi Chowdrain) *Opposite Party.*

Baboo Mohinee Mohun Roy for the Petitioner.

Where a complaint was made by *A* that timber belonging to his master which had been cut and stacked in a certain place had been removed by *B*, who said that the timber was cut not by *A's* master but by himself, and that he had stacked it in a place where he always put his timber, it was held that the Magistrate could not proceed under Section 62 of the Code of Criminal Procedure, but was bound to try the charge brought against *B*, and either restore the timber to *A* or leave it where it was according to the result of the investigation.

Reference.—Two parties having contending claims to some stacked timber, the Deputy Magistrate then in charge of the Attiah Subdivision called upon them to show cause why an order should not be issued under Section 62 of the Code of Criminal Procedure.

He examined two witnesses who deposed regarding the claims set up, and the parties appeared in their own defence and presented petitions.

The Joint Magistrate, during the absence of the Deputy Magistrate, received charge of the Attiah Sub-division, and passed a prohibitory order in respect of the said timber. Considering that interference by either party with the same would be likely to bring about a breach of the peace, he recorded an order under Section 62, Code of Criminal Procedure, directing them not to interfere with the timber, until their dispute was either settled amicably or by some competent Court.

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This order appears to me to be opposed to the ruling of the Hon'ble Court reported in Volume XII Weekly Reporter, page 38, Criminal Rulings.

It was there laid down that the power of issuing orders to prevent breaches of the peace, &c., conferred on a Magistrate by Section 62 of the Code of Criminal Procedure extends only to immoveable property of the description set forth in Chapter XXII of that Code.

The Joint Magistrate in explanation states in his letter without No. of the 14th instant, that his order had reference solely to the parties' acts, and that he does not think it is effected by the nature of the property, regarding which he made no order.

The Joint Magistrate appears to have lost sight of the fact that in the nature of the property lies the whole pith of the matter as touching the legality of his order.

Neither can I understand how an order directing that certain timber should not be interfered with by certain parties, under certain conditions, can be construed as not being an order in respect of that property, but must be taken to have reference "solely to "the parties acts."

In the ruling to which I have referred, the Hon'ble Mr. Justice L. S. Jackson said:— "Baboo Kali Mohun Dass appeared to support "the order of the Magistrate. He took two "points. The first of these points was that "Section 62 justified the Magistrate in interfering with money in the hands of one person to which another person laid claim, and "in respect of which it was thought likely "that a quarrel was about to take place "which might lead to a breach of the peace. "It appears to me as clear as anything can "be that the Section referred to could have "no possible bearing on the point. The Legislature has sufficiently indicated the purposes of and the extent for which and to "which the interference of the Magistrate "of property when adverse claims to that "property are set up may take place. That "interference is expressly restricted to immoveable property of the kind set forth in "the 22nd Chapter of the same."

I have deferred submitting the records of this case, pending the receipt of the Weekly Reporter for the current month, Volume XIV, No. 17, in which is reported the decision of the Full Bench of the Hon'ble Court to the effect that the order of a Magistrate under Section 62 of the Code of Criminal Procedure is not a judicial order, and that consequently the Court cannot take cognizance of it under Section 404 of the Code.

But on reading the decisions of the several Hon'ble Judges who gave that ruling, I observe that it was, so to say, assumed that witnesses would not be examined or parties called upon for their defence before such orders were passed, the jurisdiction of the Magistrate in such cases being of a very summary character.

It may so happen however, as it has happened in this case, that parties may be regularly called upon for their defence and to show cause why action should not be taken under Section 62, and witnesses be examined, as they are found to have been in this case; and I do not construe the ruling of the Court to imply that under no circumstances could proceedings under Section 62 be of a judicial character.

It seems to me, with reference to the remarks of the Hon'ble Judges in the case I refer to, that the true test to apply to the question whether a proceeding or order of a Magistrate under Section 62 is judicial or not, is whether parties have been summoned to show cause, or placed on their defence and witnesses been examined.

Mr. Justice L. S. Jackson said:—

"There are certain Chapters and Sections of "the Procedure Code in which a specific "procedure is laid down for the Magistrate in "cases which might appear to be such as "would come under Section 62. In cases "which did come precisely within the scope "of those Sections in which a specific procedure is laid down, I think the Magistrate "would be bound to act according to that "procedure; and where that procedure requires the hearing of the parties, and the "arriving at a conclusion upon the evidence "or the decision of any contested point, no "doubt the enquiry becomes judicial and "the order is judicial."

Mr. Justice Kemp said:—"No evidence "having been taken, and no party having "been put upon his defence, this order of the "Magistrate was, in my opinion, not a judicial "order, but an executive order to prevent "people who were lawfully employed in "bringing their goods for sale in the markets "from being obstructed and annoyed."

The Chief Justice said:—"I agree with Mr. "Justice Phear, that if we look upon this "provision in the Code of Criminal Proce-

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"dure as in the nature of an injunction, "where the Court would exercise its power "in the same way as it would in the case "of an injunction, it would be necessary to "give the parties an opportunity of being "heard, and having the matter tried as in a "judicial proceeding."

I have given these extracts from the judgments of these Hon'ble Judges because they seem to me to bear out the view I have taken, that proceedings and orders under Section 62 become under certain conditions of a judicial character; and of that character they seem to have been in this case, where the parties called on to show cause appeared to do so, and witnesses were examined, final orders being subsequently passed.

I, therefore, submit that the order of the Joint Magistrate should be quashed on the following grounds:—

1*st*.—That though passed under Section 62, Code of Criminal Procedure, it was from the circumstances attending it a judicial order.

2*nd*.—That it was an illegal order with reference to the ruling of the Honorable Court in the case of the Queen *versus* Goluck Chunder Gooho, W. R., Vol. XII, Criminal Rulings, page 38.

Judgment of the High Court.

Jackson, J.—It seems to me that the order of the Magistrate, as regards the timber, should not have been passed under Section 62. A charge was preferred to him by the agent of Dwarkanath Rai, that the timber belonging to his master, which had been cut and stacked in a certain place, had been removed from that place and taken possession of by certain persons. Those persons denied the fact, and stated that they had cut the timber themselves; that it had never been stacked where the complainant alleged, but that it had been stacked at the place where they always put their timber. The Magistrate should have enquired into this complaint. It was a direct charge of theft. If the complainant proved his case, the defendants should have been punished and the timber restored to the complainant. If, on the other hand, he could not prove his case, it should have been dismissed and the timber left where it was. The passing of an order under Section 62 was, in fact, not trying the charge at all. I think that the Deputy Magistrate should be directed to try the charge now, as he ought to have done at first.

Mookerjee, J.—I concur.

The 29th April 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble A. G. Macpherson, F. A. Glover, G. C. Paul, and Onoocool Chunder Mookerjee, *Judges*.

Jurisdiction—Offence under Registration Act — Section 94 Act XX of 1866.

The Queen *versus* Sheogolam Dass and another, *Appellants*,

Committed by the Joint Magistrate and tried by the Sessions Judge of Shahabad on a charge of abetment of false personation.

Baboo Tarucknath Dutt for Appellants.

In the case of an offence under Section 94 of the Registration Act XX of 1866, if a Magistrate thinks that a more severe sentence is necessary than he is competent to inflict under the power vested in him by Act XXV of 1861, it is competent to him to proceed under Section 226 of that Act and to commit the accused to the Sessions; and on such committal a Sessions Judge has jurisdiction to deal with the charges and to convict and sentence the accused as provided for in the several Sections of Act XX of 1866.

This case was referred to the Full Bench by Macpherson and Mookerjee, J. J., with the following remarks:—

Macpherson, J.—THE Sessions Judge of Shahabad has found the appellants guilty of having committed an offence under Section 94 of Act XX of 1866 (the Registration Act), in that they abetted false personation, and has sentenced them to rigorous imprisonment and fine. They were committed by the Joint Magistrate for trial at the Sessions upon the charge on which they were tried and convicted.

They appeal to this Court. We have disposed (unfavorable to the appellants) of all their objections to the conviction and sentence, save one which we refer for the decision of a Full Bench

The question is whether the conviction ought to be quashed on the ground that the Sessions Judge had no jurisdiction to try the case.

It is contended that, under Section 95 of Act XX of 1866, the case ought to have been instituted *and tried* before a person exer-

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cising the powers of a Magistrate or Subordinate Magistrate of the first class, and that the Sessions Judge had no jurisdiction to try it. In support of this view a decision of a Division Court (Phear and Hobhouse, J. J.,) in the case of Assanoollah and others (X W. R., p. 21, Criminal) is relied on.

But a different construction of the law seems to be contained in a "Criminal Letter" of the 18th July 1867, No. 836, (VIII W. R., p. 14, Criminal Letters) issued by Sir Barnes Peacock, Mr. Justice Loch, Mr. Justice L. S Jackson, and myself. Although the Criminal Letter is not a judicial decision, it shows that a conflict of opinion and practice exists; and as the matter is one of some importance, and one in which it is most undesirable that any doubt should exist, we think that it should be referred to a Full Bench for a final decision.

If the Full Bench shall be of opinion that a Sessions Judge has jurisdiction in a case committed to the Sessions by a Joint Magistrate, then the conviction and sentence will be affirmed: if the Full Bench shall be of opinion that the Sessions Judge has not jurisdiction under the circumstances, then the conviction ought to be quashed and the prisoners ought to be released.

The judgments of the Full Bench were delivered as follow by—

Norman, C. J.—In this case the prisoners, Sheogolam Dass and Ramsoonder Dass, were charged with abetting the false personation of a witness in registering a kubooleut before the Sub-Registrar of Assurances at Buxar. The offence is punishable under the 94th Section of the Indian Registration Act of 1866, with a term of imprisonment which may extend to seven years. In pursuance of the provisions of Section 95, the prosecution was instituted before the Joint Magistrate, and by him the prisoners were committed for trial before the Sessions Judge.

The question before us is whether the Sessions Judge had authority to try the prisoners: whether in fact the conviction by the Sessions Judge ought to be quashed on the ground that he had no jurisdiction. The reference has been made to us in consequence of a decision of Mr. Justice Phear and Mr. Justice Hobhouse, which is to be found in the X Weekly Reporter, page 21, in which those learned Judges appear to have held that the whole of the criminal trial under Section 95, from complaint to adjudication on the charge, must be carried on before and by a Magistrate or Subordinate Magistrate of the first class. If that be so, of course the Joint Magistrate had no power to commit the prisoners to the Sessions. We, however, cannot agree in the interpretation which has been put by those two learned Judges upon the word "institute" in the 95th Section of the Indian Registration Act of 1866. We think that the full and true meaning of that word is given by construing it as "*commenced*;"—that the Section in question would preclude Deputy Magistrates and others not having the powers of a Magistrate or of a Subordinate Magistrate of the first class from entertaining any charge of an offence under the 94th or other Sections of the Act. Construing the word in that way we construe it according to its literal and grammatical meaning, and it is evident that such must be the true construction; for on reference to the 21st Section of the Code of Criminal Procedure, it is clear that a Magistrate has no power to sentence a prisoner to the full period of imprisonment to which he would be liable under Section 90, and subsequent Sections down to Section 94, of the Registration Act. The 21st Section of the Code of Criminal Procedure provides that "the Criminal Courts of the several grades, "according to the powers vested in them "respectively by this Act, shall have *juris-* "*diction* in respect of offences punishable "under the Indian Penal Code or under "any *special* or local law (except offences "which are by any such law made pu- "nishable by some other authority therein "specially mentioned), and in the investiga- "tion and trial of the offence hereby declared "to be within their jurisdiction shall be guid- "ed by the provisions of this Act."

Therefore, the jurisdiction of the Magistrate in respect of an offence under any special law is the same as in respect of an offence punishable under the Penal Code. Now, the Magistrate of a district or other officer authorized to exercise the powers of a Magistrate is only empowered to punish with imprisonment for a term not exceeding two years. Therefore, if we were to construe the word "instituted" as if it was intended to include the whole adjudication upon the charge, we should be construing the Act in a way which would make the 95th Section repugnant to Sections 90, 91, 92, 93 and 94 of the same Act; because the Legislature would first impose a penalty of seven years' imprisonment in certain cases, and then declare that the offence should be triable only by an officer who would not have power under the law to inflict a punishment with imprisonment for a term exceeding two years.

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For these reasons I think it perfectly clear that the rule as laid down in a letter No. 836 of 1867, printed in Vol. 8 of the Weekly Reporter, Criminal Letters, page 14, is correct; and that if the Magistrate thinks that a more severe punishment is necessary than he is competent to inflict under the power conferred on him by Act XXV of 1861, he should proceed in accordance with Section 226 of that Act to commit the prisoners to the Sessions. We think it clear that on such committal the Sessions Judge has jurisdiction and authority to deal with the charge, and sentence the prisoners as provided for in the several Sections of Act XX of 1866.

Macpherson, J.—I am of the same opinion. I think that what was said in the letter of the 18th July 1867, which was signed by three other Judges and myself, is correct. The result is, that the conviction and sentence are affirmed and the appeal is dismissed.

Glover, Paul, and Mookerjee, J. J., concurred.

The 29th April 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble A. G. Macpherson and Onoocool Chunder Mookerjee, *Judges.*

High Court—Original Criminal Jurisdiction—Section 15 of the 24 and 25 Vic., C. 104.

Criminal Motion No. 59 of 1871.

In the matter of Ameer Khan.

The Government of Bengal, *Petitioner.*

Baboo Unnoda Pershad Banerjee for the Petitioner.

A Judge of the High Court making an order in the original criminal jurisdiction of that Court is not a Court subject to the control of the Court under Section 15 of the 24 and 25 Vic., c. 104.

The petition of the Government of Bengal in this matter was as follows :—

That an application was made to the Chief Justice and Mr. Justice Loch on Saturday last, representing that Mr. Justice Phear had assumed jurisdiction in an application for the transfer of a criminal case from Patna to Calcutta, and representing that such an application could only be heard by a Bench of the Court appointed under Sections 13 and 14 of the Act of Parliament under which the High Court is constituted.

That the Chief Justice and Mr. Justice Loch said that the matter was not in a stage in which their Lordships could interfere, although it might well be that under rules of the Court already made, such an application should be properly heard by the Fourth Bench of the Court, as appointed to hear motions in Criminal matters relating to cases pending in the Patna district; and the Court added that this matter would be properly considered by Mr. Justice Phear.

That this opinion was mentioned to Mr. Justice Phear, and the Advocate General was heard in opposition to the hearing of the application by the learned Judge, but the Judge decided the other way and delivered a judgment, the gist of which seems to be that the rules of Court apportioning the business cannot take away the inherent powers of every Judge to exercise the full powers of the Court, but are mere indications of the most convenient course; and that in the present instance the most convenient course was that the application should be heard by himself sitting where his Lordship was.

That his Lordship Mr. Justice Phear accordingly directed notice to be served on Mr. O'Kinealy, who has hitherto conducted the case on the part of Government, to show cause why the case should not be transferred from the Sessions Judge of Patna to the High Court for trial in its extraordinary original criminal jurisdiction.

That as it is doubtful if an appeal will lie from Mr. Justice Phear's decision after a final order on the application has been passed, the Government wish to make it clear that it has neglected no means which the law affords of obtaining a hearing before a bench properly and conveniently constituted. It is submitted that supposing the High Court has power to remove a case, yet many powers far in excess of those of the late Supreme Court, and some in excess of those of the late Sudder Court, for controlling the administration of justice in the country, generally were given to the High Court as being a Court combining the elements which formed the late Sudder and Supreme Courts; and the contention of Government is that it was never intended to authorize the assumption of a single Judge

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sitting in the original jurisdiction to exercise those powers uncontrolled by, or it may be contrary to, the opinions of the Court at large. It is also submitted that, as a matter of fact, the Judges who sit in the original jurisdiction in practice belong to one only of the elements of which the combined Court is composed, and that the exercise of the power assumed by Mr. Justice Phear is contrary to the whole spirit and intention of the Acts and Charters by which the Court is constituted. On these grounds the Government trust that the Court will take the question into consideration, both with reference to the matter pending before Mr. Justice Phear and in order to guide the Judge of Patna, before whom the case is appointed to come on immediately and in whose Court a host of witnesses are cited to appear.

Judgment of the High Court:—

Norman, C. J.—I am of opinion that the Court cannot interfere with Mr. Justice Phear's decision in the case of Ameer Khan, unless that decision can be called in question in a formal and regular way. We have been asked to interpose our authority, which it is suggested that the Court possesses under Section 15 of the 24 and 25 Vic., Cap. 104. But Mr. Justice Phear, a Judge of the High Court, making an order in the Original Criminal Jurisdiction of that Court, is not a Court subject to our control under Section 15.

Macpherson and Mookerjee, J. J., were of the same opinion.

The 29th April 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Discharge—Committal—Section 435 Act VIII of 1869.

The Queen *versus* Sreenath Dey, *Appellant*.

Committed by the Deputy Magistrate and tried by the Sessions Judge of Jessore on a charge of rioting armed with deadly weapons.

Mr. C. Piffard and *Baboo Aushootosh Dhur* for the Appellant.

The discharge by a Deputy Magistrate of a person charged with an offence liable only by a Court of Sessions, is no bar to the Sessions Judge ordering the committal of such person to the Sessions under Section 435 Act VIII of 1869.

Norman, C. J.—The prisoner was put on his trial before Baboo Cally Prosunno Sircar, Deputy Magistrate of Bagirhat, upon a charge of rioting armed with deadly weapons under Section 148. He was acquitted by the Deputy Magistrate. The Judge under Section 435 of the Code of Criminal Procedure ordered the commitment of the prisoner to the Court of Session notwithstanding such acquittal. The prisoner on being tried by the Court of Session was convicted upon a charge under Section 149,—that being a member of an unlawful assembly in prosecution of the common object of which one of the members voluntarily caused grievous hurt by means of a dangerous weapon to one Bangshi otherwise than on grave and sudden provocation, he thereby committed and offence punishable under Sections 326 and 149.

The prisoner has appealed.

Mr. Piffard for the prisoner objected in the first instance that having been acquitted by the Deputy Magistrate, the Sessions Judge had no power under Section 435 of Act VIII of 1869 to direct the committal of the prisoner.

The answer to that is that the charge under Section 148 upon which the prisoner was put on his trial before the Deputy Magistrate is one which is only triable before the Court of Session; and I may observe that the charges which the evidence taken before the Magistrate would have properly sustained, *viz.*, those on which he was tried before the Judge, *viz.*, the charges under Sections 149 and 326, are triable by the Court of Session only.

The Deputy Magistrate had no jurisdiction to try the prisoner; and therefore notwithstanding the order of the Deputy Magistrate, the prisoner cannot be treated as a person who has been acquitted by a Court having jurisdiction to try him.

I think there was nothing in the Deputy Magistrate's order discharging the prisoner, which he calls an acquittal, to prevent the Judge from ordering the committal of the prisoner under Section 435 of Act VIII of 1869.

Mr. Piffard next attempted to show that there were discrepancies in the evidence, and that the story told by the witnesses for the prosecution is incredible.

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It is certainly a strange tale. The prisoner and one Mudden Deb have a quarrel about the right to some land in Puttiakhali. The prosecutor has taken a pottah from Mudden Deb. The prisoner and his party in three boats overtaking the prosecutor, Bangshi Paramanick, who was in a boat with two other persons, one of them a Chowkeedar, called out to Bangshi to stop and listen to him. The prisoner said to Bangshi "you must give me a kubooleut:" Bangshi said "why should I give you a kubooleut?" the prisoner said "you must:" Bangshi refused. Kala Chand, the Chowkeedar, said "why should we give kubooleuts?" The prisoner and Gopinath ordered their men to seize Bangshi. One Dedar lifted up a spear to strike Kala Chand, Chowkeedar, who jumped into the water. The witnesses, Kishore and Doorgachurn Haldar, say that Bangshi then went on to the middle of his boat with a paddle and was crying out "who will beat." Then two men, named Choti Sikdar and Nazim Mollah, speared Bangshi, and Roffi Mahomed in like manner wounded Kishore. There was an outcry that a man was killed, and the prisoner's men rowed the boat away with Bangshi and Kishore. After being detained two or three days at the house of Gopinath, a dependant of the prisoner Sreenath, the wounded men were carried back and left in a deserted homestead belonging to Doorgachurn Haldar. The riot took place on the 27th of August. The Chowkeedar made his complaint at the Thannah on the following day. It was not till Monday the 29th that the wounded men were found lying in the deserted house of Doorgachurn. The native Doctor, who was absent at the Sessions when they were first discovered, saw them on the 31st. He found that the hurt sustained by Bangshi was of a most serious character: that he would probably never get over it.

The Judge records that the leg of Bangshi is so bent in consequence of the injury sustained that he can only touch the ground with his toe; that he walks by the aid of a stick with great difficulty; and that getting up a small step into the witness box evidently caused him great pain.

We concur with the Judge and Assessors in thinking that the evidence establishes the guilt of the prisoner. The sentence of three years' rigorous imprisonment with a fine of rupees 300 to be realized from the property of the prisoner, who in default of payment is to suffer further rigorous imprisonment for one year, appears proper.

The 29th April 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Public servant—Section 228, Penal Code.

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Officiating Magistrate of Cuttack.

The Queen *versus* Hurri Kishen Doss, *Police Inspector.*

Before a conviction can be had under Section 228 of the Penal Code of offering an insult to a public servant, it must be proved that there was an *intention* to insult.

Glover, J.—We think that the order of the Assistant Magistrate must be set aside. He has convicted the Inspector of Police under Section 228 of "intentionally" offering an insult to him, the Assistant Magistrate, a public servant "sitting at the time in a stage of a judicial proceeding," in that the Inspector ordered certain policemen, whose presence was necessary in the Assistant Magistrate's Court, to attend there without their uniform belts.

These belts we observe had been ordered by the Inspector General of Police to be sent into the Sudder Station of Cuttack for inspection, and this was the reason given by the Inspector to the Assistant Magistrate for the absence of this portion of the Policemen's accoutrements.

That any Officer of Government should have, under the circumstances, taken offence at the conduct of the Inspector is a matter of considerable surprise to us; but without commenting on the Assistant Magistrate's conduct in this particular or on the somewhat remarkable explanation which he submitted to the Magistrate of his district, we have no hesitation in saying that the order imposing the fine was not warranted by Section 228 of the Penal Code.

The admitted facts show that there could have been no "intention to insult" on the part of the Police Inspector, inasmuch as he was merely carrying out the lawful orders of his immediate superior, orders which originated in the Inspector General of Police him-

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self; and if there was no "intention" there could have been no conviction.

The mere fact of there being other belts available which the Police put on after the fine was imposed, has manifestly nothing to do with proving a prior intention to insult on the part of the Inspector. If it proves anything at all, it shows a desire on the part of that official to meet the Assistant Magistrate's wishes directly he knew that his previous conduct had been ill taken.

The 29th April 1871.

Present:

The Hon'ble F. A. Glover, *Judge.*

Procedure — Confessions — Section 205, Code of Criminal Procedure.

The Queen *versus* Bhikaree, *Appellant.*

Committed by the Assistant Commissioner and tried by the Judicial Commissioner of Chota Nagpore, on a charge of attempting to commit murder.

Points out the importance of properly recording and attesting the confessions of prisoners under Section 205 of the Code of Criminal Procedure.

THE prisoner has confessed all along that he wounded the woman, and has justified himself by the fact that she was keeping his father's property away from him.

The only point in this appeal is whether the offence proved was an attempt at murder. The prisoner in his defence at the Sessions denies that he had any intention to kill; but intentions are to be presumed from acts, and as in this case the prisoner used a highly lethal weapon and inflicted at least one dangerous wound, his intention to kill may fairly be presumed. Moreover by Section 307, Penal Code, he would be rightly convicted if the act done was done under circumstances that if the act caused death the offence would be murder. In this case there can be no doubt that had the woman been killed under the circumstances of the prisoner's act, the prisoner would have been guilty of murder. The appeal is rejected.

I desire to notice the informal way in which the Assistant Commissioner has recorded the prisoner's confessions. By Section 205 of the Procedure Code, a Magistrate is bound to attest such examination by his signature, and to certify under his own hand that it was taken in his presence and in his hearing, and that it contains accurately the whole of the statement made by the accused person. In this case there is neither attestation nor certificate. There is an unreadable initial only appended to what purports to be the accused's statement, and had not there been other evidence on this point the omission on the part of the Assistant Commissioner would have been fatal to the conviction under Section 307. As the accused repeated his confession, so far as the wounding went, to the Judicial Commissioner, and as his intention is presumable from the nature of his acts no harm has been done; but the result might have been otherwise, and the Judicial Commissioner is requested to impress on his subordinates the necessity of a strict adherence to the forms of the Criminal Procedure Code.

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The 2nd May 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, A. G. Macpherson, G. C. Paul, and Onoocool Chunder Mookerjee, *Judges.*

Jurisdiction—Appellate Court—Subordinate Court—Sanction to prosecution — Sections 111, 169, 171, 422, Code of Criminal Procedure.

Reference to the High Court under Section 434 *of the Code of Criminal Procedure by the Sessions Judge of Nuddea.*

The Queen *versus* Buktear Maifaraz.

When an Appellate Court directs further evidence to be taken by a Subordinate Court under Section 422 of the Code of Criminal Procedure, it is competent to the Subordinate Court before which such evidence is given, if any offence against public justice as described in Section 169 is committed before such Court by a witness whose evidence is being recorded therein, to send the case for investigation to a Magistrate under the provisions of Section 171.

The words "whether for the decision of such cases in "the first instance or on appeal, or for commitment to "any other Court or Officer," in Section 11 of the Code of Criminal Procedure, are not intended as an exhaustive enumeration of the functions of Criminal Courts.

Reference by the Sessions Judge.—It appears that the offence with which the prisoner stands charged in this case arose out of a deposition before the Assistant Magistrate of Meherpore, taken under orders of the District Magistrate in his appellate capacity. The Assistant Magistrate considering there were grounds for suspecting perjuryin prisoner when giving evidence before him, held a preliminary enquiry under Section 171 and made over the prisoner to the District Magistrate for investigation of the charge preliminary to commitment. The Magistrate, on receipt of the record, sent it back to Meherpore for investigation by Baboo Peary Mohun Banerjee, Deputy Magistrate of that station. In passing this order the Magistrate was not acting in his appellate capacity, but as a Criminal Court to which another Court has referred a charge of perjury for investigation. There is nothing whatever to show that the records were before him at the time, or that he was exercising any discretion on the propriety or otherwise of ordering a criminal judicial investigation. The question before him appears to have been simply this—"What Magistrate should hold the investigation?" In choosing a Magistrate (which as a District Magistrate he had a right to do) he very properly selected a Deputy Magistrate other than the complaining officer, the Assistant in charge of the sub-division; but the Deputy Magistrate left the station before the order could be carried out, and the sub-divisional officer referred the matter for further orders when the District Magistrate passed the order that "there is no reason why the case should not be investigated by the sub-divisional officer;" and so it returned to the latter who then held a criminal judicial investigation, and committed the prisoner to the Sessions on a charge of perjury.

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It is contended that though the Assistant Magistrate, acting under orders of the Appellate Court in taking the prisoner's deposition on oath, was holding a judicial proceeding (Explanation 2 to Section 193), he had no power to record any judgment upon it, and that he was consequently not sitting as "a Court" within the meaning of Section 171.

I think this objection perfectly sound. It clearly rested with the Court which, on a view of the whole case, was to form an opinion upon the deposition of each witness, to say whether any one of them should be put to his trial for perjury under Section 171. The Appellate Court to which the evidence was certified might, if it had considered the evidence, have taken the same view as the Assistant or it might have taken a more favorable view.

What the opinion of the Appellate Court in this instance was is not on record. It is contended that the two orders of the District Magistrate above quoted do amount to an approval, *i. e.*, to such "sanction" as is required by Section 169. It is possible that the District Magistrate may have read the records containing the Assistant's "preliminary enquiry" before passing the order. But if he had done so with a view to consider the Assistant's opinion, the orders in question must have been passed on the records of the appellate case; or if recorded elsewhere by error, they must have contained some expression of opinion or approval. But as I have said there is no such opinion expressed, and the reference on which the order was passed shows that none was required.

The Government Vakeel offers to get the sanction of the Appellate Court now. But if the entertainment of the charge by the District Magistrate (who was apparently the first officer who entertained it) was without authority, the commitment cannot now be made valid by obtaining the sanction of the Appellate Court. The words "at any time" in Section 169 must surely be read together with the word "entertain," and must be held to mean at any time early enough to justify the entertainment.

It occurs to me that if the Appellate Court had expresed an opinion upon view of the records of the preliminary enquiry (which records were certainly under the hand of the District Magistrate), it would have been perhaps legal for him to adopt the enquiry made and to pass the order for investigation. There is nothing in the law to restrict the Court against whom the perjury was committed as to the nature, procedure, or extent of the preliminary enquiry; and I am not prepared to say that perusal of the Assistant's notes of his own enquiry would not have been sufficient ground of action for the District Magistrate.

But I think it so clear that this was not the course followed by the District Magistrate, that I do not think it necessary to send the papers to the Assistant Magistrate for explanation.

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The commitment order under the above circumstances I consider illegal, and I would therefore respectfully suggest that it may be cancelled. The prisoner has been placed on bail, but is unable I understand to give it.

The judgment of the Full Bench of the High Court was delivered as follows by

Norman, C. J.—The Magistrate of Nuddea, on hearing an appeal against the decision of an Assistant Magistrate, directed a further enquiry, and that additional evidence should be taken by the Assistant Magistrate under Section 422 of the Code of Criminal Procedure. While taking evidence in pursuance of that direction, the Assistant Magistrate, being of opinion that a witness who was examined before him had given false evidence, sent the case for investigation to the Magistrate, assuming to act under the provisions of Section 171. The accused person was ultimately committed to the Court of Session. But the Sessions Judge doubts the legality of the commitment, and has referred the case to this Court under Section 434 in order that the commitment may be quashed.

We think that when an Appellate Court directs further evidence to be taken by a Subordinate Court under Section 422 of the Code of Criminal Procedure, it is competent to the Subordinate Court before which such evidence is given, if any offence against public justice as described in Section 169 is committed before such Court by a witness whose evidence is being recorded therein, to send the case for investigation to a Magistrate under the provisions of Section 171.

We think that the Assistant Magistrate, to whom the case was sent back and before whom the evidence in the present case was taken, was lawfully exercising jurisdiction in a criminal case. The words "whether "for the decision of such cases in the first "instance or on appeal, or for commitment "to any other Court or Officer," in Section 11 of the Code of Criminal Procedure, are not, in our opinion, intended as an exhaustive enumeration of the functions of Criminal Courts.

The jurisdiction of the Assistant Magistrate was that of a judicial officer exercising a particular function, not merely an authority delegated to him by the Magistrate.

The trial must therefore proceed.

The 3rd May 1871.

Present:

The Hon'ble H. V. Bayley and G. C. Paul, *Judges.*

Murder—Capital sentence—Pregnancy.

The Queen *versus* Panhee Aurut, Appellant.

Committed by the Magistrate and tried by the Sessions Judge of Rungpore on a charge of murder.

Capital sentence should be pronounced on a conviction for murder even if the accused be pregnant, although the execution of the sentence should be deferred till after delivery.

Bayley, J.—THERE is no ground to interfere on this appeal. Indeed, the appeal itself is mainly on the ground that the prisoner's sentence will prevent her supporting her family. The Sessions Judge did not pass a capital sentence because the prisoner was pregnant when committed; but this of itself is no legal ground for not *pronouncing* the capital sentence of the law, although the *execution* of it is deferred till after delivery.

The appeal is rejected.

Paul, J.—I concur. I consider the conviction correct, and I think the Sessions Judge has assigned a reason which is not a legal one, as pointed out by Mr. Justice Bayley, for not passing capital sentence.

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The 5th May 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Magistrate's record.

The Queen *versus* Kasim Ali and others, Appellants.

Committed by the Magistrate and tried by the Sessions Judge of Chittagong on a charge of giving false evidence.

Mr. M. L. Sandel for the Appellants.

The Magistrate's record of the proceedings prior to commitment should always be forwarded to the High Court.

Jackson, J.—We have no doubt as to the guilt of the prisoners, and shall not, therefore, interfere with their conviction or with the sentences passed upon them. The proceedings might on some points have been conducted with greater precision, as pointed out by the pleader for the prisoners; but we are not satisfied that the prisoners have been in any way prejudiced by the irregularities in question. The sanction which was obtained from the Judge to the prosecution might have been more clearly worded. The charges are unnecessarily prolix and contain much irrelevant matter. They should only have contained the sentences of the prisoners' deposition which related to the payment of the money and the giving of the receipt,—the points on which the perjury is charged. There has been some difficulty in proving what each prisoner said, the depositions having been taken down by the former Judge who has left the station. But the record has been proved and the handwriting and signature of the Judge, and there is other independent evidence. I have no doubt that the prisoners gave the depositions. It seems to me important that the record of these depositions should be made by law *primâ facie* evidence that they were given as recorded. Formerly, when the depositions were recorded in the vernacular, the Bengalee mohurrir who wrote them down could be called to attest them; but they are now recorded by the Judge in English, and if he has left the station there must always be a difficulty in procuring his evidence. This would be obviated by declaring his record of the deposition to be *primâ facie* evidence.

The Sessions Judge of Chittagong did not forward to this Court the record of the proceedings prior to commitment in the Magistrate's Court, and he has explained that he did not do so because he is of opinion that these were not evidence in the case. It seems to me immaterial whether they are evidence or not. The practice has always been to forward the record, and the Judge has no authority to change the practice without special orders or sanction from this Court. It frequently happens that some portions of the Magistrate's record are evidence on the Sessions trial; and as happened on this occasion, portions of the evidence being on the record of other cases were not taken out and incorporated with the Sessions record, as it should be. The Magistrate's record is also frequently required by this Court to ascertain if all the evidence bearing on the case has been recorded, and the Sessions Judge will find great assistance in conducting trials in serious cases from the police record also. But the Magistrate's record must always be forwarded to this Court under the present practice.

The 6th May 1871.

Present:

The Hon'ble G. Loch and Onoocool Chunder Mookerjee, *Judges.*

Jurisdiction — Obstruction — Thoroughfare — Section 308, Code of Criminal Procedure.

(Miscellaneous Case.)

Becharam Bhuttacharjee and others, *Petitioners.*

Baboo Khetter Mohun Mookerjee for the Petitioners.

In the case of a complaint under Section 308 of the Code of Criminal Procedure, for the removal of an obstruction from a thoroughfare, a Magistrate should first enquire if the road is a public one or not. If he finds in the affirmative, he has jurisdiction to proceed; if in the negative, he should withhold his hand and abstain from carrying out the order for removal of the obstruction.

Loch, J.—We think that we cannot interfere with the order made by the lower Court in this case.

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Where parties come in under the provisions of Section 308 of the Criminal Procedure Code and ask for the removal of an obstruction from a thoroughfare, it is the province of the Magistrate to determine whether the road referred to by the complainant is or is not a thoroughfare, and on determining this point he has jurisdiction to proceed under the provisions of the Section above referred to; and the province of the Jury seems to be merely to determine the propriety or otherwise of carrying out the order made by the Magistrate on the defendant, after he, the Magistrate, has found that he has jurisdiction to make such order. Should the Magistrate, however, before passing a final order come to the conclusion that he has committed an error in considering the road to be a public road, and that he has reason to believe either from the evidence or from any personal enquiry that the road is not a public road, we think that he would be right in holding his hand and abstaining from carrying out the order for removal of the obstruction. This is what the Deputy Magistrate appears to have done in the present case. We think therefore that his order must be upheld, and the application rejected.

The 8th May 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Examination of accused — Attestation of Magistrate—Evidence—Sections 205 and 366, Code of Criminal Procedure.

Reference to the High Court under Section 404 *of the Code of Criminal Procedure by the Officiating Magistrate of Hooghly.*

The Queen *versus* Goshto Lall Dutt.

It is not necessary under Section 205 of the Code of Criminal Procedure to state in the body of the examination of the accused that the statement comprises every question put to the accused and every answer given by him, or that they were recorded in full and read to him, and that he had full liberty to add to or explain his answers. The Magistrate's attestation at the foot of the examination when duly recorded in the terms of that Section, is sufficient *primâ facie* evidence of such examination, unless the Sessions Judge doubts the genuineness of the Magistrate's signature, in which case he should take evidence on that point. The examination of the accused properly recorded is evidence, and should be allowed to go to the Jury under Section 366 of the Code.

Glover, J.—This case was sent for by the Court on a reference made by the Officiating Magistrate of Hooghly.

I may premise that in accordance with at least three Rulings of this Court (Queen *versus* Chunder Kant Chuckerbutty, X Weekly Reporter, p. 14; Queen *versus* Gora Chand Gope V Weekly Reporter, p. 48; and Queen *versus* Gora Chand Ghose, XI Weekly Reporter, p. 29, the last being a Full Bench case) a verdict of acquittal by a Jury, although given in consequence of a mis-direction on the part of the Sessions Judge, cannot be interfered with under Section 404, Code of Criminal Procedure.

I think it right, however, to express my opinion that the Judge did mis-direct the Jury in this case. He told them to "exclude "from their minds anything they had heard "relating to a confession or statement made "before the Magistrate, because the state-"ment, not being admissible in evidence, had "not been placed before them." Now, Section 205 of the Criminal Procedure Code describes how the examination of an accused person is to be taken, and how, after being taken, it is to be attested by the signature of the Magistrate, who is to certify under his own hand that it was taken "in his presence "and in his hearing, and contains accurately "the whole of the statement made by the "accused person." There is nothing in the Section that makes it necessary to state in the body of the examination (as supposed by the Sessions Judge) that the statement comprised every question put to the accused and every answer given by him; that they were recorded in full and read to him, and that he had liberty to add to or explain his answers, &c. &c. The attestation at the foot of the examination, when duly recorded in the terms of the Section, is sufficient proof that the accused had the proper opportunities given to him of testing, whether what was recorded had been made conformable to what he declared to be the truth; and as, in this case, the Magistrate's attestation is in the exact words of the law, nothing else was, as it seems to me, required. The statement of the accused, as it stood on the record, was perfectly legal evidence and ought to have been laid before the Jury.

The Ruling in Queen *versus* Mussumat Niruni, VII Weekly Reporter, p. 49, quoted by the Sessions Judge in support of his opinion, does not, I think, apply to this case at all. There the statement of the accused

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was not attested by the Magistrate's signature, and there was consequently no guarantee that the provisions of Section 205, Code of Criminal Procedure, had been in any way complied with. The Judges in that case said:—"We do not think it proper to admit "as evidence against the accused an examina- "tion which appears to have been recorded with "such utter disregard of the forms pre- "scribed by law as that of Moniruddeen in "the present case." I was one of the Judges in question, and retain the opinion then expressed. A strict observance of the law in all matters relating to confessions is in the highest degree necessary, but in the present case all the provisions of Section 205 have been fully complied with.

With reference to the second point referred by the Officiating Magistrate, it seems to me that the Magistrate's attestation at the foot of the examination was sufficient *primâ facie* evidence that everything had been legally and properly done, and that neither threats nor promises had been used. If, however, the Sessions Judge had doubts on this point, he should have cleared them up by taking evidence as to the manner in which the accused's statement was recorded.

Kemp, J.—I entirely concur. There has, in my opinion, been a clear failure of justice in this case, owing to the Judge's mis-direction to the Jury. The provisions of Section 205 have been strictly complied with in this case, and the examination of the accused ought to have been admitted in evidence at the trial under Section 366. The attestation of the Magistrate, which is in the proper form, was sufficient *primâ facie* evidence of such examination, and the Judge, if he doubted the genuineness of the Magistrate's signature, was bound to take evidence on that point. I think the Judge is wrong, and the Officiating Magistrate is perfectly right in his view of the law.

The 11th May 1871.

Present:

The Hon'ble J. B. Phear, A. G. Macpherson, and Onoocool Chunder Mookerjee, *Judges.*

High Court—Jurisdiction—Transfer of criminal cases—Section 29, Charter of High Court—Section 35, Code of Criminal Procedure.

Rule Nisi in the matter of

Ameer Khan and Hashmadad Khan, *Petitioners.*

The Advocate General (*Graham*) and *the Officiating Standing Counsel* (*Wilkinson*) for the Government.

Ingram and Evans for the Petitioners.

The High Court has power, under Section 29 of its Letters Patent, to transfer a criminal case from a Court in the Mofussil for trial before itself.

The mere possibility or probability that difficult questions whether of law or of fact will arise is no reason for transferring a case under Section 29, there being a sufficient remedy provided in the right of appeal to the High Court.

Per Macpherson, J.—It is under Section 35 of the Criminal Procedure Code, and under that Section alone, that the High Court ought to order the transfer of criminal cases from one Court to another,—except in very special cases (indicated.)

Phear, J.—The two prisoners, on whose behalf the present application to this Court is made, are now awaiting their trial before the Sessions Court at Patna on various charges which the Joint Magistrate at Patna, after duly holding a preliminary investigation, has preferred against them; in other words, the cases of the prisoners are criminal cases pending for trial at the Sessions Court at Patna, and the object of the application is to obtain the transfer of the case from the Sessions Court to this Court for trial.

The transfer is sought under the provisions of Section 29 of the Letters Patent of this Court, which says:—"And we do further ordain that the said High Court shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction, and also to direct the preliminary investigation or trial of any criminal case by any Officer or Court otherwise competent to investigate or try it, though

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such case belongs in ordinary course to the jurisdiction of some other Officer or Court."

The Advocate General, on behalf of the prosecution in the first place, urges that this Section 29 does not confer on the Court the power to make such a transfer as this. The Advocate General, as I understand his argument, urges that this Court, in its character of a Court exercising Criminal Jurisdiction over the Town of Calcutta, is a distinct Court, *sui generis*, and is not so related to the Criminal Courts of the Mofussil as to fall within the scope of the words of Section 29, "any other Court of equal or superior jurisdiction." It appears to me that we cannot give effect to this argument without sanctioning a distinction of parts in the High Court which has no reality, and thus giving currency to an error which may become fertile in mischievous results. The High Court is endowed with extensive, I may say, exalted jurisdiction, embracing in its ambit various subjects or topics, and is described in the Letters Patent under various heads. The Judges of whom the Court is composed are numerous, and the Legislature has empowered the Court by its own rules (I am now quoting Section 13 of the Chapter Act) to "provide for the exercise, by one or more Judges, or by Division Courts constituted by two or more Judges of the said High Court, of the original and appellate jurisdiction vested in such Court, in such manner as may appear to such Court to be convenient for the due administration of justice." The Court has availed itself of this power, and does exercise its power, as we know, by single Judges, and Division Courts consisting of two or more Judges. The rules of the Court by which this is done are perhaps little systematic, and certainly have not been framed with any view to the particular point upon which the present objection depends. It is not necessary for me now to discuss those rules, and I do not now propose in any way to review them. Nothing in them, however, as I understand them, gives favour to the present contention; for that would require that the effect of the rule should be to confer on each particular Bench of this Court a portion only of the jurisdiction of this Court. And it seems to me that there are only two ways in which this could be done, namely, either by deputing to each Bench a portion of jurisdiction by express words of limitation, or by assigning to it work locally or otherwise defined, and delegating to it only so much and such limited jurisdiction as may be needed for that work. Now, assuredly, the rules bearing on this matter have never been understood as operating in either of these directions. It is within our daily experience that a Division Bench of the Court whose work is defined by local limits, takes up and disposes of work which in the same way belongs to another Bench. And in many other modes, work is being constantly done without question, which, I apprehend, would be without authority and legal efficacy, if the view which has been contended for before us were correct. And see what the result would be. The High Court rarely sits as a whole. Only once in the whole course of my experience has it done so. The result would be that instead of one High Court, we should have a group of Courts, each of imperfect and ill-defined limited jurisdiction. This, I think, would offer every sort of opportunity for uncertainty whether or not any particular matter of litigation had been decided by competent authority. This would be a wretched state of things, and one not likely to have been intended, but rather very foreign to the mind of the Legislature which amalgamated the Sudder and Supreme Courts. And I think there is nothing in the words of Section 13 of the Charter Act which would warrant such a limited deputation of jurisdiction to a Division Court in this fashion. I need not now say anything as to the distribution of work and the disposal by the Division Benches of the business which is actually brought before them. But I come, without any sort of hesitation, to the conclusion that this Court, when engaged in administering criminal justice within the district of Calcutta under its ordinary criminal jurisdiction, is none other than the High Court itself. It is the High Court discharging one of its proper functions,—it is not merely the High Court in some, to me not very conceivable, inferior capacity. If this be so, the application to remove this criminal case from the Sessions Court at Patna into this Court to be tried by virtue of its criminal jurisdiction, seems to me to be an application made precisely within the words of Section 29. As regards the Sessions Court at Patna, the High Court is unquestionably a Court of superior jurisdiction. Why then are we to say that we have not the power under that Section to make the transfer which is sought?

In the first place, the Advocate General says that supposing the works of Section 29 are large enough to comprehend this Court, yet the situation of the Section relatively to other Sections, is such that it cannot be reasonably supposed that those words were intended to have the fullest signification. I thought that there was considerable force in Mr. Evans' answer to this objection, and a closer survey

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of the Letters Patent makes that answer more forcible than appeared at first sight; because I think it very apparent that the different clauses of the Letters Patent have been very inartistically framed and put together, and in truth that the Letters were drawn without any great completeness of purpose.

But I am not even prepared to take the view that the Clause authorizing the transfer of a criminal case into this Court would be inaptly placed in the position which Section 29 occupies. By the nature of Mr. Advocate General's argument, he admits that the Clause is rightly placed for the purpose of giving power to this Court to transfer cases from one local District Court to another District Court. If that be so, I see nothing inapt in including in the same Section a power to transfer to this Court. If the power to transfer to this Court is needed at all, it is needed for reasons amongst others which would render it right and proper to transfer cases from one local Court to another.

If such reasons existed for the transfer from the district of the 24-Pergunnahs into another district, why should the power to transfer it into this district for those reasons be absent? It seems to me to be quite unintelligible. For instance, to take the case given by the late Chief Justice in the case of *Nobodeep Chunder Gossamee*,* that this Court should have the power of transferring the trial of criminal cases from the Court of the 24-Pergunnahs to any other district of Bengal upon grounds of convenience, if convenience ex-

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* The 8th April 1868.†

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble J. P. Norman and W. Markby, *Judges*.

The Queen *versus* Nobodeep Chunder Gossamee and others.

The Standing Counsel (Eglinton) for the Crown.

Newmarch and Woodroffe for the accused.

THE accused in this case were committed for trial on a charge under Section 412 of retaining stolen property, to wit a Government currency note for rupees 1,000; and the first prisoner was also charged under Section 465 with dishonestly and fraudulently making a false document, that is to say, a false endorsement or receipt for interest on the said Government currency note; and further under Section 471 with dishonestly using as genuine the said forged document knowing it to be forged. The offences charged were committed at Calcutta, but the preliminary investigation was conducted by Mr. Ryland, Deputy Magistrate of Serampore and Justice of the Peace, who committed the accused for trial before the High Court at Calcutta.

The prisoners were tried and convicted at the criminal sessions of the High Court before Markby, J., but the prisoners' Counsel having raised certain points of law and having moved in arrest of judgment, Markby, J., reserved the points, which came on for argument before Peacock, C. J., and Norman and Markby, J. J. The arguments on the points reserved and on the motion in arrest of argument were addressed to the Court on separate days, and the Court delivered separate judgments on each day.

The following are the judgments which were delivered on the first day on the points reserved :—

Peacock, C. J.—Upon the two questions which have been argued before us I entertain no doubt.

The first relates to the answer given to the police constable when he arrested the prisoner. The answer did not amount to a confession of guilt, but was a statement of facts, which, if true, shewed that the prisoner was innocent. It was not a confession obtained under an inducement of hope or fear. The only objection to the statement being admissible in evidence is, that it was made in answer to a question which was put by the police officer.

The cases upon this subject in England are conflicting; but the later cases seem to show that statements made by a prisoner in answer to a question put by a police officer are admissible in evidence.

In the Queen and Berriman, 6 Cox's Criminal Cases, page 388, Mr. Justice Erle refused to admit as evidence an answer given by a prisoner to a question put to him by a Magistrate; and a similar ruling by Chief Justice Wilde is to be found in the case of the Queen and Pettit in the 4th Volume of Cox's Criminal Cases, page 164.

But in a later case, the Queen and Cheverton, 2 Foster and Finlayson, page 833, Chief Justice Erle admitted as evidence against the prisoner a statement which she had made in answer to a question put to her by a police officer. In that case, it appeared that Baxter, a police officer, had said to the prisoner—"You had better tell me all about it, it will save trouble," and then put certain questions to the prisoner which she answered. It was held that the answers given to Baxter were inadmissible, because they had been made under the influence of something in the nature of a threat or inducement. Afterwards another police officer put questions to the prisoner which she answered, and it was objected that those answers were inadmissible, inasmuch as they had been made under the inducement held out by the former police officer. Chief Justice Erle, after consulting Mr. Justice Wightman, admitted the statements made to the second police officer, holding, as I suppose, that the answers were not given in consequence of the inducements held out by the first officer. That is a distinct authority that statements made by a prisoner in answer to questions put by a police officer are admissible; and it may be remarked that in that case the answers were held to be admissible, though the prisoner had not been cautioned.

In the case of the Queen and Mick, 3 Foster and Finlayson, p. 842, it was held by Mr. Justice Mellor that a confession made by a prisoner in answer to a question put to him by a police officer was admissible.

A similar decision will be found in I Moody's Crown Cases, page 27, in which it was held that a confession obtained without threat or promise from a boy 14 years

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[† The judgments in this case are given *in extenso*, as the case is an important one not only as to the construction of Section 29 of the Charter, but also as regards other points of law and procedure which were raised and decided in it.]

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isted, and yet should not have the same power to remove the case into this Court across Circular Road, even though the reasons of convenience were ten-fold stronger. It appears to me that there are classes of cases in which the transfer of criminal trials to this Court might require to be made upon grounds exactly similar to those which would justify

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old, by questions put to him by a police officer in whose custody the boy was on a charge of felony, and when the boy had had no food for nearly a whole day, was properly received as evidence against him. That was held by six Judges to three upon a point reserved. The majority held that the confession was rightly received, as no threat or promise had been made.

Mr. Justice Mellor in the case of the Queen and Mick, to which I have referred, remarked that many Judges would not receive the evidence, and that he highly disapproved of the course which the police officer had adopted in asking questions.

Having these contradictory decisions before us, I should be disposed to act upon the decision given in the case reserved, even if it were not borne out by every principle of common sense.

If an inducement is held out to a prisoner to make a confession by telling him that he will be better off if he makes a confession, he may be induced, if he knows that circumstances are strong to lead to a presumption of guilt, to make a confession, although he is innocent. There may be reasonable grounds against the admission of such a confession, though perhaps it would be better to admit it and to leave those who have to determine as to the guilt or innocence of the prisoner to judge of the weight which ought to be attached to it.

The object of the criminal law is to punish the guilty for the purpose of deterring them and others from committing offences. The object of the law of procedure, including the law of evidence, is or ought to be that the innocent shall be protected and the guilty punished. I cannot, therefore, agree at all in the remarks of Mr. Justice Mellor, and in the expression of his disapproval of the conduct assumed by a police officer in asking questions, provided he does not hold out hope or fear as an inducement to confess.

Some cases have gone to the extent of saying that a statement is not admissible, if it is obtained by telling the prisoner that he had better tell the truth. For my own part, I cannot see any objection to telling every man that he had better tell the truth; but that is very different from telling a man that he had better confess, when you do not know whether he is innocent or guilty.

Though it has been held in some cases that confessions obtained by asking questions are not admissible, and although law is said to be the perfection of reason, it has been distinctly ruled in England, and I believe without a dissentient voice, that confessions obtained by artifice or deception are admissible. Therefore, where a confession was obtained by a person who took an oath that he would never mention what the prisoner told him, the statement made, when disclosed, was held to be admissible.

So, where it appeared that one of the prisoners had made a statement to a constable whilst he was drunk, and it was imputed to the constable that he had given him liquor to cause him to be so, the statement was held to be admissible in evidence against the prisoner, the statement not having been made under the inducement of hope or fear.—*See* the cases collected in Roscoe on Evidence in Criminal Cases, p. 47.

It is high time I think that we should decide according to principles which are founded in reason and good sense. I therefore hold that what the prisoner said in answer to questions put to him by the police officer was admissible, no threat or deception having been used or any false hope held out.

The other question remaining is, whether statements made in answer to questions put by a Justice of the Peace or a Magistrate are admissible against the prisoner.

I do not wish to put this question upon any technical ground. Section 202 of the Code of Criminal Procedure says that it shall be in the discretion of the Magistrate, from time to time at any stage of the enquiry, to examine the accused person and to put such questions to him as he may consider necessary, and it shall be in the option of the accused person to answer such questions. It does not appear whether Mr Ryland was acting as a Deputy Magistrate or in his character as a Justice of the Peace, when the charge was first brought before him. I have no doubt that answers given by a prisoner to questions put by a Magistrate under Section 202 are admissible in evidence, although the Magistrate may omit to inform the prisoner what the law is and that he is not bound to answer the questions. I apprehend that any statement which is made by a prisoner in answer to such a question is admissible against him, not only in regard to cases within the jurisdiction of the Magistrate or bearing upon the case before the Magistrate, but also with regard to other offences of which the prisoner might be charged in another Court.

For instance, if a prisoner were apprehended at Howrah upon a charge of murder at Howrah, and if the policeman should say "when the prisoner saw me coming up dressed as a police officer he immediately ran away:"—suppose the Magistrate should ask the prisoner, "why did you run away when you saw a police officer," and he were to say "I had stolen some money from A B in Calcutta. I had just crossed the ferry, and when I saw the policeman coming up I thought he was going to take me into custody for stealing the money and therefore I ran away." That statement being made in answer to a lawful question put to him by the Magistrate would, I have no doubt, be evidence against the prisoner, if he were acquitted of the murder and indicted at the sessions in Calcutta for stealing the money.

I have no doubt, therefore, that what the prisoner said to the Magistrate would in this case be admissible against him, even if the questions put by the Magistrate were put whilst he was acting in his character as a Magistrate.

But, as I said before, I do not wish to put this case upon a technical ground; and I will assume therefore that Mr. Ryland was acting throughout as a Justice of the Peace for Bengal with reference to an offence committed in Calcutta.

There is not much difference as regards the common sense point of view between statements made in answer to questions put by Mr. Ryland as a Justice of the Peace, and statements made in answer to questions put by the police officer, assuming it to be true that the statements were made. There would however, be this difference that when the questions were put by the Magistrate, the prisoner might have believed that the Magistrate had the same power to compel him to answer the questions as he would have had with regard to a witness; that therefore it may be urged that the Magistrate ought to have explained the law to the prisoner and told him that although he asked the questions the prisoner was not bound to answer them.

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the transfer from one Mofussil Court to another. And if so, it does not seem strange that the power to transfer a case into this Court should be included in the same Section as that which gives the power to transfer cases from one Court into another.

But then it was urged that Section 13 of the Letters Patent does give express power to remove a civil case from a Mofussil Civil Court to this Court for trial, in words altogether

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In the King and Wilson, I Holt's Reports, page 597, it was held by Chief Baron Richards that the examination of a prisoner before a Magistrate who examined him as a witness, although he held out no threat or inducement, could not be used as evidence against the prisoner. The Judge says—"No matter whether the prisoner was sworn or not, an examination of itself imposes an obligation to speak the truth." Suppose the prisoner in this case was ignorant of the law, and believed that when the Magistrate asked him these questions without telling him that he was not bound to answer, he was under a legal obligation to speak the truth when the law allowed him to be silent. The Magistrate did not deceive him, nor did he use artifice; and if artifice or deception would be no legal answer to the reception of the statements against the prisoner, why should the statements be rejected because the Magistrate omitted to tell the prisoner what the law was? There was no torture used,—no threat of punishment, and if the prisoner answered under a belief that he was bound to speak the truth, it appears to me that there is no injustice in receiving against him the answers which he made under that belief. We are not to infer that the prisoner said what was not true, because he erroneously believed himself to be under an obligation to speak the truth. Even if what the prisoner had stated amounted to a confession of guilt, it would be very different from a confession made under an inducement of hope or fear, because, as I have already remarked, a confession made under an inducement held out to make a confession may be made falsely by a prisoner under a belief that he will benefit by it.

In the King and Ellis, 1 Ryan and Moody's Reports, p. 432, Mr. Justice Littledale held that the examination of a prisoner charged with felony taken without threat or promise by questions put by a Magistrate was admissible. He there says, after referring to Starkie on Evidence and to the case of the King and Wilson to which I have referred—"Mr. Justice Holroyd received an examination which was the subject of the same objection;" and he added, "I think his decision is the correct one, and that the evidence is upon principle admissible."

For these reasons, I think that the statements made by the prisoner in answer to the questions put by Mr. Ryland were admissible against him.

The decision of Mr. Justice Phear was made during a trial and without full argument upon the whole question, and it does not appear that any of the authorities to which I have referred were brought to his notice. It was in the nature of a *nisi prius* decision, by which Courts sitting in Banco do not consider themselves bound.

I wish to add a few words on a point which escaped me. It was said that on the second occasion, when the Magistrate informed the prisoner that he was not bound to answer the questions, he informed him that if he objected to answer that fact would be noted. It was contended in argument that that amounted to a kind of threat; but I think the Magistrate was quite right when he told the prisoner that he was not bound to answer and that if he objected to answer the fact would be noted. The Magistrate by telling the prisoner he was not bound to answer, without adding that, if he objected, a note would be taken, might have induced the prisoner to decline to answer the question, when the fact of his declining might have raised a prejudice against him.

Norman, J., concurred.

Markby, J.—I only wish to add a few words. If this matter had now to be discussed for the first time. I should have concurred with the eminent Judges and writers on the Law of Evidence, who have expressed the opinion that the rule which excludes statements made by prisoners to police constables or Magistrates ought never to have been established. I think it would have been better to have left the whole to the Judge or Jury, including the circumstances which go to detract from the value of the statements, and leave them to judge of the value of the statements. The cases are so various that it is impossible to ground on them any general rule of exclusion, which does not exclude many statements that ought to be received, or admit many that are worthless. If is too late now, however, to discuss the validity of the rule.

The rule I take to be this, that statements are excluded if made under any threat or inducement of a temporal nature held out by a person in authority. If not of a temporal nature they are admissible, and similarly if not held out by a person in authority. It is doubtful whether the threat or inducement must have reference to the charge.

The question in this case is whether statements by the prisoner made first before a Police Constable, and secondly before a Magistrate, in answer to questions put to them are admissible, no actual threat or inducement having been made. It seems to me that such statements can only be excluded on the ground that the relation between the accused and the Police Constable, or Magistrate, necessarily implies that the answer is given under an inducement. Two cases have been quoted in which expressions used by the English Judges go to show that such statements are not admissible for that reason; but I think it will be found that wherever the Judges have expressed an opinion after deliberation and argument they have held otherwise. I should not for a moment weigh an hasty expression falling from the mouth of a Judge in the course of a trial, against a deliberate opinion expressed by a Court engaged in consideration of the law. I believe we are laying down the law in strict accordance with the rule of evidence in England, when we hold that answers to questions put by a Police Constable, or Magistrate, are not to be presumed to be given under such a threat or inducement as to render them inadmissible, and I believe that on all rational principles we must come to the same conclusion.

With reference to the motion for arrest of judgment the Court delivered the following judgments:—

Peacock, C. J.—The prisoner in this case was charged with having committed an offence in Calcutta. The caption of the charge stated that he had been committed for trial before the High Court by W. H. Ryland, Esq., Deputy Magistrate and Justice of the Peace of and for the district of Serampore. At the close of the case of the prosecution, it was objected on behalf of the prisoner Nobodeep, first, that no proper evidence had been given of any proceeding having been had by the High Court, duly directing the preliminary investigation to be made by the Magistrate at Serampore; and secondly, that no proper evidence had been given of a direction to transfer the trial of the prisoner to this Court, and that accordingly the learned Judge who tried the case should have directed the prisoner to be acquitted.

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beyond any possible misapprehension. If, therefore, the framers of the Letters Patent intended this Court to possess the like power of removing a criminal case, why did not they say so with equal precision and expressness?

I am not sure that if there were nothing in the Letters Patent to qualify this argument, that it ought to be allowed to cut down the natural operation of the words in Section 29. The power which is given to us in Section 29

The prisoner had pleaded not guilty, and the question which arises upon this portion of the case is whether the plea of not guilty of the offence stated in the charge raised any question of fact as to the authority of the officer who preferred that charge. When by Section 3 Act XIII of 1865 the Grand Jury was abolished, it was provided that any Justice of the Peace who shall commit to custody or hold to bail any person for trial before the High Court for an offence committed, or which, according to law, may be dealt with as if it had been committed within the local limits of its Ordinary Original Civil Jurisdiction, shall, together with all examinations, informations, bailments, and recognizances now required to be delivered to such Court before the trial, deliver to the Clerk of the Crown a written instument of charge signed by him stating for what offence such person is to committed or held to bail.

Section 4 enacts that the Clerk of the Crown shall peruse and consider the charge, and may, if he consider it necessary or expedient so to do, amend, alter, or add to the same. "The charge with such amendments, alterations, or additions, if any, shall be recorded in the High Court, and the person charged shall be entitled to have a copy of such charge, with such amendments, alterations, or additions (if any) gratis."

Section 6 enacts that "upon charges recorded as aforesaid, persons committed to custody or held to bail shall be deemed to have been brought before the High Court in due course of law, and (subject to the provisions contained in the 8th Section of this Act) shall be arraigned at the suit of the Crown, and the verdict shall be recorded thereupon."

There is no doubt that this Court had jurisdiction to try the prisoner for the offence committed, if a charge had been made against him by a person authorized to make that charge; and when this Court being a Court of superior jurisdiction put the prisoner upon his trial upon that charge, it must in my opinion be assumed, until the contrary was shewn, that the charge had been preferred by a person competent to prefer it; and even if the charge had no caption at all, in my opinion, when the prisoner was put upon trial by this Court, it must be assumed that the Court had jurisdiction to try him.

The rule as to jurisdiction is that nothing shall be intended to be out of the jurisdiction of a superior Court but that which specially appears to be so: and on the contrary, nothing shall be intended to be within the jurisdiction of an inferior Court but that which is so expressly alleged.—Peacock *vs.* Bell and Kendal, I William's Saunders's Reports, 74b.

Section 3 of the Act XIII of 1865 does not require the officer making the charge to set forth his jurisdiction, but it merely requires the charge to state for what offence the person is so committed or held to bail; and I am of opinion that the charge would be presumed to be sufficient if the caption had merely stated that a charge had been duly preferred against him; and if that would have been sufficient, I think it would also have been sufficient if the Court had stated that a charge had been preferred against him; because when the superior Court put him upon trial upon a charge preferred against him, it would be presumed that that charge had been duly preferred.

I by no means mean to say that the prisoner would have no remedy if the charge had not been duly preferred; but I am of opinion that when the prisoner pleaded to the charge that he was not guilty of the offence stated therein,—he raised no question as to whether the charge was duly preferred or not. It is stated in the caption that Mr. Ryland was a Deputy Magistrate and Justice of the Peace for Serampore; but I think that that makes no difference with regard to the question now under consideration, which is merely whether proof ought to have been given as to whether Mr. Ryland had sufficient authority to send up the charge. If he had no authority to send up the charge, there were two courses open to the prisoner. He might have applied to the Court to quash the charge, bringing to the notice of the Court the facts upon which he contended that the officer had no jurisdiction to prefer it; or he might have pleaded to the jurisdiction of the Court, showing that Mr. Ryland had no jurisdiction to prefer the charge; or if it appeared upon the face of the charge and the caption that Mr. Ryland had no jurisdiction to prefer it, he might possibly have demurred.

It has been held that objections to the jurisdiction may be taken by demurrer if the objection appears on the face of the indictment and caption, and that the want of jurisdiction may also be pleaded specially if the defect does not appear upon the face of the indictment. But it has been held that from the nature of the plea of want of jurisdiction it must evidently be pleaded before the general issue, because by pleading not guilty the defendant admits the power of the Court to try him and refers his case to their decision.—See Chitty's Criminal Law, p. 438, and cases there cited.

The prisoner, therefore, by pleading not guilty in this case, admitted the jurisdiction of the Court and of the Jury to try him for the offence; and it was no part of the issue which the Jury were sworn to try upon the plea whether Mr. Ryland had jurisdiction or not.

I am, therefore, clearly of opinion that the ruling of the learned Judge was right in holding that upon the issue which the Jury had then to try, it was unnecessary to give any evidence with regard to Mr. Ryland's jurisdiction.

The next question is whether the learned Judge was right in refusing to arrest the judgment. We are not called upon to arrest the judgment, but to say whether the learned Judge was right or not in refusing to arrest it.

Section 29 of the last Letters Patent ordains that the High Court shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction; and also to direct the preliminary investigation or trial of any criminal case by any officer or Court otherwise competent to investigate or try it, though such case belongs in ordinary course to the jurisdiction of some other officer or Court.

It has been contended upon this Section that the High Court would have no power to direct the transfer of any criminal case or appeal from any Court in the Mofussil to the High Court itself; and it is also further contended upon the force of that argument that the High Court has no power to direct the preliminary investigation or trial of any criminal case in which the offence has been committed in Calcutta to any officer or Court who would be competent to investigate or try it, if the offence had been committed in the Mofussil within the jurisdiction of that officer.

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whatever may be its proper extent, is unquestionably remedial in its nature; and I am disposed to think that this Court, the highest Court in this presidency, ought not to decline a remedial power which the words of its Letters Patent apparently give it, without the strongest possible grounds for thinking that these words were not intended to mean what they apparently do mean. But there is much in the Letters Patent, or perhaps I ought to say omitted from the Letters Patent, which leads me to think that any argument drawn from the existence of Section 13 must be taken with very great qualification. Section 13 provides for but one portion of the Civil Jurisdiction, as compared with the other portions of the Criminal Jurisdiction which are dealt with by Section 29. Section 13 is confined only to the removing civil suits for trial; Section 29, on the other hand, in one comprehensive set of words, provides for the transfer of criminal cases from district to district, including, if the words are to be taken in their apparent sense, removal to this Court, and further gives power to this Court to direct preliminary investigations; in other words, the institution of criminal suits in any district.

It appears to me, however, giving the best construction that I can to Section 29, that the High Court has power, if in its discretion it thinks right to exercise it, of transferring the trial of any criminal offence committed in Calcutta to a Mofussil Court which is otherwise competent to try it, or to direct the trial by the High Court of an offence committed in the Mofussil. The trial can only be transferred to a Court or officer otherwise competent to investigate it;—"competent to investigate it" does not, as it appears to me, include competency as regards local jurisdiction, but only competency with regard to the offender, the nature of the offence, and the punishment.

For instance, the Court could not transfer to the Judge of the 24-Pergunnahs the trial of an offence committed by a European British subject in Calcutta, because the Sessions Judge of the 24-Pergunnahs could not have tried the offender even if the offence had been committed in his own jurisdiction. So, they could not transfer to a Magistrate in the Mofussil the trial of any offence which by the terms of the Code of Criminal Procedure could be tried only by a Sessions Judge, because the Magistrate would not be a Court competent to try the offence if it had been committed within his own local jurisdiction.

If we hold that the Court can transfer the investigation of a case committed in Calcutta to a Mofussil Magistrate otherwise competent to make the preliminary investigation, I do not see how we can stop short and say that the Court could not direct the trial of that case before an officer or Court in the Mofussil otherwise competent to try it. The words "to investigate or try it" are coupled in this Section in such a manner that I think that if the Court has power to transfer the investigation, it has also power to transfer the trial.

It might be very inconvenient in many cases if the Court had not this power. Suppose two men were indicted for forging and uttering a forged note, and the evidence tended to show that the forgery was committed on one side of Circular road in the district of the 24-Pergunnahs, and that the uttering took place in Calcutta at the Bank of Bengal: it would be very inconvenient that the prisoners should be tried first at Alipore for the forgery, where they might be acquitted on the ground that the note was a genuine one, and that they should afterwards be tried in Calcutta and convicted of uttering a forged note on the ground that it was a forgery. It would be much more convenient that the Court should remove the trial for forgery into this Court, and to have the question as to the forgery and the uttering tried by the same Court.

It might be convenient under certain circumstances that if an offence should be committed in Calcutta and the prisoner should escape and be caught in some district in the Mofussil, to allow the Magistrate of the district in which the offender was caught to make the preliminary investigation. The words of the Section, therefore being sufficiently large, and the convenience greatly in favor of the construction which I am about to put upon this Section, I have no doubt that the High Court would have had power, if they thought fit to exercise it, to have directed the preliminary investigation in this case by Mr. Ryland, the Deputy Magistrate of Serampore. I cannot say that the Court did so in the present instance, for the letters have been rejected and we have no evidence of the fact. I can only say that Mr. Ryland might have had that jurisdiction.

The question then is, is this indictment bad in arrest of judgment because it does not appear that the High Court did authorize Mr. Ryland to make the preliminary investigation?

It is unnecessary for the Court to determine whether they can take judicial notice that Mr. Ryland was a Justice of the Peace for Bengal, or whether the Court would be bound to ignore that fact even if they issued the Commission appointing him and the Chief Justice had signed it. If it should so happen that the High Court did issue a commission and the Chief Justice signed it, it would be a great failure of justice that this judgment should be arrested and the prisoner sent to a Justice of the Peace of Calcutta for the purpose of having a new preliminary investigation; and, this failure of justice would be the more apparent and glaring if the Commission should happen to be proved. In such a case, the prisoner must be recommitted for trial, and the time of this Court and of a new jury would have to be occupied in re-trying him, and the witnesses be again brought from their homes and from their business, some of them perhaps clerks in the Bank of Bengal, in order to re-prove the guilt of the prisoners, because this Court would not or could not by law take judicial notice that Mr. Ryland was a Justice of the Peace for Bengal though they had appointed him themselves. If it became necessary to decide the point, I should hold that this Court could take judicial notice of the fact whether Mr. Ryland was or was not a Justice of the Peace for Bengal if from the records of this Court it should appear that a Commission had issued, as it has in fact issued. In fact, I hold that Commission in my hand under my own signature and it would be monstrous to hold that I cannot take judicial notice of its existence.

But it is not necessary to determine the question, for I have already held that as a Magistrate of Serampore, he might have had power conferred upon him to make the preliminary investigation; and, if so, he would be a Magistrate having the power to prefer the charge.

I am of opinion that it would be no ground of demurrer or in arrest of judgment if a prisoner were put upon his trial by this Court upon a charge preferred by a Mofussil Magistrate subordinate to this Court, who

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The Sections, therefore, do not, in my opinion, admit of being closely compared. And further, that which is left out of Section 13 and does not appear anywhere else in the Letters Patent, is nevertheless taken to be a power belonging to this Court and to lie within its jurisdiction. I mean the power to transfer civil cases from one district Court to another. This Court obtains that power under the general representation which it, so-to-speak, makes to the Sudder Court, and that power was given to the Sudder Court by the Civil Procedure Code; so that Section 13 and the Letters Patent are very defective, if it were intended that all our powers should be found in the Letters Patent—defective, that is, as regards civil matters in an important particular which is supplied by Section 29 with regard to criminal matters Or else, that which is put in Section 29 with regard to criminal matters is there of design. If the one is a defect due to inattention of the

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might have had the power of making the preliminary investigation conferred upon him, although the charge or the caption should not show upon the face of it that that jurisdiction had been conferred.

Law Journal Reports, Magistrates' cases, Vol. 33, p. 219; 5 Best and Smith, p. 532.

In the case of Knowlden and others against the Queen a case arose with reference to the Vexatious Indictment Act, the 23 and 24 Vic. Chapter 17, Section 1. That statute enacted that no bill of indictment for conspiracy, among other offences, shall be presented to or found by any Grand Jury unless such indictment be prepared by the direction or with the consent in writing of a Judge or of the Attorney or Solicitor General. It was held that it was not necessary that the indictment should aver or that it should be proved before the Petty Jury that the conditions imposed by that statute had been performed.

The judgment of Mr. Justice Blackburn puts the case in a very clear light, and therefore I will read an extract from it. He says:—"The statute 22 and 23 Vict., Chap. 17, Section I, has not changed the essentials in the offence charged or the tribunal which is to try it, but has introduced by proviso a limitation on the general authority of the Grand Jury, *viz.*, that before a bill is presented to or found by them certain preliminaries shall be complied with. And the question is whether it should be averred in the indictment that these preliminaries have been complied with, or should be left to the Petty Jury as a question of fact. Whatever is part of the offence must be found by the Petty Jury, and whatever is matter of title is to be found by the Grand Jury. But this is only a restriction put on the general jurisdiction of the Grand Jury to find the bill, and is precisely the same as the restriction put on the filing of informations by statute 4 and 5 W. & M., Chap. 18, Section 2, that the prosecutor must take the leave of the Court in open Court to file it. It may happen that in some cases the preliminaries have not been complied with, although the bill has been presented and found, or some counts may have been inadvertently inserted in the indictment, and then the far more convenient course would be that the defendant, on discovering that the statute has not been complied with, and, as has been pointed out, he cannot be in ignorance of the omission, should apply to the Court, and the Court will quash the whole of the indictment, or those counts with respect to which the preliminaries have not been complied with, which was the course adopted by my brother Crompton at Monmouth. It is possible that some doubt might arise whether the offence charged was within the statute, as in Reg. *versus* Heave, and one Court, holding that it was not, might refuse to quash the indictment or strike out the counts, and the prisoner might wish to question that decision in another Court. Perhaps he might plead to the jurisdiction, or, if he did not know of the omission to comply with the statute in time to plead, he might perhaps bring error in fact."

It appears to me that that case is a very important one with reference to the point as to whether it was necessary for the charge to state that Mr. Ryland was empowered by this Court to make the preliminary investigation.

But even if that case is not a sufficient authority, I apprehend that the only proper course would have been to move the Court to quash the indictment if Mr. Ryland had no jurisdiction; or to plead the want of jurisdiction if the prisoner wished to have the fact tried by a Jury, or if the objection had appeared on the face of the record to have raised it by demurrer.

It is said in Chitty's Criminal Law that "the omission in the caption of an indictment of the words "then and there" in the statement of the swearing of the Jury, was formerly held fatal; because without them it did appear that the oath was taken in the county where the offence is alleged to have been committed; but the law is now otherwise; and it will be no ground for arresting the judgment, after special verdict removed by certiorari, that the Judge who tried the prisoner is not stated to have been of the quorum, that no issue appears on the record, or that the authority of the justices of gaol delivery is not stated." The cases are referred to in Chitty's Criminal Law, 1st Volume, pages 661 and 662.

Further, as this is a Court of superior jurisdiction, the want of jurisdiction is not to be presumed. Act XIII of 1865 does not require the officer making the charge to state the jurisdiction under which he is acting, and by Section 6 of that Act it is enacted that upon charges recorded as aforesaid (that is, by the Clerk of the Crown) persons committed to custody or held to bail shall be deemed to have been brought before the High Court in due course of law.

Looking at all these grounds, it appears to me that if the indictment ought to set forth in the caption the facts which constituted the jurisdiction of the officer who made the charge, the omission of stating that which ought to be presumed, and which might have been raised by the prisoner by pleading to the jurisdiction or by motion to quash the charge, would be a mere formal defect which under the provisions of Section 41 of Act XVIII of 1862 ought to be taken by demurrer, and not by motion in arrest of judgment, after the party has pleaded to the charge and thereby admitted the jurisdiction of the Court to try him.

That Section enacts that every objection to an indictment for uncertainty or for any formal defect apparent on the face thereof shall be taken by demurrer or motion to quash such indictment before the Jury shall be sworn, and not afterwards, and every Court before which any objection shall be taken by demurrer or motion to quash for any formal defect, may, if it be thought necessary, cause the indictment to be forthwith amended in such particulars by some officer of the Court or other person, and thereupon the trial shall proceed as if no such defect had appeared.

If the objection had been taken in this case that Mr. Ryland's jurisdiction did not appear on the face of the record for want of the Court authorizing him as

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framers of the Letters Patent, the value and weight of the argument from Section 13, which depends altogether upon a supposition of the completeness of the Letters Patent, is very materially qualified. And if that which is inserted in Section 29 is put there intentionally, it is very important to observe that Section 29 is a re-production of Section 35 of the Criminal Procedure Code with a certain omission. So it stands thus: that the framers of the Letters Patent did not think it desirable to put into the Letters the enactment relating to the transfer of civil suits, thinking it sufficient where it stood in the Civil Procedure Code; but at the same time thought it proper to bring the corresponding enactment from the Civil Procedure Code into the Letters Patent, making an alteration in it while they did so. And if that be the true version of what took place, the alteration is surely very significant. Section 35 says :—

Magistrate to make the preliminary investigation, the Court might have made an enquiry into the fact; and if they had found that he had had that authority conferred upon him, or that he was a Justice of the Peace for the whole of Bengal, and therefore might have investigated the charge without such authority, the Court might have ordered the caption of the indictment to be amended, and every thing would have been right. If the facts did not exist which conferrod jurisdiction upon Mr. Ryland and the prisoner had wished to have those facts tried by a Jury, he might have pleaded to the jurisdiction. But it appears to me that the omission to show all the facts which constituted the jurisdiction or that Mr. Ryland was a Justice of the Peace for Serampore, instead of a Justice of the Peace for Bengal, is no ground for arresting the judgment.

Though Act XVIII of 1862 speaks of indictments and not of charges, Section 7 Act XIII of 1865 sets that right, because it enacts that the word "indictment" in Act XVIII of 1862 shall be understood to include the word "charge," and that all the provisions of Act XVIII of 1862 shall apply to charges recorded under Act XIII of 1865 and the trial of such charges.

It appears to me, therefore, that the present is one of those technical objections which tend to defeat justice and to which the Court ought not to yield unless it is compelled to do so by law. I am of opinion that the learned Judge was right in proceeding to pass sentence and not yielding to the objection and arresting the judgment, which, unless we believe that the Jury was wrong in the verdict which they pronounced, could only have led to a verdict of guilty upon which the prisoners must have been ultimately sentenced after a fresh preliminary investigation and the waste of the time of the Court, the Jury, and the witnesses, who would all have been required to go through the farce of a new trial for the sake of a mere technical objection, the sole tendency of which is to defeat and not to promote the due administration of justice. If the learned Judge had yielded to the objection he would merely hold out false hopes to the prisoners which, if the verdict of the Jury who tried them is correct, and I see no reason to doubt it, could never have been realized and which must have ultimately turned out to be a mere delusion.

It appears to me that there is no force in the objection and that the judgment must stand. The prisoners will be remanded to jail to undergo the sentence which has been passed upon them.

Norman, J.—On the first question discussed I entirely concur with the Chief Justice. I am glad that the decision has been based on no technical point but on the broad ground laid down by him.

Every technical objection which the law allows the prisoner has been made in his favor, and it appears to me that these objections are entirely unfounded. I desire to guard myself against being supposed to allow that the prisoner does not get the full benefit of every exception. I agree with the first proposition of Mr. Newmarch that in order to a valid conviction under Act XIII of 1865, there must be a valid charge, that is, a charge by a Justice of the Peace, or a Magistrate having jurisdiction to prefer that charge. I also go with another proposition of Mr. Newmarch's, that in this particular case, supposing that Mr. Ryland acted as a Magistrate, and not as a Justice of the Peace, it was essential that he should have been empowered by the High Court under Section 29 of the Letters Patent in order to give him, a Mofussil Magistrate, power to hold the preliminary investigation at Serampore, of a charge against the prisoner who had been arrested in Calcutta for a crime alleged to have been committed in Calcutta.

I am not prepared to say that the rule laid down in Knowlden *versus* The Queen is sufficient to decide the case now before us.

The marginal note of that case, which is reported 33 Law Journal, Magistrates' Cases, page, 219, is as follows: —"By the 22 and 23 Vict. C. 17 S. 1, no bill of indictment for certain specified offences shall be presented or found by the Grand Jury, unless some one of certain conditions have been performed. Held that it was not necessary that the performance of any of these conditions should be averred on the face of the indictment, or proved before the Petty Jury." On the argument, the cases of Hollis *versus* Marshall, 2 Hurlstone and Norman, 755, and the King *versus* Fraser, 1 Moo. Cr. C., 407, were cited for the defendant. Mr. Justice Blackburn pointed out that the Grand Jury had *a general jurisdiction* [though the statute had imposed certain restrictions on the general jurisdiction which they already had] to find the bill. And it is that fact which distinguishes Knowlden *versus* the Queen from those above mentioned.

In that case, the indictment was presented by an authority, *viz.*, the Grand Jury, which had general jurisdiction. In the present case, if the facts are as supposed by Mr. Newmarah, the charge was preferred by an officer, *not having jurisdiction unless specially empowered by the order of the High Court under the 29th Section of the Charter*, and therefore it would have been necessary if the matter were put in issue to show that the Magistrate had such special powers, because without such evidence it would appear that the charge was preferred by an officer not having jurisdiction.

Apart from Act XIII of 1865, if the prisoner desired to take the objection that the Magistrate had not been so empowered, I think he could not have done so on his trial under the plea of not guilty. The objection does not show that no offence had been committed of which this Court had jurisdiction, and therefore the case is not like that of *the Kinloch's*, Foster's Crown cases, 17-23. The offence was committed and the prisoner arrested within the jurisdiction of this Court, and to such a case, the observation of Lord Ellenborough, in the King *versus* Johnson, 6 East, 601, applies, *viz.*, the presumption is that nothing shall be intended to be out of the jurisdiction of a Superior Court of general jurisdiction which is not alleged and shown to be so.

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"It shall be competent to the Sudder Court to order the transfer of any criminal case or appeal from a Criminal Court subordinate to its authority, to any other such criminal Court of equal or superior jurisdiction, or to order that any offence shall be enquired into or determined in any district, or division of a district, other than that in which the offence shall have been committed, whenever it shall appear to such Sudder Court that such order will promote the ends of justice or tend to the general convenience of the parties or witnesses."

The Clause, as it appears in the Letters Patent, does not contain the words "subordinate to its authority" in the first part, or the word "such" in the latter part. Had these words been contained, they would have excluded this Court from the category of superior

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The King *versus* Johnson shows that a plea to the jurisdiction would have been bad, because it would not and could not have shown any other tribunal before which the prisoner ought properly to have been tried.

It is said that the Crown was bound to prove or was at least liable to be called on to prove that an order had been made directing the transfer of the case for the preliminary investigation

The 5th Section of Act XIII of 1865 provides that any Justice of the Peace or Magistrate, who shall commit to custody or hold to bail any person for trial before the High Court, for an offence committed within the local limits of its Ordinary Original Civil Jurisdiction, shall together with all examinations, &c., deliver to the Clerk of the Crown a written instrument of charge signed by him, stating for what offence such person is committed for trial. The 4th Section empowers the Clerk of the Crown to consider, and if necessary, to amend the charge, and directs that the charge with any such amendment is to be recorded. The 6th Section enacts that upon charges so recorded as aforesaid persons committed to custody or held to bail, *shall be deemed to have been brought before the High Court in due course of law*, shall be arraigned at the suit of the Crown, and the verdict recorded thereon.

The effect of this 6th Section is that if a person is committed for trial before the High Court for an offence committed, or which was by Law so dealt with as if it had been committed, *within the local limits, by any Magistrate*, the charge is to be deemed to have been brought before the High Court in due course of law. It follows that if in a particular case, any special order of the High Court is necessary to empower the Magistrate to hold the investigation, *it must be presumed* for the purposes of the trial that such preliminary order was duly made.

The duty of the Court in dealing with a charge so recorded is clearly prescribed in the 6th Section—the prisoner is to be arraigned and the verdict recorded upon the charge.

It does not follow that the prisoner has no remedy if there were no such order. No doubt, if a charge by a Magistrate not having any jurisdiction is sent up, the prisoner can question it; but that apparently must be by motion to quash the charge before the trial, or by error in fact after the verdict.

I think the Crown was not bound to give evidence of the preliminary order and that the learned Judge was not bound to receive the evidence. The prisoner was arraigned and the verdict given as directed by the 6th Section, and the learned Judge was right in accepting and recording the verdict as the case stood.

As to arrest of judgment, I think that there was not any ground for moving in arrest of judgment, because the matter alleged to be error does not appear on the face of the record. No injury has been sustained by the prisoner. We are not bound to go into facts, because as the 6th Section raises a *primâ facie* presumption of the regularity of the charge, it was for the prisoner to rebut it and show that the charge was not rightly instituted; and he has not done so. But if we do go into the facts, there is sufficient proof by evidence under the hand of the Registrar, an officer of the Court, that an order was made directing that the preliminary enquiry should take place before the Magistrate of Serampore.

It has been urged that Clause 29 of the Letters Patent does not give to the High Court power to give such a direction as to the preliminary investigation. The first branch of that Clause refers to the transfer of criminal cases and appeals; the second branch empowers the Court to give directions as to holding preliminary investigations.

(His Lordship here read the Clause in question).

I know of no conceivable reason why the words "any Officer or Court" should bear the restricted sense contended for by Mr. Newmarch. His contention even as to the first branch, it seems to me, entirely failed. The result is that in my judgment, whether Mr. Ryland was a Justice of the Peace or not, there is no reason for alleging that he was not an Officer competent to prefer the charge, and on that ground I think the conviction wholly unassailable.

Upon the point whether we can take judicial notice that Mr. Ryland is a Justice of the Peace for Bengal, Behar and Orissa,—our records show that he is so.

He is an officer of the Court, subject to it, and constantly committing prisoners for trial to the Court. Before we receive such charges, are we to enquire and take evidence whether he has received a Commission or not? His Commission is now in Court, under the seal of the Court and the signature of the Chief Justice.

It seems to me plain that we cannot but recognize our own records and acts, and our own subordinate Magistrates. Mr. Ryland professed to act as a Magistrate. I think in so doing he acted rightly, and I do not rest my judgment on the ground that he was also a Justice of the Peace for Bengal, Behar and Orissa.

Markby, J.—I agree substantially with the Chief Justice. I think all that is put in issue by the plea of not guilty in the charge is what follows the word "change;" just as on an indictment presented by a Grand Jury, all that is put in issue is what follows the word "present." I think it would lead to the greatest inconvenience, if on every trial the correctness of the procedure by which the prisoner was brought before the Court was considered as challenged.

I therefore think I was right at the trial in refusing to leave to the Jury any question as to whether the Magistrate at Serampore had been duly authorized to hold the preliminary enquiry.

With regard to the motion in arrest of judgment, I concur in the construction which has been put upon Section 29 of the Charter by the Chief Justice.

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Courts referred to in Section 29; and therefore reasonable inference from the omission of them is that this Court was not intended to be excluded.

It is no doubt singular that if Section 29 of the Letters Patent does confer the general power, which I think it does, Section 24 should have been put into the Letters Patent, inasmuch as it appears to be little other than a particular instance of that general power. There are, however, provisions, even in that Section, which under a nice discrimination might possibly distinguish the power there given, and prevent it from being strictly such a particular case as that to which I have referred. However this may be, having regard to the want of completeness of drafting which certainly is manifested in the Letters Patent, I do not think that even the presence of such a provision as that of Section 24 should be allowed much weight in the arguments which I have already dwelt upon at some considerable length.

And lastly, we have the express opinion of the late Chief Justice, the present Officiating Chief Justice, and Mr. Justice Markby, in *Nobodeep Chunder Gossamee's* case, all concurring in laying down that this Court does, under Section 29, possess the jurisdiction which is now invoked by Mr. Ingram's client. I have thought it necessary at this length to give the reasons which have led me to concur in the opinion of these three Judges, because the question whether or not this Court possesses the power, is one, I apprehend, of the greatest importance to the administration of justice in Bengal.

I come now to the facts upon which this application is made. The principal grounds upon which the application is based seem to me to be shortly these, namely:—

1. That in substance, all the numerous charges preferred against the prisoners are allegations of criminal acts and conduct committed and exhibited at Calcutta, not at Patna.

2. That the course of the prosecution, whether intentionally or not, has been unfair, and that the selection of Patna as its place, is certainly calculated to prejudice the prisoners.

3. That the case against the prisoners has been, and is being, put together by an organized set of police agents who have had their quarters at Patna, and are using improper and illegal means to attain their object.

4. That the effect of the proceedings of this police agency is to create at Patna such a feeling of dread and insecurity among persons likely to be called upon to give testimony there in the matter, as will prevent a trial held in that place from being fair, impartial, and satisfactory.

5. That several of the material witnesses for the defence refuse to go to Patna to give evidence.

6. That difficult points of law are likely to arise at the trial.

These taken together did appear to me to afford very sufficient cause why the trial should be held in the superior Court at Calcutta rather than in the Sessions Court at Patna; and as the affidavits filed by the applicant were undoubtedly strong enough to make out these grounds *primâ facie*, the rule was issued by this Court.

In answer to this rule the prosecutor has filed affidavits denying, to a very great extent, the statements of the applicants relative to the conduct of the prosecutor and behaviour of the Police. I do not think it right that we should express anything in the shape of a judicial decision on the many issues of fact thus raised between the parties, or compare the relative truthfulness of the different deponents on the one side and on the other, because we can hardly do this without giving grounds which might probably prejudice the parties at the trial. It seems to be now sufficient to say—to state very generally—that I have considered the affidavits on both sides with the gravest anxiety. I am very sensible of the weight which must of need be attached to the forcible arguments employed by Mr. Ingram, and I feel much the absence of former decisions of the point, which might, in so grave a matter as this, afford the valuable guide to a proper exercise of the discretion of the Court. It appears to me that instances drawn from the practice of the Court of Queen's Bench in England with reference to the granting or withholding of writs of *certiorari* to bring up an indictment from an inferior Court are not near enough—not nearly parallel enough—to this case, as to afford us any real assistance in forming our judgment. In England all criminal trials except trials for small offences are heard by Jury, which I may say is drawn somewhat promiscuously from a not very high class of the population. There is, therefore, some risk that the impartiality of the tribunal so constituted should be affected by existing causes of popular feeling or excitement bearing on the matter to be

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tried. And then the verdict of this body is final without appeal. Any risk of miscarriage of this kind by such a tribunal, if it is to be prevented, can only be prevented by removal to a better or less prejudiced tribunal for trial. Hence, a comparatively small cause may possibly be found inducing the Court of Queen's Bench to remove criminal cases in England, which might not be sufficient to render a removal necessary or justifiable under a different kind of procedure.

In the present case the prisoners will be tried at Patna by a Judge assisted by Assessors of intelligence and of respectable independent social position, and an appeal from the decision of the Sessions Court will lie to this Court, both upon fact and law. Bearing this in mind, I think the affidavits put in on behalf of the prosecution do appear so far to displace the case set up before us by the applicants, as to remove the grounds for supposing that they will not have a fair and impartial trial at Patna.

There remains, perhaps, on the face of these affidavits themselves, enough to indicate that there has been a long continued and zealous activity on the part of the Police in procuring witnesses in support of the prosecution, such as may not possibly be without an effect upon the character of the evidence upon which the Sessions Court will have to act.

But although for this reason more than common care will be required for the proper trial of the case, I do not see in it sufficient cause to justify our coming to the conclusion that the Sessions Court at Patna is not competent to exercise the requisite care.

Finally, it appears to me that it is not likely that points of law will arise in the course of this trial, such as the Sessions Court cannot satisfactorily deal with; and in saying this I bear in mind that should the Sessions Court by any misfortune err in this matter, the error can be set right afterwards in this Court.

On the whole, then, I think that the applicants have failed to show to this Court that it is necessary to promote the ends of justice that the removal asked for should be ordered.

Macpherson, J.—The questions to be decided on this rule are, whether the High Court has power to order this case to be transferred to itself for trial; and whether, if this Court has this power, it ought to exercise it in this particular case.

I confess, I think, that there is great force in the argument of the Advocate-General as to the power of transferring criminal cases to this Court from a Court in the Mofussil; and it may be, that if the matter were *res integra*, I should have adopted the view for which he contends. I am, however, unable to discover anything which actually excludes that interpretation of Section 29 of the Letters Patent which gives this Court power to transfer cases to be tried by itself in the exercise of its Original Criminal Jurisdiction. Indeed, I must admit that on a perfectly fair, reasonable, and unstrained reading of the words used, they do bear that interpretation.

This being so, I find that a Court consisting of three Judges (Peacock, C. J., and Norman and Markby, J. J.,) have held expressly that the High Court has power to transfer a criminal case to itself. This was in the case of *Reg. vs. Nobodeep Chunder Gossamee* (1 B. L. Rep., 31, Criminal) decided in April 1868; and the decision was given after formal argument of the question, though the judgment of one at least of the learned Judges turned more especially upon another point.

Under these circumstances, I am not prepared to say that I differ from my learned colleagues, who now are clearly of opinion that Section 29 does confer this power on the Court. At the same time, I must add that I think that the language of Section 29 is ambiguous, and might fairly have been construed in the more restricted sense which the Advocate General would put upon it, and which the position of Section 29 in the Letters and various of the provisions of the other Sections of the Letters, would seem to indicate that the framers of the Letters Patent intended should be put upon it.

I concur in the opinion that sufficient grounds have not been made out to justify the High Court in transferring this case for trial before itself in Calcutta.

The cases referred to as showing the circumstances under which a criminal case may in England be brought up by *certiorari* for trial in a superior Court, appear to me to have little or no applicability to the present matter. In England there is, I may say, practically no appeal in a criminal case from the decision of the Court which tries it,—no remedy for a miscarriage of justice. From the decision of the Patna Court, if it tries this case, there is an appeal to the High Court on both facts and law. In my opinion, therefore, the mere possibility or probability that difficult questions whether of law or of fact will arise, is no

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reason for transferring a case under Section 29. For, in the event of a miscarriage on the part of the Mofussil Court, a sufficient remedy is provided in the right of appeal to this Court.

A very much stronger case must be made out to justify us in transferring a case to this Court, than would in England justify the removal of a case by *certiorari*. For the effect of a transfer under Section 29 is wholly different from the effect of a removal under a *certiorari*. In England, a case brought upon *certiorari* is tried in precisely the same manner before the superior Court as it would have been tried if it had not been removed. Here a case transferred to this Court is tried under a procedure wholly different from that of the Mofussil Court from which it is transferred. While such a transfer in England involves change only of place of trial and Court, here it involves change of place of trial and Court and also of procedure. I may add that the transfer of a criminal case to this Court may involve further very substantial changes in the personal status and privileges of the accused, and of all others who come from the Mofussil into Calcutta for the purposes of the trial. To obtain the benefit of these changes is one of the avowed and principal objects of the present application.

Section 35 of the Criminal Procedure Code gives the High Court power to order the transfer of a criminal case from one Court in the Mofussil to any other Mofussil Court of equal or superior jurisdiction, whenever it shall appear "that such order will promote the ends of justice, or tend to the general convenience of the parties or witnesses." Considering the great difference which exists between the effect of a transfer from one Mofussil Court to another, and the transfer from a Mofussil Court to the High Court, it appears to me that it is under Section 35 of the Criminal Procedure Code, and under that Section alone, that this Court ought to order the transfer of criminal cases from one Court to another, except in very special cases. The excepted cases would comprise the class indicated by Sir Barnes Peacock in his judgment in Nobodeep's case, *i. e.*, cases in which the transfer is necessary in order to avoid the trial of what is substantially but one issue more than once in different Courts with different jurisdictions. They would also include cases in which it is clearly made out that there is a substantial doubt as to whether the accused can have a fair trial elsewhere than in Calcutta. I see no reason, on the materials before me, for entertaining any such doubt. I, therefore, think the rule should be discharged.

Mookerjee, J.—I concur with Mr. Justice Phear in holding that the High Court has the power to direct the transfer of any criminal case to itself, and to try the same. It cannot be denied that the Letters Patent give the High Court much larger powers and more extensive jurisdiction than those possessed by either the late Sudder Court or the Supreme Court. Section 29 of the Letters Patent of 1865, I think, gives the power to the High Court to remove a criminal case from any Court to any other Court including itself. The Sudder Court was only a Court of Appeal; and it appears to me, therefore, that the Legislature in 1861 never contemplated that the Court should try and determine criminal cases as a Court of Original Criminal Jurisdiction. The language of Section 35 Act XXV of 1861 is as follows:—

"It shall be competent to the Sudder Court to order the transfer of any criminal case for appeal from a Criminal Court, *subordinate to its authority*, to any other *such* Criminal Court of equal or superior jurisdiction or to order that any offence shall be enquired into or determined in any other district, or division of a district, other than that in which the offence shall have been committed."

The language used in Section 29 of the Letters Patent of 1865 is quite different. It does not use the words "from a Criminal Court subordinate to the authority of the High Court," and also omits the word "such." On the contrary, the Section says "to any other Court of equal or superior jurisdiction." That the High Court is a Court of superior jurisdiction to that of a Sessions Judge, cannot, I apprehend, be denied. I cannot see how it can, therefore, be contended that the High Court, which can transfer criminal cases from the Court of one Sessions Judge to that of another (which is a Court of equal jurisdiction), is not empowered by the terms of Section 29 to remove the case to itself, which is undoubtedly a Court of superior jurisdiction to that of a Mofussil Sessions Judge. I, therefore, entirely agree with the learned Judges who decided the case of *Nobodeep Chunder Gossamee*, and hold that it is competent to this Court to direct the trial by the High Court of an offence triable by the Sessions Court at Patna. This decides the first objection raised by the Advocate General as to the jurisdiction of this Court, under the Letters Patent, to remove a Mofussil criminal case to itself.

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With reference to the second objection raised by the learned Advocate General as to expediency of removing this particular case from the Court of the Sessions Judge of Patna to the High Court, I agree with my learned colleagues that no sufficient case has been made out by the prisoners to induce a reasonable belief that the prisoners will not have a fair and impartial trial in the Court of the Sessions Judge. English cases have been cited to show that where important questions of law arose, or where accounts of a complicated nature had to be tried, the Court of Queen's Bench issued writs of *certiorari* and removed the trial from the inferior Court to itself. But in England there is no appeal in criminal cases, whereas in this country a regular appeal on facts and law is allowed by our procedure, and any mistake of law or fact committed by the Sessions Judge can be rectified by an appeal to this Court. If a strong case had been made out that there is a reasonable apprehension that the prisoners will not have a fair trial at Patna, I would not have hesitated to direct the removal of this case from the Sessions Court at Patna to this Court for trial.

The 12th May 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice,* and the Hon'ble G. Loch, *Judge.*

Surety—Warrant—Section 220, Code of Criminal Procedure.

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Officiating Magistrate of Nuddea.

Khoodee Koiburtnee

versus

Doorgadass Bhuttacharjee.

Before a warrant can issue attaching the property of a surety, he should be called on under Section 220, Code of Criminal Procedure, to show cause why he should not pay the penalty mentioned in his bond, and it must appear clearly on the face of the record that he had such notice given him.

Reference.—One Doorgadass Bhuttacharjee was sent up by the police for trial under Section 448 of the Penal Code. It seems that the accused was sent up on bail, one surety in the sum of 100 rupees having been required by the police and found. The surety was bound over to cause the accused to appear before the Joint Magistrate at 10 A. M. on the 10th November 1870. The case was made over for trial to Mr. Deputy Magistrate * * The accused was not present on the 10th. On the 11th Mr. * * recorded a "proceeding" ordering that the bail bond should be forfeited, and "that a warrant be issued for attachment and sale "of the moveable property belonging to, 1*st*, "Doorgadass Bhuttacharjee, 2*nd*, that of his "surety Jadub Chunder Surnokar, to the "extent of 20 rupees each."

The whole of this order appears to me to be illegal.

The order, as against the accused person himself, was passed under a misconception. The Deputy Magistrate was under the impression that the accused gave his own recognizance to appear. As a matter of fact he did not give it. This is now admitted by the Deputy Magistrate, and there can be no doubt that the money ought not to have been demanded from the accused person.

With reference to the order against the surety, I have to remark that it was the Deputy Magistrate's duty, under Section 220 of the Criminal Procedure Code, to give notice to the surety to pay or to show cause why he should not pay the penalty mentioned in the bond. It is only when the surety fails to show sufficient cause that a warrant can issue.

In the present case, I do not find that any notice was given to the surety. The order for the issue of a warrant was therefore, as it seems to me, illegal.

I submit the Deputy Magistrate's explanation.

With reference to it I have only to observe that a mere verbal and unrecorded order to show cause would not, in my opinion, have been sufficient, even if it had actually been given. Before a warrant can issue, it seems to me to be necessary to show clearly, on the face of the record, that the surety has had notice, and that he has either not availed himself of it, or has appeared and failed to show cause.

Judgment of the High Court.

Norman, C. J.—The order of the Deputy Magistrate is illegal, and must be quashed for the reasons mentioned in the Magistrate's letter.

There seems to be several other objections to it.

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The 13th May 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

High Court—Sentence—Sections 404 and 405, Code of Criminal Procedure.

(Criminal Motion.)

Messrs. Watson and Co., *Petitioners,*

versus

Bykuntnath Doss, *Opposite Party.*

Mr. R. T. Allan for the Petitioners.

In a case in which a legal sentence, however light it may be, has been passed, the High Court, sitting as a Court of revision under Section 404 of the Code of Criminal Procedure, have not the power to interfere with that sentence, inasmuch as under Section 405 the Court cannot say that the sentence is contrary to law.

Kemp, J.—This is an application under Section 404. The petitioners appear to seek to obtain an order from this Court enhancing the punishment inflicted by the lower Court upon the prisoner. The accused was convicted under Section 408 of criminal breach of trust, and the sentence passed upon him is certainly a very light one; but we cannot say under Section 405 that it is contrary to law. The punishment for the offence described under Section 408 is imprisonment of either description for a term which may extend to seven years. Mr. Allan for the petitioners has drawn our attention to a case to be found in Vol. V, Weekly Reporter, Criminal Rulings, page 45. In that case no doubt the Court acting as a Court of revision did hold that this Court as a Court of revision could reverse a sentence and pass a proper sentence notwithstanding that in such a case the sentence must be enhanced in order to pass a legal sentence; and an illustration of this was given to this effect, namely, that if an accused person be convicted of murder which would be punishable either by death or transportation for life, and the lower Court had passed a sentence of say 14 years' rigorous imprisonment, such sentence not being a legal sentence could be reversed and set right by this Court acting as a Court of revision, although in doing so the sentence must be enhanced in order to pass a legal sentence. In this case a legal sentence has been passed, however light it may be; therefore sitting as a Court of revision we have not the power under Section 404 to interfere with that sentence, inasmuch as under Section 405 we cannot say that this sentence is contrary to law.

The application is rejected.

The 15th May 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Procedure—Evidence—Examination of accused—Magistrate's attestation—Sections 205 and 366, Code of Criminal Procedure.

The Queen *versus* Chupput Khyrwar, *Prisoner.*

Committed by the Deputy Commissioner and tried by the Judicial Commissioner of Chota Nagpore on a charge of Murder.

Before the examination of a prisoner in the presence of the committing officer can be used as evidence against him under Section 366, Criminal Procedure Code, the provisions of Section 205 of that Code must have been complied with and the committing officer's attestation affixed in full to the examination.

Glover, J.—This prisoner has been convicted by the Judicial Commissioner of Chota Nagpore of the murder of his brother, Kurrumalee, and has been sentenced capitally subject to the confirmation of this Court.

The evidence on which he has been convicted is his confession before the Deputy Commissioner and the testimony of two witnesses.

We think that what the accused said, or is alleged to have said, before the Deputy Commissioner cannot be used as evidence against him under Section 366, Criminal Procedure Code, because the examination was not taken in accordance with the provisions of Section 205. That Section requires that the examination of an accused person, after being tested and "made conformable to what he declares is "truth," shall be attested "by the signature "of the Magistrate." Now there is no *signature* attached to the accused's examination in this case. There is no doubt an initial of some kind, which may be the initial of the

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Deputy Commissioner, but this is not a "signature," and the law requires that there should be a "signature."

Before making his examination evidence against an accused, it is absolutely essential that the terms of the law should have been strictly complied with. The point was fully discussed in the case of Queen *versus* Mussamut Niruni, VII Weekly Reporter, p. 49, Criminal Rulings, and in accordance therewith we think that the examination said to have been made by the Deputy Commissioner is not admissible in evidence against Chupput, and should not have been so used in the Sessions Court.

We may remark in this place that we have on more than one previous occasion observed considerable laxity of procedure on the part of the criminal authorities of Chota Nagpore in respect of the way in which the examination of accused persons are taken, and the Judicial Commissioner should be careful to impress on his subordinates that the provisions of the law as laid down in Section 205, Code of Criminal Procedure, should in every case be most fully and most carefully complied with.

In this particular case justice will not miscarry by reason of the Deputy Commissioner's omission to record the prisoner's examination in a legal and proper manner, because there is, we think, sufficient evidence on the record apart from Chupput's examination to justify his conviction. There is the direct testimony of the woman Goomnee, which does not seem open to suspicion, and her evidence is to some extent corroborated by the evidence of the Chowkeedar to whom the woman reported the murder almost as soon as it had been committed. The fact of this man's ignorance of the intrigue does not throw any suspicion on his veracity, for the affair had not been going on for more than a couple of months, and would, under the circumstances, be kept as secret as possible. There is no possible explanation of the woman's subsequent conduct except on the supposition that her story is true, for the prisoner would be the last person she would have thought of charging with a crime he had never committed.

Her evidence satisfied the Judicial Commissioner and his Assessors and we see no reason to distrust it. If it be believed, it fully justifies the conviction and sentence.

We confirm the sentence of death passed on the prisoner Chupput.

The 20th May 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Procedure—License—Section 77 Act III of 1864.

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Sessions Judge of 24-Pergunnahs.

The Chairman of the Municipal Commissioners for the Suburbs of Calcutta,

versus

Umbica Churn Mookerjee.

Where the accused was charged with a breach of Section 77 Act III of 1864 in not taking out a license for a woodyard, and he pleaded that the yard had been in existence prior to 1864, it was held that the Magistrate was wrong in refusing to enquire into the allegation as to the existence of the yard prior to 1864.

Norman, C. J.—The defendant was charged with a breach of Section 77 of Act III of 1864 in not having taken out a license for a woodyard. He answered that his yard was an old one, meaning a yard which had been in existence prior to the passing of Act III of 1864. The defendant admitted that he had taken out a license in previous years. The Magistrate thought he was not bound to enquire whether the yard existed prior to 1864, and convicted the accused, fining him rupees 25.

In refusing to try the question whether the woodyard existed prior to 1864 the Magistrate was clearly wrong and the conviction cannot be sustained.

The fine, if levied, must be repaid.

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The 20th May 1871.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,

Judges.

Procedure — Land disputes — Breach of the peace—Section 318, Code of Criminal Procedure.

(Miscellaneous case).

Gunga Narain Mitter, *Petitioner*,

versus

Gour Soonder Chowdhry, *Opposite Party.*

Mr. Mun Mohun Ghose and *Baboo Doorga Mohun Dass* for the Petitioner.

Baboo Kalee Mohun Doss for the Opposite Party.

When both the disputing parties are examined and state that men were collected by their opponents for the purpose of committing a breach of the peace, a Magistrate is justified, without enquiring who was the aggressor or the aggrieved party, to proceed under Section 318 of the Code of Criminal Procedure, and to take whatever steps are in his opinion necessary to prevent a breach of the peace.

Kemp, J.—We do not think it necessary to interfere in the order passed by the Magistrate in this case. The first objection taken by the learned Counsel for the 2nd party is that no judicial finding has been recorded, which is a condition precedent before proceedings under Section 318 of the Code of Criminal Procedure can be instituted. The next point refers to a question of jurisdiction The learned Counsel contends that a part of a mouzah comprised in lot Khundoho is not within the jurisdiction of the officer passing the order. In this case, on examination of the record it appears that both parties put in petitions through their karpurdazes on one and the same day. In both petitions it is stated that some 60 or 70 men are collected in different villages armed with soorkies, lattees, and other weapons, with the object of preventing the opposite party from collecting the rents and also with the object of looting the cutcherry of the opposite party. Both their karpurdazes were examined on oath, and both stated that there was, in their opinion, an apprehension of a breach of the peace. Upon this the Police were directed to enquire and they reported the result of their enquiry. Upon the receipt of these reports the Deputy Magistrate on the 13th of February 1871 recorded a proceeding stating that from the police reports and other papers and from enquiry it appeared to him that there was reason to apprehend a breach of the peace, and he therefore proceeded under Section 318. A decision has been referred to dated the 22nd of September 1869,—I allude to the case of Kashee Kishore Roy *versus* Tarinee Kant Lahoree ; and in that case Mr. Justice Norman held that the Deputy Magistrate had not recorded any proceeding nor does he anywhere say that he is satisfied that a dispute likely to lead to a breach of the peace existed. Now in this case the Magistrate has recorded a proceeding : he has stated the grounds on which he is satisfied that a breach of the peace was likely to occur. It appears to us also very clear that when both parties are examined and both parties state that men are collected for the purpose of committing a breach of the peace, that the Magistrate was justified, without enquiring then and there who was the aggressor or the aggrieved party, to proceed under the Section and to take whatever steps were in his opinion necessary to prevent a breach of the peace. With reference to the 2nd point, the learned Counsel for the 1st party Mr. Ghose stated that he only asked for an order with reference to such mouzahs as were within the jurisdiction of the officer passing the order. The order of the Magistrate will therefore stand, but only with reference to such mouzahs as are situated within his jurisdiction.

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The 23rd May 1871.

Present:

The Hon'ble F. Jackson and Onookool Chunder Mookerjee, *Judges.*

High Court—Procedure — Land disputes—Breach of the peace — Section 318, Code of Criminal Procedure.

(Miscellaneous Case).

Bharut Chunder Bose, *Petitioner,*

versus

Dwarkanath Chowdhry, on the part of Doorga Monee, *Opposite Party.*

Baboos Romesh Chunder Mitter and *Amarendro Nath Chatterjee* for the Petitioner.

Mr. W. C. Banerjee and *Baboo Bycunt Nath Dass* for the Opposite Party.

Where a Magistrate proceeding under Section 318, Code of Criminal Procedure, decides on the evidence in favor of a party as being in possession of the disputed land, the High Court cannot re-consider the Magistrates' decision and decide which party is in actual possession.

Jackson, J.—No sufficient ground has been made out upon which we can legally interfere with the decision of the Assistant Magistrate. It is said that no sufficient notice was given to the present applicant that it would be necessary for him to attend the Magistrate on the 9th and 10th January last with his evidence; that notice was served upon him to put in his written statement, but no sufficient notice for the production of his witnesses; that when both parties went to the spot in accordance with the notice, he asked the Assistant Magistrate for time to enable him to file documentary evidence, and also time in order to examine witnesses, one of whom was apparently a gomastah who was at the time imprisoned in the Furreedpore jail.

The Assistant Magistrate has explained that he passed no order upon the several petitions of the applicant, because he had previously given notice to the parties and that he thought that they ought to have produced their evidence at the time the enquiry was held. It is very clear that a large quantity of evidence both documentary and oral was produced by both sides on that day. The enquiry was under Section 318 of the Criminal Procedure Code. The Assistant Magistrate in order to satisfy himself and to give every opportunity to the parties to produce their witnesses, went to the spot in person. The present applicant was evidently aware that he was expected to produce his evidence at that time, inasmuch as he did produce a large quantity of it. And if he really was in possession of the land it seems to me quite impossible that he should not have been able to produce the very best evidence on the point of his possession on the spot. The Assistant Magistrate enquired from both parties as to whose ryots were in possession of each different field in the disputed land, and the result of his enquiry was to satisfy him that one side was unable to point out the ryots to whom the fields belonged, and the other side then and there pointed out the occupier of each different field. This investigation satisfied the Assistant Magistrate that the present applicant to us was not in possession, but that the other side was. The Assistant Magistrate accordingly has decided on the point of possession alone, totally regardless of all questions of right and title, in favor of the person whose evidence he believed. It is very seldom that in such a case as this we find that the decision solely turns on the question of the fact of possession. It seems to me that the applicant in this case wishes us to reconsider the question of possession on evidence regarding title. We have no power whatever to re-consider the decision of Assistant Magistrate, and to decide which party is in actual possession. If the Assistant Magistrate had not decided this case on the possession of the parties, we might have directed him to decide it on that point, and on that point alone. It may be, I do not know whether it is really the case, but it is alleged, that there is some mistake in his decision in the names attributed to this land. But whether there is such a mistake or not, it seems to me quite unimportant, as the Assistant Magistrate distinctly says that he does not decide whether the land belongs to one chur or to another. He has only decided that the land in dispute is in possession of the party whose evidence he believed. On the evidence which was before him it seems to me that that was the proper way to decide this case, and we have no power to interfere. We reject the application.

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The 26th May 1871.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Procedure — Complainant—Evidence —Section 262, Code of Criminal Procedure.

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Officiating Sessions Judge of Midnapore, in the case of Notobur Bera.

A complainant in a case who mentioned the names of several witnesses on his behalf was requested to produce them on a certain date. Instead of doiug that he produced only 2 witnesses, who were examined. Held that as the complainant did not apply to the Magistrate to issue summonses on the other witnesses or ask him to proceed under Section 262, Code of Criminal Procedure, the Magistrate was not wrong in law in deciding the case on the evidence which was before him.

Reference.—COMPLAINANT, Notobur Bera, brought a case under Section 383 (with other Sections) stating he was dragged from his house to defendant's cutcherry and on a false charge of immorality fined 25, and made, by beating and kicking, to pay Rs. 5 as part payment. He produced two witnesses who confirmed his story.

The Deputy Magistrate dismissed the case. He referred to a case under Section 282, Criminal Procedure Code, as parallel, and also discredited the witnesses,—one, because he said the naib had never done so before, and the other because he was complainant in another case.

I think that of the two points urged by complainant in appeal, the first, *viz.*, the rejection of evidence given, is not a ground for my taking action under Section 434, although it does show that the Deputy Magistrate's judgment is unsound and that he cannot appreciate the weight of evidence; (this has been the case in other instances.) But the second point, *viz.*, that he was entitled to have his other witnesses examined, is a legal ground for proceeding under Section 434. The High Court rulings at page 45 and page 47 of 7 Weekly Reporter are to the effect that the witnesses named in a petition of complaint should be examined before the accused is discharged under Section 250. There are three other witnesses yet unheard *in this* instance. I would suggest that, if it should direct the order of discharge to be set aside, the High Court would be pleased to direct the case to be heard by *another* Magistrate.

Judgment of the High Court.

Glover, J.—We do not think that we need interfere in this matter. The complainant mentioned the names of four witnesses, Radha Gorai, Rammohun, Bhojee, and Kaleepershad, and he was told to bring them with him on a certain date. He brought two whose evidence was recorded. He did not ask the Magistrate to issue summonses on the remaining two or ask him to proceed under Section 262.

It appears to us that if these remaining witnesses were not examined, it was the complainant's own fault. Parties should ordinarily be left to bring their own witnesses, and it is only when a complainant cannot ensure their attendance that a Magistrate, after being satisfied that their evidence is necessary, can issue a summons.

In this case no application was made to the Deputy Magistrate, and therefore, he was not wrong in law in deciding the case on the evidence before him. Whether he decided rightly or not is not the question with which we have to deal on this reference.

The 27th May 1871.

Present :

The Hon'ble E. Jackson and W. Ainslie, *Judges.*

Procedure—Accused—Evidence—Recognizance—Breach of the peace—Government.

(Miscellaneous case.)

Johan Buksh, *Petitioner.*

Mr. R. E. Twidale for the Petitioner.

In a case in which the accused person cited a number of witnesses, and the evidence already before the Magistrate was contradictory, it was held that the Magistrate should have summoned and examined the witnesses whom the accused wanted to call.

Per Ainslie, J.—In a case in which proceedings are taken for forfeiture of recognizances, the person against whom they are held is competent to give evidence on oath on his own behalf.

Quære.—When recognizances are forfeited, is a Magistrate bound to forfeit the whole amount of the bond, and is the power of reducing the sum to a penalty corresponding to the breach of the peace confined only to the Government.

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Jackson, J.—In this case one Jehan Buksh has been convicted of a petty assault in a family quarrel, and has been sentenced to a fine of 10 rupees, and at the same time recognizances which he had previously given not to break the peace, to the extent of 500 rupees, have been forfeited, and he has been required to pay those 500 rupees. He has applied to this Court to set aside this order on the ground that he petitioned the Magistrate to examine a number of witnesses whom he cited to prove that he had not committed the assault, and that the Magistrate refused to accept the petition or send for the witnesses It appears that there had been contradictory evidence given before the Magistrate as to whether Jehan Buksh had committed the assault, two witnesses deposing he had, and two other witnesses denying his participation in it and stating that the assault had been committed by other parties, and not by Jehan Buksh. The record does not show that there had been any sifting of this evidence or cross-examination from which it would be clearly ascertained whether Jehan Buksh had taken part in the assault or not. Under such circumstances, I think that the Magistrate was bound to send for these additional witnesses and examine them before convicting Jehan Buksh of the assault, the more so as his conviction virtually involved the forfeiture of such heavy recognizances. Jehan Buksh has not applied to this Court to set aside the conviction for assault, but I think that our proper course is to set aside that conviction on the ground of the irregularity I have above alluded to, and at the same time to set aside the forfeiture of the recognizances and to direct that if necessary there shall be a proper trial on the charge of assault; and on its result will depend whether the forfeiture of recognizances is to take place or not. It may not be necessary then to decide the question whether when recognizances are forfeited, a Magistrate is bound to forfeit the whole amount of the bond—and that it is only the Government which can reduce the sum to a penalty corresponding to the breach of the peace which has taken place. I admit that I should hesitate very much before coming to any such conclusion, notwithstanding the decision of the Bombay High Court to the contrary. I would therefore set aside the conviction of assault as well as the forfeiture of recognizances, and order a new trial if the Magistrate thinks it necessary to take any further steps in the case.

Ainslie, J.—I think the forfeiture of the recognizances should be set aside, and that the petitioner should be allowed to give evidence to show that he is not bound to pay the penalty of the bond. The proceeding to realize the penalty is of the nature of a civil proceeding, and the person against whom it is held is competent to give evidence on oath in his own behalf, and is also entitled to go into evidence. I hold that the conviction of assault is not an estoppel, because the nature of the proceedings is changed and because the same terms are used in Section 293 in respect of the principal as in Section 294 in respect of the surety, and the surety never had an opportunity of contesting the conviction.

The 27th May 1871.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Procedure — Commitment — Section 171, Code of Criminal Procedure.

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Officiating Sessions Judge of Midnapore, in the case of Tarraproshad Sahoo.

The plain intention of the Legislature in Section 171 of the Criminal Procedure Code was that the Court before which an offence was committed and by which the preliminary enquiry was made should not be the Court to investigate, try, or commit for trial.

Glover, J.—I doubt whether there was any necessity for this reference so far as the trial of the accused was concerned, inasmuch as the Sessions Judge might, in the terms of Section 169, himself have sanctioned the entertainment of the charge under Section 193 of the Penal Code.

But with regard to the power of the Officiating Joint Magistrate to commit, I think that the Sessions Judge is right, and that the plain intention of the Legislature in Section 171 of the Procedure Code was that the Court before which the offence was committed, and by which the preliminary enquiry was made, should not be the Court to investigate, try, or commit for trial. The ruling in the Queen *versus* Chunder Seekur Roy,* which has certainly been more than once followed by this Court, is quite in point, and the

* 12 W. R., Criminal, p. 18.

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principle therein laid down is not dependent on the fact that the committing officer was an Assistant Magistrate only.

The reference made by the Officiating Joint Magistrate to the Criminal Letter (Volume 13, W. R., Criminal Letters, 4) does not assist his view of the case. For not only was the opinion expressed therein not a judicial decision, but it was given, I observe, by the same Judge (Mr. Justice Louis S. Jackson) who afterwards,—as that learned Judge himself clearly explains in the case of Queen *versus* Chunder Seekur, — saw reason to change his opinion, and to hold that the correct principle was that the Officer before whom an offence of the nature described in Section 193, &c., of the Penal Code, should not be the one to investigate or try the case.

In this particular instance, there would have been no difficulty whatever in procuring the requisite sanction, but in any case it appears to me that the Officiating Joint Magistrate was not the proper person to commit the case to the Sessions.

Kemp, J.—I concur.

The 30th May 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, F. B. Kemp, J. B. Phear, A. G. Macpherson, and Dwarkanath Mitter, *Judges.*

Whipping—Punishment—Section 46, Code of Criminal Procedure—Act VI of 1864.

Reference to the High Court under Section 434 *of the Code of Criminal Procedure by the Officiating Sessions Judge of Backergunge.*

Moniruddeen Shamadar and another

versus

Gour Chunder Shamadar.

HELD (*Kemp and Phear, J. J.*, dissenting) that notwithstanding Section 46 of the Code of Criminal Procedure, a person convicted at the same time of two or more offences punishable under the Penal Code may, in addition to the punishments prescribed by the Penal Code, be sentenced to whipping under Act VI of 1864. The Penal Code and the Code of Criminal Procedure must be read as if the Whipping Act formed a part of the Penal Code from the date of its enactment, and Section 46 of the Code of Criminal Procedure is applicable to all offences and punishments as prescribed by the Penal Code in its present and amended form.

This case was referred to the Full Bench by Norman, C. J., and Loch, J., with the following remarks:—

Norman, C. J.—ON the morning of the 9th Choitro, Gour Chunder Shamadar carried off a cow belonging to Moniruddeen under circumstances which, in the opinion of the Magistrate, constituted the offence of theft. On the evening of the same day Moniruddeen went to complain to the talookdar whose ryot he is.

Gour Chunder, who lives near the talookdar, on seeing Moniruddeen, seized him, carried him inside the verandah of his house, and beat him.

Gopal Shamadar, hearing the outcries of Moniruddeen, remonstrated with Gour Chunder, upon which Gour Chunder attacked Gopal and struck him with a lattee, breaking his arm.

The Magistrate convicted Gour Chunder on three charges; 1st, of theft; 2nd, of illegal confinement of Moniruddeen; and 3rd, of causing grievous hurt to Gopal Shamadar.

For the first offence Gour Chunder was sentenced to and received twenty stripes; for the second to one month's rigorous imprisonment; and for the third to six months' rigorous imprisonment.

The Judge, with reference to the sentence of one month's imprisonment, with respect to which there is no appeal, has sent the case before this Court.

I am of opinion that the rule laid down in the 9th Weekly Reporter, Criminal, p. 41, Nassir *versus* Chunder and others, requires further consideration, and that the question of the legality of the sentences should be referred to a Full Bench.

The following are the judgments of the Full Bench:—

Norman, C. J.—Gour Chunder Shamadar was tried by the Magistrate of Backergunge and convicted at the same time of three totally distinct and separate offences. He was sentenced to a month's imprisonment for the offence of wrongful confinement under Section 342, six month's imprisonment for the offence of voluntarily causing grievous hurt under Section 325, and to whipping with 20 stripes for the offence of theft as defined in Section 378 of the Penal Code.

Each of these sentences taken by itself is a legal punishment for the offence in respect of

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which it was pronounced. As regards the sentence of whipping, the 2nd Section of Act VI of 1864 enacts that whoever commits any of the following offences, of which theft is one, may be punished with *whipping* in lieu of any punishment to which he may for *such offence* be liable under the Indian Penal Code. The punishment of whipping was therefore legally substituted for the punishment to which Gour Chunder would have been liable for the offence of theft.

If the trial for each offence had taken place separately, there would have been no possible doubt of the legality of the three separate sentences.

Let us now see on what principle it can be said that, if instead of trying the charges separately, a Criminal Court of competent jurisdiction tries the prisoner on the three charges at the same time it is incompetent to pronounce that the accused shall suffer for each offence the penalty prescribed by the law.

I leave aside for the moment the question of the jurisdiction of the Magistrate, to which I propose to come hereafter.

Sir Barnes Peacock says:—"The question is "whether if a person is convicted at the "same time of two or more offences punish- "able under the Indian Penal Code, it is law- "ful for the Court, in addition to the penalties "prescribed by the Penal Code, to sentence "the prisoner to whipping."

I confess I do not understand why not, if the sentence for each offence is itself legal.

The 1st Section of Act VI of 1864 enacts that in addition to the punishment prescribed in Section 53 of the Indian Penal Code offenders are also liable to whipping under the provisions of that Code.

Sir Barnes Peacock refers to Section 46 of the Code of Criminal Procedure. He says—"It does not say that when a prisoner shall be "convicted of two or more offences it shall be "lawful for the Court to sentence such per- "son for the offences for which he shall have "been convicted to the several penalties pre- "scribed by any subsequent Act."

He assumes what Mr. Justice Phear states more directly that "a Magistrate" (or Criminal Court, for the same argument must apply to all Criminal Courts) "cannot pass simul- "taneously several sentences which shall take "effect in succession to one another. That "provision is given solely by the Code of "Criminal Procedure." Again, he says—"I "think a Magistrate has no power to inflict "a succession of punishments, except under "the provisions of Section 46 of the Code of "Criminal Procedure."

Now, by Section 22, a Magistrate is declared competent to pass sentence in respect of the offences triable by him within the limit of imprisonment of either description not exceeding the term of two years, including such solitary confinement as is authorized by law, or fine to the exent of Rupees 1,000, or both imprisonmont and fine in all cases in which both punishments are authorized by the Indian Penal Code.

Suppose Section 46 had never been enacted, and a Magistrate having convicted a prisoner of theft and violent assault on the police attempting to arrest him had sentenced him to six months' imprisonment for each offence, the second sentence to take effect at the expiration of the first. What objection would there be to the sentence?

The amount of punishment would be within the limit which the Magistrate was competent to inflict, and in each case a sentence of imprisonment for six months would be legal.

It is not easy to understand why the prisoner should not suffer the full penalty of the offences committed by him.

If the sentences would be illegal it must be because there is some rule of law which prevents a judicial officer from passing a sentence of imprisonment to take effect in future after the expiration of an existing sentence, or sentence for another offence pronounced at the same time.

The question was raised upon a writ of error argued in the House of Lords in the year 1769 in the case of John Wilkes *vs.* the King, 4 Brown's Parliamentary Cases, p. 367, also reported in 4 Burrow's Reports, p. 2577, where the House of Lords affirming the judgment of the Court of King's Bench, in accordance with the unanimous opinion of the Judges, held that a sentence of imprisonment against a defendant to commence from and after the determination of an imprisonment to which he was before sentenced for another offence was good in law. See also 1 Chitty's Criminal Law, p. 718.

In my opinion, it is clear that Section 46 of the Code of Criminal Procedure (which is analogous to the English enactment 7 and 8

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Geo. IV C. 26 Section 10 and to the 23rd Section of the 9 Geo. IV C. 74, rendered applicable to offences under the Penal Code triable on the original side of the High Court by Act XVIII of 1862) was not necessary in order to create, but was passed in order to regulate and extend the power of Courts in passing such sentences.

Sir Barnes Peacock thinks that Section 46 must be construed strictly, and treats it as not applying to penalties imposed by any subsequent Act.

I confess I do not understand that view of the case. It seems to me that Section 46 of a general Code of Criminal Procedure is applicable not only to offences created by the Penal Code, but presumably to all offences created by subsequent legislation, and that if Section 46 does not apply to offences or penalties created after the passing of the Code of Criminal Procedure, the same argument must apply to any other portion of that Code. From the date of the passing of Act VI of 1864, whipping is made one of the penalties which by the Indian Penal Code are prescribed for the punishment of offenders. I think that the Indian Penal Code and the Code of Criminal Procedure must be read as if the Whipping Act formed a part of the Penal Code from the date of its enactment. In passing a sentence of whipping, a Magistrate is not exercising any *extraordinary* jurisdiction. It is a sentence which, since the passing of Act VI of 1864, he is competent to inflict in the exercise of his ordinary jurisdiction. I think it plain that we must read Section 46 as applying to all offences and punishments as prescribed by the Indian Penal Code in its present and amended form.

The 46th Section consists of two parts or clauses—the first part an empowering or enabling clause, the power being limited by the second part or proviso. The first clause is as follows :—"When a person shall be convicted "at one time of two or more offences punish- "able under the same or different Sections of "the Indian Penal Code, it shall be lawful "for the Court to sentence such person for "which he shall have been convicted to the "several penalties prescribed by the said "Code which such Court is competent to in- "flict ; such penalties when consisting of "imprisonment to commence the one after "the expiration of the other. It shall not "be necessary for the Court by reason only "of the aggregate punishment for the sever- "al offences being in excess of the punish- "ment which such Court is competent to "inflict on conviction of a single offence, to "send the offender for trial before a higher "Court."

Under the first clause, reading it according to its grammatical construction, when a prisoner has been convicted of several offences a Criminal Court competent to inflict the penalty of whipping is competent to punish one of such offences with whipping—that being one of "the several penalties prescribed by the Code," and other offences with other of "the "several penalties prescribed by the Code"—such as imprisonment or the like.

Then come the qualifications or provisoes, the second of which we have to deal with : "Pro- "vided that if the case be tried by a Magistrate "the punishment shall not in the aggregate "exceed twice the amount of punishment "which such Magistrate is by his ordinary "jurisdiction competent to inflict."

The limit of the power of imprisonment possessed by the Magistrate of the district is two years, and fine to the extent of one thousand rupees.

A Magistrate before the passing of the Whipping Act, under Section 46 could have sentenced an offender convicted at the same time of several offences to an aggregate of punishment amounting to four years' imprisonment and fines amounting to Rs. 2,000.

Since the passing of the Whipping Act, the Magistrate has the power to inflict whipping in lieu of imprisonment for certain offences. If Section 46 does not apply to punishment under the Whipping Act, the only question as to such sentence would be whether it is a legal punishment for the offence for which it is to be inflicted. The limitation under Section 46 of the Magistrate's power would not apply to a sentence of whipping. But if Section 46 does apply, as I think it does, the punishment in the present case is clearly warranted by it.

The Magistrate of a district has power to inflict two years' imprisonment, with whipping in certain cases, or whipping in lieu of imprisonment in others.

Twice that would be four years' imprisonment (with—or in lieu thereof) two whippings. One whipping and seven months' imprisonment is clearly within the limit of twice the amount of imprisonment which the Magistrate was competent to inflict.

I am therefore of opinion that the sentences upon the prisoner Gour Chunder are not

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illegal. I do not discuss the question whether a Magistrate has power to inflict two whippings. That depends entirely on the construction of the Whipping Act. I confess I do not think it presents much difficulty.

Loch, J.—I concur in the view taken by the Chief Justice that Act VI of 1864 should be read as part of the Penal Code, though there are no express words to that effect in the Act. It appears however to me, from the preamble to the Act as well as from the wording of Sections 1, 2, 3, and 4, that this view is correct. Whipping was a punishment excluded from the list of punishments prescribed by the Penal Code. It has been added to that list by Act VI of 1864; and this punishment is to be inflicted as shewn by Sections 2 and 3 of the Act in lieu of or in addition to any punishment prescribed by the Penal Code. I would therefore read the Code, as Mr. Justice Jackson did on a former occasion when this question was before the Court, *e. g.*, I would read the punishment prescribed for theft as follows:—Whoever commits theft shall be punished with imprisonment of either description for a term which may extend to three years or to fine or both or with whipping in lieu of or in addition to other punishment, as the case may be; and so on in other cases where the offence is made punishable with whipping under Act VI of 1864. A party convicted of theft for the first time would be liable to be whipped in lieu of other punishment. If convicted of theft a second time, he would be liable to whipping in addition to a sentence of imprisonment and fine. If then a prisoner be tried at one time for two or more offences, one of which involves the punishment of whipping in lieu of or in addition to the punishment of imprisonment, what sufficient reason is there that he should not be sentenced in each case to the penalty prescribed for each offence? If a man have committed theft, and in resisting a neighbour of the party robbed he inflicts grievous hurt, why should the offender not suffer for both offences? It is clear that he might be punished with imprisonment for the theft and with imprisonment for the grievous hurt, and under the provisions of Section 46 Criminal Procedure Code the period of imprisonment in one case would commence from the close of the period in the other; but why, if whipping have been added to the punishments prescribed by the Penal Code, should not the offender be punished with whipping in lieu of other punishment for the first offence, and with imprisonment for the second; or if he have been convicted of theft more than once, why should he not be punished with whipping in addition (Section 3 Act VI of 1864) to any other punishment prescribed by the Code, and also to imprisonment for the other offence; and if the punishment in the first case be whipping in addition to imprisonment, the punishment of imprisonment awarded in the second case would, under the provisions of Section 46 of the Criminal Procedure Code, commence on the expiration of the other. Reading as I do Act VI of 1864 as part of the Penal Code, I must confess that I see no sufficient reason for holding that if a Magistrate proceeds under Section 46 of the Code of Criminal Procedure, he must confine his sentence *strictly* within its provisions.

Bayley, J.—I think the Magistrate's acts are not illegal. The Whipping Act does not preclude punishment for those offences to which it is applicable, such as theft here; and because a man is punished according to law with whipping for theft, I do not see why he should not be punished for assault and grievous hurt when he commits those distinct and separate offences, as in this case. I see nothing in the law against this view.

Kemp, J.—I think that the view taken by the late Chief Justice Sir Barnes Peacock and by Mr. Justice Phear (see Volume 9 Weekly Reporter, Criminal Rulings, p. 143) is correct.

Macpherson, J.—I remain of the same opinion which I expressed at length in the case of Nassir (9 Weekly Reporter, page 41, Criminal): and I have no doubt in my own mind that the sentences passed on the prisoner Gour Chunder are legal.

Mitter, J.—I am of opinion that the view taken by the Chief Justice and by Mr. Justice Macpherson is correct. The reasons in support of that view have been so fully gone into by those learned Judges that it would be mere waste of time on my part to repeat them.

Phear, J.—I regret very much that I cannot bring myself to agree with the majority of my colleagues in this case. I am unable to perceive error in the view taken by Sir Barnes Peacock and myself on the occasion which has been referred to. It still appears to me that a multiple punishment inflicted by one sentence is essentially different in its character and effect from the aggregate result of the punishments which are its factors, supposed to be separated from each other by an interval of time. I take it that no Judge of

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sound discretion, if called upon to accumulate punishment for different offences, would award each punishment precisely in the same manner as he would if the correponding offence were alone under his consideration. For instance, if a man was convicted at one time of three thefts, for each of which, if it stood single, one year's imprisonment might be an appropriate punishment, I suppose that the convicting officer would not for a moment think that, therefore, the aggregate of three years was the right punishment for the three offences. The whole of Section 46 of the Criminal Procedure Code, and especially the proviso in the latter part of it, appears to me to show beyond question that the Legislature held the view which I endeavour to express, namely, that a punishment effected by accumulation of penalties is not merely a set of separate punishments.

Then also the words of the Whipping Act seem to me to make it as plain as can be that the Legislature, in giving Criminal Courts the power which they did not before possess, of inflicting the punishment of whipping, intended for reasons which may be easily conjectured carefully to limit its application. I cannot see in the Act the smallest indication that the Legislature contemplated whipping as by any possibility becoming under the Act an element in any punishment, except under the circumstances which are therein expressly mentioned. On the contrary, the language of the Act coupled with the elaborately detailed form of its various provisions leads me to think that the Legislature only meant that whipping should be associated with another punishment, in the particular cases of which express mention is made. But if the Whipping Act does in truth apply, not only to single sentences, but also to each constituent factor of an accumulated sentence, such as is the subject of Section 46 of the Criminal Procedure Code, whipping may be lawfully associated with other punishments even in cases of minor offences not committed after previous conviction; a result which certainly seems to me diametrically opposed to the unmistakeable spirit of the Act itself. Thus, if a boy were convicted of stealing two mangoes belonging to one owner, he could not be both whipped and also imprisoned. The whipping, if inflicted, must, by the words of the Act, be in *lieu* of any other punishment. But if it were proved that one mango belonged to one owner and the second to another, the Magistrate might, on the principle now maintained, convict for two offences, and in this way both imprison and whip. I cannot believe that the Legislature, against the very spirit of the Act, intended to leave a discretion of this sort to the Judicial Officer. Before the Whipping Act was passed, he certainly had not uncontrolled discretion in the matter of accumulating such punishment as then existed. Section 46 expressly restricted him in this respect; and I think the consequence is that since that Section at any rate he has had no other power of accumulating punishment than is given him either by that or by some subsequent enactment. In the case which has been cited I gave at length my reason for coming to the conclusion that the punishment of whipping was not included among the punishments which a Judicial Officer could accumulate in the event of simultaneous conviction for several offences. To the opinion which I then expressed I still adhere, and therefore I need not now discuss this question again.

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States what cases should be entered in Col. 2 of Magistrates' Statement D—Explains when an accused person is said to be under trial—The new forms make no alteration in the meaning of the words "discharged without trial."

Extracts (paras. 3, 4 and 5,) from letter No. 125, dated 4th February 1871, from the Registrar of the High Court, to the Magistrate of 24-Pergunnahs.

3. As regards your 3rd paragraph, I am to inform you that all cases that used to be entered in Col. 2 of the old Statement No. 1, Part I, under the heading "Number of Crimes ascertained to have been committed," must be entered in Col. 2 of the Statement D. For further instructions you are referred to Rule 13 of the Rules for the preparation of Magistrates' Statements.

4. In reply to the inquiry in your 4th para., namely, "when is an accused person said first to be under trial," I am to refer you to Rule 15 of the Magistrates' Rules, as explained by Rules 91 and 94, from which you will see that the number of persons brought to trial in any period is "identical with the number apprehended or attending on summons." All such and such alone are "under trial" until their cases are finally disposed of.

5. With regard to para. 5 of your letter, I am to observe that the new form makes no alteration in the significance of the words "discharged without trial," as previously understood and fully explained in para. 4 of Circular Order No. 18, dated 15th September 1864, cited on the margin for facility of reference. The persons entered as discharged in the forms hitherto in use are the persons to be shewn as discharged in the new form.

Col. 15 discharged under Sections 225 and 250 of Code of Criminal Procedure.

"Col. 15 will provide for persons dicharged without trial under Chapters XII and XIV, Code of Criminal Procedure."

Explains the intention of the words "each Criminal Court" in Circular No. 1, dated 11th January 1871.

Letter No. 186, dated the 1st March 1871, from the Registrar of the High Court to the Magistrate of Moorshedabad.

In reply to your office letter No. 1925, dated the 7th ultimo, in which inquiry is made as to the intention of the words "each Criminal Court" in Circular Order No. 1, dated the 11th January last,* I am directed to state that the Court, in explanation of the Circular Order, desires it to be understood that it is not intended that when more than one officer is exercising the functions of a Magistrate at any place, every such officers should keep a separate register; but that, for the purposes of the Circular Order, every such Magistrate's Court should be regarded as a branch of the principal Magistrate's Court at the same station, the register remaining in the custody of such principal Magistrate.

* Infra, Crim. Cirs., p. 1.

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An appeal lies in all cases where a sentence of imprisonment and fine is passed, although both punishments be within the limits laid down in Section 411 of the Code of Criminal Procedure.

Letter No. 338, *dated the 2nd May* 1871, *from the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to the Officiating Sessions Judge of Rungpore.*

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

WITH advertence to your letter No. 9, dated the 14th ultimo, soliciting instructions as to whether, with reference to the terms of Section 411 of the Code of Criminal Procedure, an appeal will lie where the sentence is one of imprisonment not exceeding one month and a fine not exceeding fifty rupees, I am directed to observe that the Court, (Bayley and Mitter, J. J.) as at present advised, in giving its opinion on this as a reference only, thinks that an appeal will lie in all cases where the sentence of imprisonment and fine is passed, although both the punishments be within the limits laid down in Section 411.

All questions put by a Magistrate and answers thereto should be recorded. Course to be pursued under Section 205, Code of Criminal Procedure, in recording statement of the accused and in the Magistrate attesting such statements.

Letter No. 396, *dated the* 19*th May* 1871, *from the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to the Sessions Judge of Hooghly.*

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

IN acknowledging the receipt of your letter No. 46, dated the 13th instant, I am directed to state, with advertence to the 3rd paragraph thereof, that every question and every answer is to be recorded. The Section makes no exception in favor of irrelevant questions. The Magistrate is responsible for putting such questions; but if they are put they must be be recorded, as also must be the answers where answers are given.

2. There is nothing, as the Court have already remarked, in Section 205, Code of Criminal Procedure, which makes it necessary to record in the body of the examination that the accused declares that what he has caused to be written is conformable to the truth. The Magistrate's attestation, at the bottom of the examination, is sufficient *primâ facie* proof that every thing has been properly done in accordance with the terms of the Section, and this would include the reading over to the accused the whole of his statement, the allowing him to add to or explain it, and the taking from him an acknowledgment that what was written had been recorded conformably to what he said was the truth.

3. No Magistrate, the Court supposes, would deem himself at liberty to sign the attestation required by law, if he had not previously satisfied himself that the accused had had every thing in his examination thoroughly explained to him, and every opportunity of making it what he said was the truth. If a Sessions Judge has doubts as to the way in which the examination of an accused person has been taken, notwithstanding the Magistrate's attestation, he can call for evidence on the point.

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CIVIL CIRCULAR ORDERS OF THE HIGH COURT.

Instructs officers to arrange with the Accountant-General, Bengal, for funds for transmitting judicial records through the post.

CIVIL CIRCULAR No. 1.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil and Sessions Judges and Magistrates of Districts, dated Calcutta, the 4th January 1871.

(Civil and Criminal Sides).

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and E. Jackson, *Judges*.

THE Government of India having decided* that the charge for transmitting judicial records through the post from one Court to another shall be, as heretofore, borne by the State; and the new Post Office Rules† requiring pre-payment of banghy postage whenever that mode of transmission is adopted, the Court directs that all Civil and Sessions Judges and District Magistrates will put themselves in communication with the Accountant, General of Bengal, with a view to provision being made for the funds necessary to meet the requirements of the rules above-mentioned.

* Government Order, Financial Department, No. 3118, dated 21st November 1870.

† *Vide* page 498, *Calcutta Gazette of* 16th March 1870.

By order of the High Court,

(Signed) F. B. PEACOCK,

Registrar.

Directs that all orders for attachment of estates for arrears of revenue be notified to the Collector in whose district the estate lies.

CIVIL CIRCULAR No. 2.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Zillah Judges and Judicial Commissioners, dated Calcutta, the 10th January 1871.

(Civil Side).

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and E. Jackson, *Judges*.

THE Court directs that all orders by all Civil Courts for the attachment of estates and shares of estates for the recovery of arrears or demands of the descriptions mentioned under Section 5 Act XI of 1859, shall be immediately notified to the Collector of the district within which such estates or shares of estates are situated.

By order of the High Court,

(Signed) F. B. PEACOCK,

Registrar.

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Draws attention to the provisions of the Court Fees' Act which require the cancellation of stamps.

CIVIL CIRCULAR No. 3.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Authorities in the Lower Provinces, dated Calcutta, the 17th January 1871.

(Civil Side).

Present :

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and E. Jackson, *Judges.*

THE attention of all Civil Courts subordinate to the High Court, is drawn to the provisions of Section 30 of the Court Fees' Act (VII) of 1870, prohibiting the use, in any proceeding, of any document requiring a stamp under that Act until such stamp has been concelled, and prescribing the mode in which cancellation is to be effected.

2. The Civil Courts subordinate to the High Court are at the same time directed, at the suggestion of the Government of India, to cause the labels affixed to documents *issued* by them, and liable to a fee under the Act, to be cancelled *at the time that they are affixed,*— such a course being calculated to protect the revenue and prevent all evasions of the law.

By order of the High Court,
(Signed) F. B. PEACOCK,
Registrar.

Corrigendum to be made in letter to Superintendent of Stationery, circulated with Circular Memo. No. 7, dated 17th December 1870.

CIVIL CIRCULAR MEMO. No. 1.

From the Registrar of the High Court of Judicature at Fort William in Bengal, dated Calcutta, the 17th January 1871.

(Civil Side.)

Present :

The Hon'ble G. Loch, *Judge.*

WITH reference to Court's letter No. 3816, dated 17th December 1870, to the Superintendent of Stationery, copy of which was forwarded by their Circular Memorandum No. 7* to all Zillah Judges and District Magistrates, the following corrigendum is circulated for information and guidance of those Officers :—

Page 2, line 3,
For
"Twelve copies"
Read
"Twenty copies."

By order of the High Court,
(Signed) F. B. PEACOCK,
Registrar.

* 14 W. R., Civil Circulars, 43.

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Instructions regarding the submission of the Annual Reports of Civil Justice.

CIVIL CIRCULAR No. 4.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Zillah Judges, dated Calcutta, the 2nd February 1871.

(Civil Side.)

Present :

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, L. S. Jackson and E. Jackson, *Judges*.

THE recent Circular Order, dated 8th November 1870, No. 32,* by which new forms of Annual Statements are prescribed, having provided no form for the submission of the Annual Reports, the following directions are now issued for the guidance of all Zillah Judges in supersession of previous orders on the same subject :—

I. Report on the Administration of Civil Justice.

This report will present the main features of the year's administration under the heads, and in the Tabular shapes following :—

ORIGINAL JURISDICTION.

Table showing the Suits instituted, disposed of, and pending in the past year, as compared with the preceding year.

	Instituted.		Disposed of.		Pending.	
	1869.	1870.	1869.	1870.	1869.	1870.
Increase...						
Decrease						

Table showing Suits commenced and Suits disposed of in 1870, *and pending at the close of that year, in the various Courts of the District.*

	Commenced.	Disposed of.	Pending.
Judge			
Additional Judge			
Subordinate Judge			
2nd Subordinate Judge			
Moonsiff of			
Moonsiff of			

NOTE—A suit transferred to another Court is not thereby disposed of.

* 14 W. R., Civil Circulars, p. 25.

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Table showing Number and Value of Suits of different kinds commenced in all Courts of the District in the past, as compared with the preceding, year.

Description of Suits.	No. in 1869.	No. in 1870.	Value, 1869.	Value, 1870.
Suits of Small Cause Court Class ...				
Rent-Suits				
Other Suits				
Increase				
Decrease				

Table showing Miscellaneous Cases of a judicial nature, other than Regular Suits or Proceedings in execution, disposed of by, and pending in, each of the Courts in—

	Disposed of.		Pending.	
	1869.	1870.	1869.	1870.
Zillah Judge				
Additional Judge				
Subordinate Judge				
2nd Subordinate Judge				
Moonsiff of				
Moonsiff of				

Table showing Number of Decrees completely and partially executed in 1870 *in the several Courts of the District.*

	Completely.	Partially.	Amounts realized.
Zillah Judge			
Additional Judge			
Subordinate Judge			
2nd Subordinate Judge			
Moonsiff of			
Moonsiff of			

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APPELLATE JURISDICTION.

Table showing Appeals from Decisions in Original Suits instituted in the District, disposed of, and pending in the past year, as compared with the preceding.

APPEALS.	INSTITUTED.		DISPOSED OF								PENDING.							
	1869.	1870.	1869.				1870.				1869.				1870.			
	In Zillah Court.	In Zillah Courts	Judge	Subordinate Judge.	2nd Subordinate Judge.	S. C. Court Judge, with powers of Subordinate Judge.	Judge.	Subordinate Judge.	2nd Subordinate Judge.	S. C. Court Judge, with powers of Subordinate Judge.	Judge.	Subordinate Judge.	2nd Subordinate Judge.	S. C. Court Judge, with powers of Subordinate Judge.	Judge.	Subordinate Judge.	2nd Subordinate Judge.	S. C. Court Judge, with powers of Subordinate Judge.
Increase																		
Decrease																		

Table showing the Number of Appeals preferred to Zillah Courts from each of the Subordinate Courts in the District, the ratio of Appeals to Decisions, the Number of Decisions affirmed, and ratio of affirmed to decided.

Appeals from	Appeals preferred.	Ratio of Appeals to Decisions.	No. of Decisions affirmed.	Ratio of affirmed to decided.
Subordinate Judge				
2nd Subordinate Judge				
Small Cause Court Judge, with powers of Subordinate Judge				
Moonsiff of				
Moonsiff of				

Similar Statements for Miscellaneous Appeals of all kinds.

Apposite observations as to increase or decrease of business, or the like, to accompany each Table where necessary.

These Tables to be followed by a report on the condition of the Judicial Buildings, the Records of the several Courts, the Judge's Library, and the Securities of those public Officers from whom security is required.

The character, qualifications, and official merits of the several Subordinate Judges and principal Ministerial Officers to be made the subject of a separate report, in which the work done by, and the result of appeal from, such officers are to be analyzed and commented upon, only as aids to forming a judgment as to their respective deserts and fitness for promotion, or continuance in the public service. This, however, is not to debar Zillah Judges from recording in their Administration Reports any instance of special and distinguished merit on the part of any of their subordinates, which they consider deserving of conspicuous mention and entitling the person indicated to the favourable notice of the Court or of Government.

By Order of the High Court,

(Signed) F. B. PEACOCK,

Registrar.

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Prescribes new forms of Annual Statements for Small Cause Court Judges, for submission to the Zillah Judges.

CIVIL CIRCULAR No. 5.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Judges of Courts of Small Causes, dated Calcutta, the 25th February 1871.

(Civil Side.)

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and E. Jackson, *Judges.*

THE Court directs that Judges of Small Cause Courts will submit annual returns of their work to the Judges of the Districts in which their Courts are respectively situated in the four forms appended hereto,* in supersession of the returns hitherto made to the Court direct under the provisions of Circular Order No. 12, dated 19th December 1862. The returns now prescribed will begin with the work of the past year, 1870.

* Nos. 6, 7, 8 and 10 (Judicial).

2. These instructions will not interfere with the *monthly* returns Nos. 1 and 2 prescribed by the same Circular Order, which will continue to be made to the High Court as heretofore.

By order of the High Court,

(Sd) W. M. SOUTTAR,

Offg. Registrar.

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Judicial Statements—6—(Small Cause Courts.)

STATEMENT showing the number and description of Civil suits instituted in the Court of Small Causes at in the year 18 .

CLASS OF TRIBUNALS.	On written obligation.		On unwritten.		On account stated.		Money had and received.		Goods sold.		Breach of contract not mentioned above.		Rent not falling under the Rent Law		Moveable property or value thereof.		Damages.		Remarks.
	Rs. 500 and under.	Above Rs. 500.	Rs. 500 and under.	Above Rs. 500.	Rs. 500 and under.	Above Rs. 500.	Rs. 500 and under.	Above Rs. 500.	Rs. 500 and under.	Above Rs. 500.	Rs. 500 and under.	Above Rs. 500.	Rs. 500 and under.	Above Rs. 500.	Rs. 500 and under.	Above Rs. 500.	Rs. 500 and under.	Above Rs. 500.	

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Judicial Statements—7—(Small Cause Courts.)

STATEMENT showing value of suits disposed of in the Court of Small Causes at *in the year* 18 .

VALUE OF SUITS.	Number of suits disposed of in Small Cause Court.	REMARKS.
Not exceeding Rupees 5		
,, ,, ,, 20		
,, ,, ,, 100		
,, ,, ,, 500		

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Judicial Statement—8—(Small Cause Courts.)

STATEMENT showing the general result of the trial of suits in the Court of Small Causes at .... *in the year* 18 .

| CLASS OF COURTS. | | |

Judicial Statement—10—(Small Cause Courts.)

STATEMENT showing the execution of the decrees of the Court of Small Causes at *in the year* 18

CLASS OF COURTS.	Applications to execute decrees.				Decrees completely executed.	Decrees partially executed.	Pending at the end of	Decrees executed by possession being given.	Nature and number of coercive processes issued.					Remarks.
	Pending.	Filed.	Received by transfer.	Total.					Imprisonment of person.	Moveable property.		Immoveable property.		Orders under Section 248, Code of Procedure.
										Attached.	Sold.	Attached.	Sold.	

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Requests Zillah Judges and Judicial Commissioners to satisfy themselves that evidence is properly recorded by the subordinate Courts in cases under Section 15 Act XIV of 1859.

CIVIL CIRCULAR ORDER NO. 6.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Zillah Judges and Judicial Commissioners, dated Calcutta, the 17th March 1869.

(Civil Side.)

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and E. Jackson, *Judges*.

AN instance having been brought to the notice of the High Court, of culpable carelessness and negligence on the part of a Moonsiff in hearing witnesses, and recording evidence in cases under Section 15 Act XIV of 1859, which misconduct has since led to the removal of the Moonsiff from office, the attention of Zillah Judges and Judicial Commissioners is drawn to the necessity of satisfying themselves that evidence is properly recorded in such cases. The Court directs that Judges on their inspection tours will give special attention to the subject, and that they will not omit to notice it in their report.

By order of the High Court,

(Signed) W. M. SOUTTAR,

Officiating Registrar.

Encloses Circular from the Post Master General regarding postage on parcels.

CIVIL CIRCULAR ORDER No. 7.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Authorities, dated Calcutta, the 22nd March 1871.

(Civil Side.)

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and E. Jackson, *Judges*.

THE accompanying copy of a Circular letter No. 95, dated the 30th December, issued by the Post Master General of Bengal, and based upon the Financial Resolution of the Government of India, No. 3118, dated 21st November 1870, is hereby circulated for the information and guidance of all Civil Courts subordinate to the High Court, in supersession of Circular Order No. 1, dated the 4th January last,* which was issued before the Court had received intimation of the instructions now notified, and which is hereby cancelled.

By Order, &c.,

(Sd.) W. M. SOUTTAR,

Offg. Registrar.

(*From* J. TWEEDIE, ESQ., *Officiating Post Master General of Bengal, to all Post Office Officials,—Circular No.* $\frac{95}{\text{L. M. 10, No. 2}}$, *dated Fort William, the 30th December* 1870.)

Postage on Parcels which contain *records in transmission through the post from one Court to another* is no longer to be charged either by stamps or in cash to sender or to addressee.

2. All other kinds of Parcels hitherto chargeable under Rule 25 of the rules regarding official correspondence will be charged, as usual, under that rule.

* *Ante*, p. 1.

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Circulates amended copy of Circular requiring orders of Civil Courts regarding attachments of estates to be notified to Collector of District in which estates are situated.

MEMO. No. 2.

THE accompanying copy of Circular Order No. 2, dated 10th January 1871, should be substituted for the copy previously issued, which should be destroyed.

By Order, &c.,

(Signed) W. M. SOUTTAR,

Offg. Registrar.

HIGH COURT :
The 3rd April 1871.

CIVIL CIRCULAR No. 2.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Zillah Judges and Judicial Commissioners, dated Calcutta, the 10th January 1871.

(Civil Side).

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, L. S Jackson, and E. Jackson, *Judges.*

THE Court directs that all orders by all Civil Courts for the attachment of estates and shares of estates shall be immediately notified to the Collector of the district within which such estates or shares of estates are situated.

By order of the High Court,

(Signed) F. B. PEACOCK,

Registrar.

Prescribes new rules for the Police when employed in escorting remittances made by Moonsiffs.

CIVIL CIRCULAR No. 8.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Zillah Judges and Judicial Commissioners, dated Calcutta, the 6th April 1871.

(Civil Side).

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, L. S Jackson, and E. Jackson, *Judges.*

I AM directed to forward herewith, for your information and guidance and for communication to the Moonsiffs subject to your control, the amended Rule given below, which has been framed at the instance of His Honor the Lieutenant-Governor of Bengal, for the guidance of the Police employed on escort duty in connexion with remittances made by Moonsiffs, and to state that the present instructions should be regarded as superseding those conveyed in Circular Order No 9, dated 13th July 1868,* which is hereby cancelled.

By order of the High Court,

(Signed) W. M. SOUTTAR,

Officiating Registrar.

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* W. R. Civil Circulars.

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AMENDED RULE.

Rule 26.—Where Moonsiffs' Courts exist, a day in each month will be fixed by the Judge on which the money will be paid over to the Police for transmission to the treasury.

Clause I.—The Moonsiff will give notice at the police station on the day before the guard is required, and the police officer in charge will himself, on the day appointed, proceed to the Moonsiff's Cutcherry with a guard as directed in the above instructions.

Clause II.—The money will then be counted in the presence of the officer in charge of the guard and placed in a bag, which will then and there be sealed and made over to the guard, who will forthwith proceed with it to the treasury or sub-divisonal treasury. The officer in charge will be furnished with a memorandum of the amount.

Clause III.—The police officer will cause the bag and seal to be inspected in his presence by the treasury officer to whom it is addressed; and while held responsible for the total amount in the bag, he will not, provided the bag and seal show no signs of being tampered with, be called on to replace any light or spurious coin that it may contain.

Clause IV.—The above rules apply to small remittances made by Moonsiffs in bags. Larger remittances will be sent more securely packed.

Clause V.—The provisions of paragraphs 12 and 18* apply equally to the transport of all remittances from Moonsiffs' Courts. If a remittance be in copper coin, and exceeds six seers and one pow in weight, coolie labor should be employed.

Clause VI.—Should any necessity arise for a second remittance during the month, the same course will be pursued on due notice being given at the police station.

* Paragraphs 12 and 18 alluded to above.

"12.—Under ordinary circumstances the strength of escorts shall be as follows :—

For Prisoners.	*For Treasure.*
For 1 to 3 prisoners, 2 constables.	For sums not exceeding Rs. 30, a single constable of known integrity and trustworthiness.
For 4 to 6 prisoners,* 3 constables.	*N. B.*—If such an officer be not available, two constables should be sent.
* Of these, one man to act as head constable.	For any amount above Rs. 30, and not exceeding Rs. 250, two constables.
	For Rs. 250 and up to Rs. 500, three constables.
	N. B.—One of these should act as head constable.
	When the sum of money transmitted under the escort of the police does not exceed Rs. 500, it should be carried by the police themselves without the employment of coolie labor.
	For any amount above Rs. 500, and not exceeding Rs. 1,000, four constables.
	N. B.—One of these should act as head constable.
	For any sum above Rs. 1,000, and not exceeding Rs. 10,000, a regular guard of at least one head constable and four constables.
	For upwards of Rs. 10,000, and not more than one lakh, one head constable and eight constables.
For 7 to 12 prisoners, 1 head constable and 4 constables.	For one to two lakhs, two head constables and twelve to sixteen constables.
For 13 to 18 prisoners, 1 head constable and 6 constables	Above two lakhs, one Sub-Inspector and two head constables, and sixteen to twenty constables, and so on, for each lakh above two lakhs, four constables in addition, and officers in proportion.
For 19 to 24 prisoners, 1 head constable and 8 constables, and so on in proportion.	
For Prisoners.	*For Treasure.*
N. B.—When a guard of more than 8 men is deemed necessary, additional head constables should be allowed in proportion.	When treasure is escorted by rail, a head constable and two constables are deemed sufficient, but during the transit of the treasure to the railway van or from it, a proper guard of full strength as above must be provided.
	When treasure is conveyed by steamer, a guard of one head constable and six armed constables should be detailed with any amount not exceeding one lakh. The men should furnish one sentry by day and two by night if necessary. With a despatch of treasure exceeding one lakh, the guard should be increased in proportion up to a maximum of twelve constables.

"18.—All arrangements as regards carriage will devolve upon the officer to whom the escort is supplied, and will not in any way form part of the duty of the police. Prisoners and treasures should not, unless under special circumstances, be sent together."

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Calls for information regarding remuneration of Nazirs when conducting sales in execution of decrees.

CIVIL CIRCULAR MEMO. No. 3.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Zillah Judges and Judicial Commissioners, dated Calcutta, the 26th April 1871.

(Civil Side).

Present:

The Hon'ble G. Loch, *Judge*.

I AM directed to request you will be so good as to state for the information of the Court what the practice is in the Courts of your district, as regards the remuneration of the Nazir when he conducts sales in execution of decrees of Court. Is he allowod any remuneration, at what rate, and from what source is it derived?

Issues instructions regarding the service of writs of summons and of notices of appeals.

CIRCULAR ORDER No. 9.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Zillah Judges and Judicial Commissioners, dated Calcutta, the 6th April 1871.

(Civil Side.)

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, F. B. Kemp, L. S. Jackson, E. Jackson, F. A. Glover, D. N. Mitter, W. Ainslie, G. C. Paul, and O. C. Mookerjee, *Judges*.

THE returns transmitted by the local Courts, of the service of writs of summons and of notices of the hearing of appeals issued by the High Court for service within the jurisdiction of local Courts, are, in many instances, so insufficient as to necessitate postponements, the re-transmission of such process for further proof, or the issue and transmission of fresh process for service.

2. The Courts frequently send up nothing but the Nazir's return, which is often no more than a mere report of oral statements made to him by others as to the mode of service. Such returns, without proof of the statements contained therein, are of no value.

3. By the Civil Procedure Code, whenever it is necessary that summons should be served beyond the limits of the jurisdiction of the Court which issued it, the Court which is called upon to serve the summons is, by Section 59, placed in the same situation as if it had itself issued the summons, and ought to satisfy itself that the summons has been effectually served as directed by the Act.

4. The duty of the local Courts is, notwithstanding repeated admonitions, so often imperfectly performed in this matter, that it appears to the High Court necessary to remind them that no Court can rightly proceed to hear a suit or an appeal *ex-parte* until it has been proved to the *satisfaction* of that Court that the summons to a defendant to appear, or notice to a respondent of the hearing of an appeal, as the case may be, has been duly served, *i. e.*, has been served strictly in such manner as the law provides.

5. The service should be personal in all cases in which personal service is practicable, and the Court ought not in *ex-parte* cases to act upon any thing short of personal service, until it is satisfied that personal service could not reasonably be effected.

6. The nature of the proof of service which the Court ought to require in each case, according as it falls under one or another of the various Sections of the Civil Procedure Code relating to service of summons on defendants, may be shortly stated as follows:—

(1).—When the summons or notice is served on the defendant or respondent personally, the service and signature of the defendant on the back of the summons or copy should be proved by the affidavit or solemn declaration recorded in writing of the person who actually effected the service; and the identity of the person served with the party to whom the process is addressed, should be proved by the affidavit or solemn declaration of some one

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personally acquainted with the party to be served.

(2).—If the service be made under Section 49 of Act VIII of 1859 on an agent, it should be proved that this person was empowered to accept service, either by reason of his being one of the class of recognised agents described in Section 17 of Act VIII of 1859, or by virtue of appointment for that purpose in writing.

Note.—The party causing the service to be effected must give proof to this effect. It is a matter of which, ordinarily speaking, the serving officers would have no knowledge.

(3).—If the service be made under Section 53, it should be proved by the affidavit or solemn declaration of the officer effecting the service, and, if necessary, of some other person or persons acquainted with the facts, that the defendant, or respondent, could not be found and had no agent empowered to accept the service, and that the person to whom the process was delivered was an *adult* male member of his family and was actually residing with him at the time of such service.

(4).—If the service be made under Section 55, it should in like manner be proved that the defendant, or respondent, could not be found, and that there was no agent empowered to accept the service, nor any other person on whom the service could be made, and that the defendant, or respondent, was *actually dwelling* (*a*) in the house, on the outer door of which a copy of the process was fixed, at the time when it was so fixed.

(*a*) The facts leading to this inference should be stated.

(5).—If the service be made under Section 57, it should in like manner be proved that the house, upon the door of which a copy of the process was fixed, was the house in which the defendant, or respondent, last resided (*b*), and that the service was made in all respects in conformity with the order for substituted service, which should accompany the process.

(*b*) It should be stated how long and until when he resided in the house, and what has become of him.

(6).—If the service be made under Section 61, it should be proved in like manner that the summons or notice could not be served on the defendant, or respondent, in person, and that he had no agent empowered to accept service, and that the person to whom the process was delivered was an agent of the defendant, or respondent, in charge of the land or other immoveable property forming the subject-matter of the suit.

(7).—If the service be made under Section 63, it may be proved that the summons or notice was left at the *registered* Office of the Company, or was delivered to any Director, Secretary, or other principal Officer.

(8).—If the summons or notice, when tendered, be declined by the defendant, or his agent, or a male member of his family, besides the proof required as to identify, &c., as stated above, it should be proved that the party was informed that the document tendered was a summons or notice, and that he was made acquainted with the nature and contents thereof.

(9).—The Court should in all cases obtain the proof which is above described as requisite, according to the case, either by the affidavit or verified statement of the person by whom the service was effected, and of any person who may have accompanied the serving officer for the purpose of identifying the party to whom the process was addressed or otherwise directing or assisting the serving officer; or, if deemed necessary, by the examination in Court as witnesses of such persons as the Court may think fit to examine.

(10).—When the summons which has been served is the summons of another Court transmitted to the serving Court for the purpose of service only, then, upon service being effected, this latter Court should re-transmit the summons to the Court by which it was issued, together with the Nazir's return and the affidavits, verified statements or depositions of the serving officer, and the witnesses relative to the facts of the service.

7. The foregoing directions apply to, and must be followed in the cases of, all notices and judicial processes which, by Section 108 of Act VIII of 1859, are required to be served in the manner directed for the service of summons upon a defendant to appear and answer.

Certificate by Judge of due service of Summons, under Section 59.

"I do hereby certify that I did on the
" day of 18 cause
" a copy of the within summons (or notice)
" to be served upon the abovenamed res-
" pondent," or
" that the above summons (or
" notice) was not, in my opinion, duly serv-
" ed upon the abovenamed defendant, or
" respondent, for the following reasons:—"

ZILLAH,
The of 18 . } *Judge.*

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Directions for Serving Officers, and forms of Returns to be made by Nazirs.

I. Nazirs in serving summonses and other process under Act VIII of 1859 must carefully attend to the directions of the Act as to the service of process. Their attention is particularly called to the fact that, wherever it is practicable, the service of process placed in their hands should be personal.

II. They will be held responsible for the due and regular service of all process entrusted to them for service by themselves and their subordinates, and in each case for the correctness of the statements made in the return.

No peon should be retained for the service of process who cannot read and write, or who is not capable of fully and intelligently carrying out these rules in so far as they relate to actual service.

III. Forms of returns to be made by Nazirs are annexed, which should be followed as nearly as the circumstances of the case admit.

IV. In all cases, if the summons or other process is served personally and the person served signs any acknowledgment of the service, the return shall state that fact and refer to the signature of the party signing, thus:—

"That the said did at the time
"of such service in the presence of
"and sign the acknowledg-
"ment of the service endorsed on the sum-
"mons (or other process) hereto annexed."

V. If the summons or other process was tendered and declined, it will be necessary to show that the contents of the same were brought to the knowledge of the party served.

The return must state

"that the summons (or other process) was ten-
"dered and returned, and that the defendant
"or respondent refused to receive the same,
"whereupon informed him
"what the document was and acquainted
"him with the nature and contents there-
"of."

FORM No. 1.

Return of service of Summons or Notice on Defendant in person, under Section 49 of Act VIII of 1859.

I do hereby certify that I did on the day of deliver (or tender *(a)* or cause to be delivered or tendered) a copy of the summons hereto annexed under signature of and the seal of the Court [with (if the document is in English, and the party to be served be a native,) a translation thereof in the language and character] to the defendant (or respondent) (name and describe him by his residence and occupation and caste, and father's name if known: state facts as to signature, &c.)

(a.) This word to be used if the summons has been declined.

FORM No. 2.

Return of Service of Summons or Notice on Agent, under Section 49.

I do hereby certify that I did on the day of deliver (or tender (*a*) or cause to be delivered or tendered) a copy of the summons (or notice) hereto annexed, under the signature of the and seal of the Court [with (if the document is in English, and the party to be served be a native,) a translation thereof in the language and character] to (name and describe him) in person, who is *(b)* an agent of the defendant (or respondent) empowered to accept service of the same [or if a recognized agent state how he is so]. (State facts as to signature.)

(a.) Ante.

(b.) If necessary "as I am informed and believe."

FORM No. 3.

Return of service of Summons or Notice on a male member of the family, under Section 53.

I do hereby certify that as the defendant (or respondent) cannot be found, and has, as far as I am aware, no agent to accept service of summons (or notice), I did on the day of deliver (or tender (*a*) or cause to be delivered or tendered) a copy of the summons (or notice) hereto annexed under the signature of the and seal of the Court, [with (if the document is in English, and the party to be served be a native), a translation thereof in the language and character] to the (state if relation or servant, and his apparent age) of the said defendant residing with him.

(a.) Ante.

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FORM NO. 4.

Return of service of Summons or Notice, under Section 55.

I do hereby certify that as the defendant (or respondent) cannot be found, and there is, as far as I am aware, no agent empowered to accept service of summons, nor any other person on whom the service can be made, I have fixed (or caused to be fixed) a copy of the summons (or notice) hereto annexed under the signature of the and seal of the Court [with (if the document is in English, and the party to be served be a native,) a translation thereof in the language and character] on the outer door of the house in which the defendant (or respondent) is now residing.

(State whether this is of server's own knowledge or from information and belief.)

FORM No. 5.

Return of service of Summons or Notice, under Section 57.

I do hereby certify that I have, under an order of the Court of the made under Section 57 of Act VIII of 1859, served (or caused to be served) the summons (or notice) hereto annexed by fixing up a copy thereof under the signature of the and seal of the Court [with (if the document is in English, and the party to be served be a native,) a translation thereof in the language and character] upon a conspicuous place in the Court House of the , and also upon the door of a certain house (describe it) in which, as I was informed and believe, the defendant (or respondent) last resided.

FORM No. 6.

Return of service of Summons or Notice, under Section 61.

I do hereby certify that, as the defendant (or respondent) cannot be found, and has, as far as I am aware, no agent empowered to accept service of summons, I did on the day of deliver (or tender (*a*) or cause to be delivered or tendered) a copy of the summons hereto annexed, under the signature of the and seal of the Court [with (if the document is in English, and the party to be served be a native,) a translation thereof in the language and character] to (name and description) who is (or as I am informed, and believe, is) an agent of the defendant in charge of (state what land or immoveable property) which is the subject-matter of the suit.

(*a*.) Ante.

FORM No. 7.

Return of service of Summons or Notice, under Section 63.

I do hereby certify that I did on the day of leave a copy of the summons (or notice) under the signature of the and seal of the Court at the registered office of the Company at No. Street [or did deliver (or tender) a copy to Mr. (state what his position is) an officer of the Company.]

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Requests Courts to satisfy themselves as to the cancellation of adhesive stamps filed between 1st April last and the receipt of Circular, dated 17th January 1871.

CIVIL CIRCULAR No. 10.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to the Civil Authorities, Lower Provinces, dated Calcutta, the 13th April 1871.

(Civil Side).

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and E. Jackson, *Judges.*

THE attention of all Civil Courts subordinate to the High Court is drawn to the necessity for satisfying themselves that cancellation of the adhesive stamp, in the mode prescribed by law, has been duly effected in the case of documents filed in Court between the 1st April last, when the Court Fees' Act came into force, and the time of the receipt of Circular Order No. 3, dated 17th January 1871,* which called attention to the provisions of Section 30 thereof.

* *Ante*, p. 2.

Directs the punctual submission to the Accountant General of Moonsiffs' Treasury Accounts.

CIRCULAR ORDER No. 11.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil and Sessions Judges and Judicial Commissioners, dated Calcutta, the 13th April 1871.

(Civil and Criminal.)

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, A. G. Macpherson, and E. Jackson, *Judges.*

THE Accountant General having complained that great delay occurs in the submission to his Office of deposit registers and other returns of Civil Courts, the High Court, at the request of the Lieutenant-Governor of Bengal, directs the Civil and Sessions Judges and Judicial Commissioners under its control to require all Moonsiffs in their districts to submit their Treasury Accounts for each month punctually on the 27th of such month.

2. These returns should include the transactions of the 27th.

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Cancels C. O. No. 20, dated 1st August 1870, requiring information for the promotion of Serishtadars from "B" to "A" Districts.

CIRCULAR No. 12.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil and Sessions Judges, dated Calcutta, the 19th April 1871.

(Civil and Criminal.)

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and A. G. Macpherson, *Judges*.

In consequence of the altered state of the law, introduced by the Bengal Civil Courts Act (VI) 1871, the instructions conveyed in Circular Order No. 20, dated 1st August 1870,* can no longer be acted upon, and the Circular in question is hereby cancelled.

* 14 W. R., Civil Circulars, p. 8.

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Appoints officers named to be Commissioners for verifying petitions, &c., to be used in the High Court, and circulates General Rules for guidance on the subject.

CIVIL CIRCULAR No. 15.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Judges, Subordinate Judges, and Moonsiffs in the Regulation Provinces, and Judicial Commissioners and Deputy Commissioners in the Non-Regulation Provinces, exercising any of the powers of Judges of Civil Courts.

(Civil Side).

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, F. B. Kemp, L. S. Jackson, J. B. Phear, A. G. Macpherson, E. Jackson, F. A. Glover, D. N. Mitter, W. Ainslie, G. C. Paul and O. C. Mookerjee, *Judges*.

THE High Court has resolved to appoint you to be Commissioners for verifying petitions, and swearing or affirming affidavits presented to you to be used in the High Court.

A commission for that purpose will accordingly be forwarded with this Circular for each of the officers addressed.

In addition to the annexed General Rules for the guidance of all Commissioners appointed by this Court to verify petitions or to swear or affirm affidavits intended for its use, the following special rules are prescribed for your guidance, *viz.* :—

Applications by parties to a suit may be verified in the manner prescribed for plaints.

Affidavits by persons not parties to a suit, when the deponent is a Hindoo or Mahomedan, shall (and in all other cases may) be affirmed in the following form:—

"I solemnly declare in the presence of Almighty God that the signature to this paper is in my name and hand-writing, and that what I have therein stated is true."

If the deponent is unable to write, he must say "I have affixed my mark by way of signature to this paper."

By order of the High Court,

W. M. SOUTTAR,

Officiating Registrar.

The 19th May 1871.

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RULES

FOR THE

Admission of applications made to the High Court on its Appellate side.

I. No application made to the High Court founded on any statement of fact shall be made otherwise than by a petition in writing, setting out the material facts, matters, and circumstances on which the applicant relies.

II. The facts stated in such petition shall be verified by the solemn affirmation of the petitioner, or by an affidavit to be annexed to the petition.

NOTE.—The affidavit may be by any person having cognizance of the facts stated. Several persons may join in a affidavit, each deposing separately to those facts which are within his own knowledge.

III. Any party opposing the grant of an application, or showing cause against a rule, who may desire to bring before the Court any facts not contained in or admitted by the petition or affidavit of the opposite party, must do so by an affidavit containing, in the form of a narrative, the material facts on which he relies.

IV. Every affidavit to be used in the High Court shall be entitled "In the High Court of Judicature at Fort William in Bengal."

If there be a cause in Court, the affidavit in support of or in opposition to an application respecting it, or made in it, must also be entitled in the cause.

If there be no cause in Court, the affidavit shall be entitled "In the matter of the petition of_____."

V. Every such petition or affidavit as aforesaid, containing any statement of facts, shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and, as nearly as may be, shall be confined to a distinct portion of the subject.

VI. Every person, other than a plaintiff or defendant in a suit in which the application is made, presenting any petition or making any affidavit, shall be described in such a manner as will serve to identify him clearly, that is to say, by the statement of his full name, the name of his father, his caste, or religious persuasion (if he be not a Hindoo), his rank or degree in life, his profession or trade, and the true place of his residence.

VII. When the petitioner in any such petition, or the deponent in any affidavit, speaks to any fact within his own knowledge, he must do so directly and positively, using the words "I affirm" (or "make oath") "and *say*."

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VIII. Where the particular fact is not within the deponent's own knowledge, but is stated from information obtained from others, the petitioner or deponent must use the expression—"I am informed," and, if such be the case, he should add, "and verily believe it to be true," or he may state the source from which he received such information. When the application rests on facts disclosed in documents or copies of documents procured from any Court of Justice or other source, the deponent shall state what is the source from which they were procured, and his information or belief as to the truth of the facts disclosed in such documents.

IX. Every person presenting a petition or making an affidavit shall, if not personally known to the person before whom the petition is to be verified or the affidavit is to be made, be identified to that person by some one known to him; and the person before whom the petition is verified or the affidavit is made, shall specify at the foot of the petition or of the affidavit (as the case may be), the name and description of him by whom the identification is made, as well as the time and place of the identification and of the verification of the petition or making of the affidavit.

X. If any person presenting a petition or making an affidavit, shall appear to the person before whom the petition is to be verified or the affidavit made to be illiterate or not fully to understand the contents of the petition or affidavit, the said person before whom the petition is to be verified or the affidavit made, shall cause the petition or affidavit (as the case may be) to be read and explained, either by himself or in his presence by a proper Officer of the Court, to the person by whom it is to be verified or made. When any petition or affidavit is read and explained as herein provided, the person before whom the petition is verified or affidavit is made, shall certify in writing, at the foot of such petition or affidavit, that it has been so read or explained, and that the person verifying the petition or making the affidavit seemed perfectly to understand the same at the time of his verifying it or making it.

Dated the 15th May 1871.

J. P. NORMAN.

G. LOCH.

H. V. BAYLEY.

F. B. KEMP.

L. S. JACKSON.

J. B. PHEAR.

A. G. MACPHERSON.

E. JACKSON.

F. A. GLOVER.

D. N. MITTER.

W. AINSLIE.

G. C. PAUL.

O. C. MOOKERJEE.

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(FORM OF COMMISSION).

In the High Court of Judicature at Fort William in Bengal.

Civil Jurisdiction.

Fort William in Bengal. } Victoria by the Grace of God of the United Kingdom of Great Britain and Ireland, QUEEN, Defender of the Faith, and so forth.

To

GREETING.

WE, confiding in the care, fidelity, and circumspection of you the said do by these presents give and grant unto you full power and authority to swear or solemnly affirm, as the case may be, all and every person or persons who shall come before you in your Court, to all and every affidavit or affidavits relating to all and every application or applications for use in our High Court of Judicature at Fort William in Bengal, which may be presented in your Court pursuant to Circular Order No. 15 of the 19th May 1871.

Witness

, Chief Justice at Fort William aforesaid.

Given under the seal of our said High Court, this day of in the year of Our Lord one thousand eight hundred and seventy——.

Registrar.

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CRIMINAL CIRCULAR ORDERS OF THE HIGH COURT.

Directs the discontinuance by Magistrates of the General Register of warrants.

CRIMINAL CIRCULAR No. 1.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Criminal Authorities, dated Calcutta, the 11th January 1871.

(Criminal Side).

Present :

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, L. S. Jackson and E. Jackson, *Judges.*

THE Court directs the discontinuance, in the Office of the Magistrate of the District, of the General Register of Warrants prescribed by the late Sudder Court's Circular of the 15th May 1835, No. 167, and the High Court's Circular, dated 1st October 1866, No. 11.*

2. Each Criminal Court is enjoined to keep up its own Register and see that its own warrants are duly returned. The form in which the Register shall be maintained is that laid down in Circular Order No. 167, dated 15th May 1835, omitting Column 6 as required by Circular Order No. 11, dated 1st October 1866*; and the manner in which entries are to be made will be found described in the Rules appended to that form.

By order of the High Court,

(Signed) F. B. PEACOCK,

Registrar.

Directs that in future warrants for the realization of fines be issued only by the Sessions Judges,—but in duplicate, one to the Magistrate and the other to the Officer in charge of the Jail.

CRIMINAL CIRCULAR No. 2.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Sessions Judges, Lower and Extra Regulation Provinces, dated Calcutta, the 18th January 1871.

(Criminal Side.)

Present :

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, L. S. Jackson and E. Jackson, *Judges.*

IT having been brought to the notice of the High Court that warrants for the rea-

* 6 W. R., Criminal Circulars, p. 9.

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lization of fines imposed by Courts of Session are sometimes issued from the Magistrate's Office, the attention of all Sessions Judges is called to Section 61 of the Code of Criminal Procedure (Act VIII of 1869), which provides for such warrants being issued by the Sessions Judge alone,—Section 384 of the Code of Criminal Procedure having been modified.

2. As, however, the present system of issuing one warrant for the carrying into effect a two-fold sentence, * one portion of which has to be given effect to by one Officer and the other portion by another, has been found to be inconvenient and to lead to difficulties, Sessions Judges are directed in future, in all such cases, to cause to be issued a warrant in duplicate fully filled up, one copy being forwarded to each of the two Officers, *viz.*, the Magistrate and the Officer in charge of the Jail, whose duty it is to see the warrant carried into effect. That portion, however, of the sentence with which the Officer to whom the particular copy is addressed has no concern, will first be written in and then scored through with red ink, as an intimation to him that no action on his part is necessary in regard to such portion. If at any time before the expiration of the alternative sentence the whole fine shall be levied, the Magistrate shall report the fact to the Officer in charge of the Jail and direct the discharge of the prisoner or; if a portion of the fine shall be levied within such time as aforesaid, the Magistrate forthwith shall report the fact for the orders of the Sessions Judge.

* Vide Forms 6, 7 and 8, also 10 and 11, appended to Circular Order No. 6, dated 23rd February 1870.†

By order of the High Court,

(Signed) F. B. PEACOCK,

Registrar.

† 13 W. R., Criminal Circulars, p. 7.

Instructions for the preparation of the tabular forms prescribed by Circular No. 32, dated 8th November 1870.

CRIMINAL CIRCULAR No. 3.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Criminal Authorities, dated Calcutta, the 2nd February 1871.

(Criminal Side.)

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, L. S. Jackson and E. Jackson, *Judges*

IT having been brought to the notice of the Court that difficulty has been experienced in the preparation of the tabular forms prescribed by Circular Order No. 32, dated 8th November last,* so far as regards the Criminal Returns, the following instructions are issued for the information and guidance of Sessions Judges and Magistrates :—

2.—The classification list alluded to in Column 2 of this Statement, of which a copy accompanied the Circular Order in question, is merely that given by the Statistical Committee and was clearly not intended to be an exhaustive, but rather a suggestive, list of offences. It is nowhere recognised or prescribed in the Circular itself, and was not meant entirely to supersede the existing Schedule provided by Circular Order No. 19, dated

Judicial Statement (Criminal) 2.

* 11 W. R., Civil Circulars, p. 25.

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31st December 1861. The Court have, however, determined to re-construct that Schedule on the principle of the classification list and to adapt it to its requirements, by a re-arrangement of its descriptive headings, according to the order of the Sections of the Indian Penal Code. This has been done in the new Schedule circulated herewith.

3.—As regards 'attempts,' the Court are of opinion that when the attempt is one for the punishment of which express provision is made (such as attempt to commit murder, culpable homicide, or suicide) whereby, in fact, such attempts are constituted substantive offences, they should come in their order accordingly; but that attempts punishable under the general provisions of Section 511, Indian Penal Code, should be inserted where they occur, immediately after the offences at which they are attempted. Finally, offences under special and local laws should be exhibited, arranged alphabetically, as indicated in the accompanying list, after the offences classified as abovementioned.

4.—With reference to Column 15 of this Statement, headed "average number of days during which each case lasted," the Court consider that the average duration should be calculated from date of complaint or information to date of conviction, acquittal, or discharge; and where there are several persons accused in the same case in respect of whom final orders are not passed at the same time, as will sometimes happen, then to the date of last order.

Judicial Statement (Criminal) 3.

5.—This Statement was intended to exhibit *every sentence* passed, and where two penalties were inflicted on the same offender to exhibit them both. With a view, however, to secure uniformity in the mode in which the columns are to be filled up, and to provide against the same offenders being reckoned more than once in the general result, the Court lay down the following instructions:—If a man has been sentenced to rigorous imprisonment with solitary confinement and fine, he will appear in Columns 5 and 9; if to rigorous imprisonment without solitary confinement, but with fine, then in Columns 6 and 9; if to simple imprisonment and fine, then in Columns 7 and 9; if to rigorous imprisonment and whipping, then in Columns 5 or 6 and 11. In adding the entries together to ascertain the total number of *persons punished*, it will be necessary to exclude Columns 9 and 11, as the persons referred to therein will be accounted for in other columns.

Judicial Statement (Criminal) 4.

6.—This is a return to be made by the appellate Courts of the District, and is intended to exhibit *their* action, *i. e.*, the orders made *by them*, and one of the orders which a Sessions Judge or a Magistrate of a District can make (rather, however, as a Superintending Court than as an appellate Court) is that of reference to the High Court. Orders of this nature accordingly will be shown in Column 9, the previous columns showing either final orders made or orders interlocutory or preparatory to *their own* final orders. Column 7 will thus show orders quashing or annulling convictions where the local appellate Court has power to make such order, *e. g.*, Section 427, Criminal Procedure Code (Act VIII of 1869), and Column 8 will include orders made by such Courts under Section 422.

Judicial Statement (Criminal) 5.

By order of the High Court,
(Signed) F. B. PEACOCK,
Registrar.

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Directions to Sessions Judges in the preparation of their Criminal Administration Reports.

CRIMINAL CIRCULAR No. 4.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Sessions Judges, Regulation and Extra Regulation Provinces, dated Calcutta, the 2nd February 1871.

(Criminal Side.)

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice,* and the Hon'ble G. Loch, H. V. Bayley, L. S. Jackson and E. Jackson, *Judges.*

THE following directions are issued for the guidance of Sessions Judges in the preparation of their Criminal Administration Reports, with reference to the new forms prescribed in Circular Order No. 32, dated 8th November 1870* and in supersession of previous orders on the subject.

The report is to contain, *inter alia,* the following matters :—

ORIGINAL JURISDICTION.

Statement of number of Offences ascertained to have been committed in year under report as compared with previous year.

OFFENCES.	1869.	1870.
Against the State or public (Cap. VI to XV, I. P. Code) ...		
Against the person (Cap. XVI, XIX, XX to XXII.) ...		
Against property (Cap. XVII and XVIII.)		
Under special laws		
TOTAL ...		

Statement shewing the number of persons brought to trial during the year, as well as those convicted, acquitted or discharged, and remaining under trial.

OFFENCES.	PERSONS				
	Under trial.	Acquitted or discharged.	Convicted.	Died, escaped, transferred.	Remaining under trial.
Against the State or public (Cap. VI to XV, I. P. Code)					
Against the person (Cap. XVI, XIX, XX to XXII) ...					
Against property (Cap. XVII and XVIII) ...					
Under special laws					
TOTAL ...					

* 14 W. R., Civil Circulars, p. 25.

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Statement shewing the number of witnesses, and their attendance.

Courts in Detail.	Number of witnesses discharged.			
	On 1st Day.	On 2nd Day.	On 3rd Day.	After 3rd Day.
Magistrate of the District				
Joint Magistrate				
Assistant Magistrate				
Deputy Magistrate				
Total ...				

APPELLATE JURISDICTION.

Table shewing Appeals from sentences and orders of Courts of Original Jurisdiction, preferred in the District, disposed of and pending in the year under report, as compared with the previous year.

From Sentence or Order of	Preferred.		Disposed of.				Remaining for Trial.	
	1869.	1870.	1869.		1870.		1869.	1870.
			Before Court of Session.	Before Magistrate of the District.	Before Court of Session.	Before Magistrate of the District.		
Magistrate of the District... ...								
Joint Magistrate								
Assistant Magistrate								
Deputy Magistrate								
Total ...								

Table shewing the number of Appeals preferred to the Court of Sessions, or to the Magistrate of the District, from the Subordinate Criminal Courts, the ratio of appeals to decisions, the number of decisions affirmed, and the ratio of affirmed to decided.

Appeals from sentence or order of	Number of Appeals preferred.	Ratio of Appeals to sentences or orders.	Number of sentences or orders affirmed.	Ratio of affirmed to passed.
District Magistrate ...				
&c., &c.,				

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Separate reports similar in character to that submitted with the Civil Administration Report, should be submitted in respect of all officers employed in the administration of criminal justice. In respect of every such officer, figures should be shown exhibiting the amount of work done, the extent to which he has been employed in other duties, the result of appeals from his decisions, and also the result of commitments made by him, in so far as such result indicates any want of discretion on his part or the converse. To such results should be appended the opinion of the District Magistrate in respect of the officer, which should be followed in each case by that of the Sessions Judge.

In prescribing these materials for the Administration Report, the Court has expressly refrained from directing the use of any particular form of covering letter, considering that such a matter is best left to the judgment of the several authorities concerned.

By order of the High Court,

(Signed) F. B. PEACOCK,

Registrar.

SCHEDULE of Offences under Act XLV of 1860.

No.	Description of Offences.	Sections of Penal Code applicable.
1	Offences against the State	Sections 121 to 130.
2	„ relating to the Army and Navy	„ 131 to 140.
3	Offences against public tranquillity ... — Unlawful assembly	„ 143 to 145, 149 to 151, 157, 158.
4	Offences against public tranquillity ... — Rioting, &c.	„ 147, 148, 152, and 153 to 156.
5	Offences against public tranquillity ... — Affray	„ 160.
6	Offences ... ... — By public servants	„ 161 to 169.
7	Offences ... ... — Relating to public servants	„ 161, 170, and 171.
8	Contempt of lawful authority	„ 172 to 190.
9	False evidence, or subornation &c., of the same	„ 193 to 200.
10	Offences against public justice	„ 201 to 229.
11	„ relating to coin	„ 231 to 254.
12	„ „ to stamps	„ 255 to 263.
13	„ „ to weights and measures	„ 264 to 267.
14	„ affecting public health	„ 269 to 278.
15	„ „ safety	„ 279 to 289.
16	„ „ convenience	„ 290 and 291
17	„ „ decency or morals	„ 292 to 294.
18	„ relating to religion	„ 295 to 298.
19	Murder	„ 302 and 303.
20	Culpable homicide	„ 304.
21	Abetment at suicide	„ 305 and 306.
22	Thuggee, &c.	„ 311.
23	Causing miscarriage ... — Attended with aggravating circumstances ...	„ 312 to 315.
24	Causing miscarriage ... — Other cases	„ 312.
25	Injury to unborn children	„ 316.
26	Exposure of infants	„ 317.
27	Concealment of births by secret disposal of the dead body	„ 318.
28	Hurt ... ... — With aggravating circumstances	„ 325 to 331, and 333.
29	Hurt ... ... — Other cases	„ 323, 324, 332, and 334 to 338.
30	Wrongful restraint	„ 341.
31	„ confinement	„ 342 to 348.
32	Criminal force or assault	„ 352 to 358.

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SCHEDULE of Offences under Act XLV of 1860—continued.

No.	Description of Offences.	Sections of Penal Code applicable.
33	Kidnapping or forcible abduction ... With aggravating circumstances	Section 364, 366, 367.
34	Kidnapping or forcible abduction ... Other cases	,, 363, 365, 368, 369,
35	Slavery	,, 370 and 371.
36	Buying or selling a minor for the purpose of prostitution	,, 372 and 373.
37	Forced labor	,, 374.
38	Rape	,, 376.
39	Unnatural offences	,, 377.
40	Theft ... ... With aggravating circumstances	,, 382.
41	Theft ... ... Other cases	,, 379 to 381, and 401
42	Extortion ... With aggravating circumstances	,, 386 to 389.
43	Extortion ... Other cases	,, 384 and 385.
44	Robbery.. ... With hurt	,, 394.
45	Robbery.. ... Other cases	,, 392.
46	Dacoity ... ... With murder	,, 396.
47	Dacoity ... ... With attempt to cause death or grievous hurt ...	,, 397.
48	Dacoity ... ... Other cases	,, 395, 399, 400 and 402.
49	Criminal mis-appropriation of property	,, 403 and 404.
50	,, breach of trust	,, 406 to 409.
51	Receiving or habitually dealing in stolen or plundered property	,, 411 to 414.
52	Cheating	,, 417 to 420.
53	Fraudulent deeds and disposition of property	,, 421 to 424.
54	Mischief ... With aggravating circumstances	,, 429 to 433, and 435 to 440.
55	Mischief ... Other cases	,, 426 to 428, and 434.
56	Criminal Trespass ... Resulting in death or other grievous hurt ...	,, 459 and 460.
57	Criminal Trespass ... For commission of serious offences	,, 449, 450, 451, 452, 454, 455, 457, and 458.
58	Criminal Trespass ... Other cases	,, 447, 448, 453, 556, 461, and 462.
59	Forgery or uttering or possessing forged documents or papers	,, 465 to 471, and 474.
60	Counterfeiting or making or possessing a counterfeit seal, &c., for purposes of forgery.	,, 472 to 476.
61	Fraudulently destroying or defacing a Will or other documents	,, 477.
62	Using a false trade or property-mark and knowingly selling property so marked	,, 482, 486, 487, and 488.
63	Counterfeiting or making, or possessing a die, plate or instrument for counterfeiting a trade or property-mark.	,, 483 to 485.
64	Removing, destroying, &c., a trade or property-mark with intent to cause injury	,, 489.
65	Criminal breach of contract of service	,, 490 to 492.
66	Offences relating to marriage	,, 493 to 498.
67	Defamation	,, 500 to 502.
68	Criminal intimidation, insult or annoyance Resulting in death or other grievous hurt ...	,, 506.
69	Criminal intimidation, insult or annoyance Other cases	,, 504 to 510.
70	Attempts	,, 511.
71	Other offences not included in the above specifications, such as—	
	1. Abkaree Laws, breach of—	
	2. Aliens, breach of Laws relating to—	
	3. Chowkeedaree cases under Act XX of 1856 and Act V of 1861.	
	4. Custom's Laws, breach of—	
	5. Ferry Laws, breach of—	
	6. Lotteries, breach of Law relating to—	
	7. Post Office Laws, breach of—	
	8. Printing Presses, breach of Laws relating to—	
	9. Railway Laws, breach of—	
	10. Salt Laws, breach of—	

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Makes an alteration in the Schedule of offences appended to Circular No. 3, dated 2nd February last.

CRIMINAL CIRCULAR No. 5.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Criminal Authorities, dated Calcutta, the 19th April 1871.

(Criminal Side)

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and E. Jackson, *Judges.*

In continuation of Circular Order No. 3, dated 2nd February last,* the Court directs that the new Schedule of offences appended thereto may be altered by the elision of heading No. 70 relating to "attempts" under Section 511, Indian Penal Code, which will necessitate the conversion of the heading next ensuing ("No. 71") into No. 70.

2. In the case of those Sessions Judges whose annual returns shall have been despatched before the receipt of these instructions, and the nature of "attempts" has not been otherwise separately indicated in them a supplementary return will be necessary, indicative of the number and nature of each class of "attempts" which may have been entered under the heading No. 70 now rescinded.

By order of the High Court,

(Sd.) W. M. SOUTTAR,

Officiating Registrar.

* *Ante*, p. 7.

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The 1st December 1870.

Present :

Sir James W. Colvile, Lord Justice James, Lord Justice Mellish, and Sir Lawrence Peel.

Joint property — Self-acquired property—Documentary evidence—Admissions—Finding of fact.

On Appeal from the High Court at Madras.

Chellayamal

versus

Muttialamal and another.

Concurrent finding of the lower Courts, based upon admissions made in written documents that property which had been originally self-acquired had come into a common stock and become joint property, upheld.

THIS is a mere question of evidence. The appeal is simply on the ground that the Court below has not come to a right conclusion upon matters of fact and matters of inference from written documents. Both Courts, the Court of first instance and the Court of appeal in India, arrive at the conclusion that certain property which is assumed by the Court of appeal, at all events, to have been originally acquired property of Paupa Reddy, had been thrown by him, although his separate acquisition, into a common stock If, although originally a separate acquisition, thrown by him into a common stock, beyond all question the appellant was wrong and the respondents were right in the litigation.

Upon that question of fact the Court below has considered that two documents were themselves sufficient evidence of the fact. The one was a document which is called Exhibit 1. and it is as follows :—"The humble "petition of Babu Reddy" (the same man who is called Paupa Reddy), "zemindar of the "Gari Mitta of Muttakapatti, etc., in the "Taluk of Namakal. The muttas registered "in my name" (which are the muttas in question), "and those registered in the names "of myself and my elder brother's son, "Polam Reddy, zemindar of Sali Mutta, and "all those property enjoyed by us, as also the "Choultry and the charities, belong after my "death to the said Polam Reddy, and to "none else." The Court below was of opinion that that writing was a writing evidencing a very deliberate admission and recognition by Paupa Reddy of the then existing condition of the property—that it is part of a joint preperty of himself and Polam Reddy.

They referred to another Exhibit, No. 30, which is to the same effect, and then they say :—"Then, in Exhibit 4, an income-tax "return made in 1861, we find Paupa "Reddy lumping these four muttas together "with the other lands which were undoubt-"edly the joint property of himself and "Polam Reddy, and treating them all alike "as joint property. By itself this admis-"sion might not have been of very great "value ; but, following, as it does, the so-"lemn recognition of the muttas as joint "property made in 1860, it is, we think, "very important evidence in favour of the "defendants."

Their Lordships think it is utterly impossible for them to come to the conclusion that the Court below was wrong in treating these documents as very important evidence, and in drawing the conclusion that the proper inference from them was, that it was a recognition of the fact that the separate property had become joint property.

Their Lordships see no ground whatever for disturbing the finding of the Court below ; and they will, therefore, humbly recommend Her Majesty to dismiss this appeal with costs.

The 2nd December 1870.

Present :

Sir James W. Colvile, Lord Justice James, Lord Justice Mellish and Sir Lawrence Peel.

Lunacy—Res-judicata — Act XXXV of 1858—Practice—Evidence.

*On appeal from the High Court at Calcutta.**

Ajoodhya Pershad and another

versus

Omrao Singh.

* From the judgment of Steer and L. S. Jackson, *J. J.*, in Regular Appeal No. 581 of 1862, dated 10th December 1863—not reported.

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Act XXXV of 1858 contemplates only the question of lunacy or sanity at the time of the enquiry; there is no provision in the Act that the enquiry shall extend to the ascertainment of the period at which the alleged lunatic first became of unsound mind. The report of an officer on such enquiry has not the effect of *res-judicata* upon the issue between two parties who allege that the lunacy commenced at different times.

When evidence of doubtful admissibility has been received in a cause in India, the Privy Council will deal with the case as they think substantial justice requires, and will not allow any merely technical objections to prevail.

In this case an action in the nature of an ejectment was brought by the respondent, Omrao Sing, as the Committee, and in right of his wife (a lunatic), for the recovery of certain parcels of land which were admitted to be in the possession of the appellants. The plaint also asked that a certain ikrarnamah should be set aside. Their Lordships may at once dispose of the latter question by saying that it appears to them, as it appeared to the High Court of Bengal, to be one which cannot be disposed of in this suit; that it is a question which can only be determined between the appellants and the persons who are named as their co-defendants on the record. Their Lordships, therefore, will deal with the case as being nothing but an action in the nature of an ejectment for the recovery of the lands in question from the appellants.

The title upon which the plaintiff sued is based upon the fact that his wife, as the daughter of Indrabuttee, the last surviving widow of one Teijnarain, became on the death of the mother entitled to the property as the next heir of her father Teijnarain; and the principal issue raised in the cause is whether that lady had not lost her right to inherit by reason of her lunacy. It seems to be admitted on both sides (the point has not been argued here, nor was it argued in the Court below) that by the Hindoo law, if she was, when the succession opened to her, that is to say on the death of her mother, insane, she did lose her right, and that it passed to the three persons who are mentioned in the record to be her sons.

The sole question, therefore, for their Lordships' determination is a question of fact, whether the lady was or was not insane at the time of her mother's death, or whether, as alleged by the plaintiff, she became insane within two months after that event. This issue of fact was found in favour of the appellants by the Court of first instance, the Principal Sudder Ameen. His judgment was reversed by the High Court upon certain grounds, and it has been contended before their Lordships that those grounds are unsatisfactory, inasmuch as the appellate Court has given undue weight to a certain document which had been admitted in evidence in the cause. Hence, there being two conflicting judgments, and a grave question touching the weight which ought to be given to a particular document, it has fallen to their Lordships to deal with this case according to their own view of the evidence taken in the cause, and to form their own conclusions upon it.

It seems to their Lordships desirable in the first instance to consider whether, by reason of the undue weight which the High Court gave to the document in question, the value of its judgment is destroyed. That document is the report of the Moonsiff made upon the application for the appointment of the husband as Committee. It appears that within two months after the death of Indrabuttee, Omrao Singh applied to the Zillah Judge, under Act XXXV of 1858 of the Indian Legislature, to be appointed committee of his wife alleging her lunacy. The Act directs that in case the party lives at a certain distance from the sudder station, the Judge shall delegate the inquiry to a local officer; who in this case was the Moonsiff The local officer has to report to the Judge who passes the final order in the case. The Act, however, contemplates only the question of lunacy or sanity at the time of the inquiry; there is no provision in the Act that the inquiry shall extend to the ascertainment of the period at which the alleged lunatic first became of unsound mind.

In these circumstances the appellants, who had long been pressing their claims in respect of this property against the other branch of the family, thought it expedient to appear as objectors on this proceeding. It is not clear that the Judge passed any order allowing them to go before the Moonsiff, but in some way or other they appear to have been admitted before the Moonsiff. They did not attend throughout the inquiry, and they failed to produce witnesses to prove that the lady had been a lunatic from the time at which they alleged she became so, or at any time before the death of Indrabuttee. The result, therefore, was that they did not go into their case before the Moonsiff. The Moonsiff on the other hand took evidence on the part of the respondent who was seeking to be appointed Committee, and came to the conclusion that the lady was of unsound mind. His report is at page 89 of the record. It states what I have just said about his having taken the evidence, and then contains this

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passage :—"In this case both parties ac- "knowledge the lunacy of Mussamut Sree- "butee ; but the dispute between them is on "this subject. The applicant writes that "Mussamut Sreebuttee became insane in the "month of Maugh 1267 Fuslee, subsequent "to the death of her mother Mussamut In- "drabuttee, and the interveners state con- "trary to this, that she has been a lunatic "for a very long time, that is to say from "anterior to the death of Indrabuttee her "mother. From the evidence of the wit- "nesses which have been produced on the "part of applicant (from No. 1 to 29), it "has become known that Mussamut Sree- "buttee, daughter of Mussamut Indrabuttee "deceased, after her death, became insane, in "the month of Maugh 1267 Fuslee, at mou- "zah Dinnaree, Pergunnah Kunhour, in the "house of her husband, and that she con- "tinues in the same state up to this time. "From the evidence as to the lunacy taken "by me before the interveners, it has been "ascertained that the Mussamut aforesaid is "quite insane. The interveners have pro- "duced no proofs before me from which it "may be learned that the Mussamut afore- "said has been insane for a greater length of "time." This report. having been made to the Judge, the appellants again objected before the Judge, but the Judge very properly held that he had no jurisdiction to decide the question between the parties; that the simple issue was whether Indrabuttee was a person possessed of any property, and if so, whether she was sane or insane and required the protection of a Committee; and accordingly he appointed the husband Committee. The learned Judge who delivered the judgment of the High Court seems to have thought that the evidence before him being conflicting, the scale was turned by the document to which I have just referred. He says:—"The evidence adduced by them (the "appellants) is not only very far from satis- "factory, but it is directly opposed to the "recorded opinion of the Moonsiff deputed "by the Zillah Judge in 1860 to investigate "the matter of Sreebuttee's lunacy." It appears to their Lordships that if he meant to give to this finding, what we do not think he did mean to give, the effect of *res judicata* between the parties, he was clearly wrong. There was no adjudication by any competent tribunal upon the point in issue in this suit. The Moonsiff had no jurisdiction to decide it; nor had the appellants in strictness any *locus standi* before him. If, on the other hand, he meant to say that the conduct of the appellants, as evidenced by that proceeding, had been such as to lead to an inference that the case they afterwards made was untrue, he seems also to their Lordships to have given an effect to their conduct which it does not fairly bear. All that appears is that they went unnecessarily before a tribunal which could not have decided the question between them and the opposite party, and that being there they failed to produce their evidence. Their Lordships are of opinion that it is neither a necessary nor a legitimate inference from that fact, that the evidence which the appellants have produced in this suit ought not to be believed. That being so, their Lordships think that the judgment of the High Court, whether the Judges came to a right conclusion or to a wrong conclusion, has been put upon grounds which do not justify that conclusion.

Their Lordships have then to consider the effect of the whole evidence. The issue is a remarkably simple one; it is whether this lady, admitted on both sides to be a lunatic, became a lunatic between the death of her mother and the period at which the husband applied to be appointed Committee—that is to say two months afterwards,—or whether she had been a lunatic for some considerable period before the death of Indrabuttee. Now their Lordships will concede that the burden of proof may be on the side of the appellants, —that it may be sufficient for the other party, in proving his title, to prove that this lady, now a lunatic, but who certainly had not always been a lunatic, was the nearest heiress to Teijnarain; but it is evidently a burden which becomes of a much lighter character when the lunacy is admitted to have supervened within two months of the critical time, the death of Indrabuttee.

Then again the case of the respondents is open to the observation which has been made at the Bar, that if it is true far better evidence of it might have been produced than has been produced by the respondent. For instance, if the woman became mad within two months of her mother's death, one would suppose that that madness must have been caused by some disorder which would require and receive medical treatment. We have, however, no medical evidence whatever. We have nothing to show that, having been sane up to a certain period, she became suddenly ill. Again, we have none of the near relations of the family produced. The mere fact that the husband verifies in the ordinary way the truth of the allegation in the plaint, is no answer to the suggestion that, if he had a true case, he, the nearest relation of this

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party, might have come forward and shown how the madness came on and all the circumstances relating to it. He, again, has within his power all her family and female domestics; but there is not a single witness produced on that side, except the witnesses of the character so common in the Indian Courts, *viz.*, male menial servants, dependants, and ryots living in the neighbourhood, who are all obviously persons less likely to have the circumstances deposed to within their knowledge, and to be far less trustworthy than the members of the family who might have been produced. On the other hand, it is said that the evidence produced by the appellants is of no better character. It does not seem to their Lordships that this observation is altogether just. There is certainly, at least, one person produced by the appellants who does stand to the parties in near relationship. No doubt his testimony is open to the observation that though the uncle of the lunatic, he is also the father-in-law of one of the appellants; but still he is a man of position; he is a man who from his relationship must have had the means of knowing what he deposes to, and he seems upon the whole to be the most trustworthy witness that has been produced to give direct evidence as to the date of the lunacy on either side. Again, there are the other witnesses mentioned by Sir Roundell Palmer, *viz.*, the two servants, one of whom was employed to take care of her, and they seem to have had more peculiar means of knowledge than those possessed by most of the witnesses on the other side. Then a great deal has been said touching the evidence of the witness upon whom the Principal Sudder Ameen seems, from the expressions in his judgment, to have placed the greatest reliance—I mean the evidence of Mr. Duff. It has been argued that Mr. Duff's evidence being mere hearsay was not admissible at all. Their Lordships are not prepared to admit that this evidence is properly described as mere hearsay. The witness speaks of his own knowledge to the fact that at a particular period the insanity of Mussamut Sreebuttee was rumoured and generally believed in the district with which he was conversant. Their Lordships do not feel it necessary to decide whether that testimony, if objected to, would have been receivable on the trial of such an issue as this in an English Court of Justice. It has been received in India; and their Lordships conceive that they ought to deal with it according to the principles enunciated by Dr. Lushington in the case mentioned in the course of the argument (see* 7 Moore's Indian Appeals, 137) as those which govern this Board, *viz.*, that when evidence of doubtful admissibility has, under the looser practice of the Indian Courts, been recieved in a cause, their Lordships, sitting as an appellate Court, will deal with the case as they think substantial justice requires, and will not allow any merely technical objections to prevail. In the present case their Lordships think that they ought not wholly to reject Mr. Duff's testimony. The next question is, what effect can legitimately be given to it. If we had to deal here with the broad question of sanity or insanity,—whether Mussamut Sreebuttee were now sane or insane,—Mr. Duff's evidence would be of little or no value. But when it is an admitted fact that the woman is insane, and the question is whether she first became so before or after the date of the death of Indrabuttee, the testimony of a trustworthy witness, that long before that period she was, to his knowledge, reputed insane, is an important corroboration of the direct testimony given in the cause to the fact of her insanity at that time.

Their Lordships, moreover, deem it right to observe that if Mr Duff's deposition was struck out of the record, they would nevertheless be of opinion that the preponderance of the evidence is in favour of the conclusion—that the lady was insane at the time of Indrabuttee's death. And they are confirmed in that opinion when they come to consider the *res gestæ* of the case. This family was originally a joint family, and there was an attempt at a partition as early as 1802. From that time forth however, the two branches of the family represented by the appellants seem to have contended that the estates were to a certain extent joint, and that the descent of them was to be governed by the rules regulating the descent of joint property. Their Lordships do not say whether they were right or wrong. In the lifetime of the two widows there seems to have been an arrangement by which the widows were left in possession of the property, but it is said on some understanding that on their death it was to go as if it were joint estate to the male heirs. Whatever may be the merits of that contention, it seems to their Lordships impossible to resist the conclusion that the punchayet which is alleged to have been held was held. Possibly the circumstances which led to it may have been circumstances of violence tending to a breach of the peace, but with that we have nothing to do. In point of fact their Lordships believe that the punchayet was held, that the ikrarnamah was executed in pursuance of that

* 4 W. R., P. C., p. 121.

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punchayet, and that the possession of the lands, which is now admitted to be in the appellants, followed upon the execution of that instrument. It is unnecessary to consider whether that document was obtained by duress or fraud, or anything of that kind, for that is a question which can only arise between the sons of this lady, who executed it, and the appellants; but if the transactions above mentioned did take place then, then it follows that at that time, which was immediately after the death of Indrabuttee, the sons, and not the mother, were held out to be and were dealt with as the heirs. If the lady had not then been insane, it seems most improbable that some person would not have put forward her interest, or that the appellants would have dealt with those as heirs who really did not possess that character.

Therefore, weighing all the circumstances, their Lordships have come to the conclusion that the Principal Sudder Ameen was right in the view which he took of the evidence, that Mussamut Sreebuttee was of unsound mind at the time of her mother Indrabuttee's death, and that consequently the plaintiff in the action has failed to make out his title. Their Lordships must, therefore, recommend Her Majesty to reverse the decision of the High Court, and to order that in lieu thereof the appeal to that Court against the decree of the Principal Sudder Ameen dismissing the appellants' suit be dismissed with costs. The appellants must also have their costs of this appeal.

The 3rd December 1870.

Present:

Sir James W. Colvile, Lord Justice James, Lord Justice Mellish, and Sir Lawrence Peel.

Question of fact—Onus on Appellant.

*On Appeal from the High Court at Calcutta.**

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* From the judgment of Loch and Seton-Karr, J. J., in Regular Appeal No. 393 of 1864, dated 29th May 1865,—See 3 W. R., Civil Rulings, p. 66.

Govind Soondaree Debea and others,

versus

Juggodumba Debea and others.

Upon a mere question of fact which has been decided in the same way by both Courts in India, the appellant must satisfy the Privy Council, beyond all reasonable question, that there was some miscarriage in the Court below in respect of some principle which they acted upon, in respect of some presumption to which too much weight was given, or in respect of something as to which they could see that there was a matter of principle involved which the Privy Council ought to set right for the guidance of the Courts of India in other cases.

This is an appeal from the decision of the High Court of Judicature at Fort William in Bengal, affirming a decision of the local Court. The question was a mere question of fact depending upon evidence, and depending upon the inferences to be drawn from the acts and conduct of the parties.

Their Lordships do not feel themselves called upon to go as minutely into the details of the evidence which has been given on the one side or on the other, as if they had been a Court of first instance, or to satisfy themselves that, if they had been such Court of first instance, they would have concurred in the judgment of the Court below, as that which the weight of evidence was in favour of. They consider that in accordance with the rule which has been more than once laid down at this Board, upon a mere question of fact, a question of fact which has been decided in the same way by both Courts in India, it is the duty of the Appellant to satisfy them, beyond all reasonable question, that there was some miscarriage in the Court below, in respect of some principle which they acted upon, in respect of some presumption to which too much weight was given, or in respect of something as to which they could see that there was a matter of principle involved which this Board ought to set right for the guidance of the Courts of India in other cases.

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In this case the question was a mere question of fact, and both Courts seem to have gone very minutely into all the questions of evidence. The Court below gave a very long and very elaborate judgment. The Court at Fort William admits, in favour of the appellant, that abundance of oral evidence had been produced to prove the fact of the permission to adopt in question in the cause having been first given verbally and then in writing, but they say—"We "entirely discredit the whole of the evidence "except that of Dr. Elton, knowing how easy "it is when family disputes arise to raise "claims, such as is made in the present case, "and to support them with any amount of "oral evidence, even that of the nearest "relatives of the family who generally range "themselves on one side or the other, and "who cast aside all regard for truth in order "to secure the success of the party whose "cause they have espoused; and our past "experience tells us that such is particularly "the case in suits to uphold or set aside "alleged acts of adoption in Zillah Mymen-"singh," the particular Zillah in question. Now, their Lordships do not feel themselves at liberty to say that this was not a true statement of the practice and of a danger to be guarded against. The Court below goes on to say,—"There are, however, rea-"sons beyond this general one, which, in our "opinion, render this testimony utterly "worthless," and then they say—"We "find that Woomesh Chunder died in 1256, "that from that time till 15th Assin 1268, "a period of twelve years, nothing was done "by the plaintiff in furtherance of the per-"mission to adopt which, as she alleges, she "had received from her husband; no pub-"licity was given to this instrument, no care "was taken to register nor to keep it in her "own custody, and the instrument itself is "not to be found; but the plaintiff comes "into Court with a plausible tale, that she "was too young to take care of the paper "when her husband died, and so made it "over to her father-in-law, from whose cus-"tody it passed on his death to that of his "son, and thus on his widow she casts the "*onus* of producing it or the odium of hav-"ing destroyed it. After the death of her "father-in-law she allowed her brothers-in-"law to take possession of the estate, made "no attempt to make the adoption, an act "which would have secured to her as guar-"dian of a minor adopted son a large share "of the family property, but she proceeded "with her mother-in-law to Benares ap-"parently with the purpose of spending the "remainder of her life there, when the unex-"pected death of her youngest brother-in-law "brought her back to the family residence, "prepared to contest, with his widow, the "right to the possession of the property, "and supporting her claim by any amount "of hard swearing which unscrupulous par-"ties about her do not hesitate to put for-"ward in her behalf. So long as any male "member of her husband's family remained "alive, she took no steps to carry out her "husband's permission to adopt; but no "sooner has the last male member deceased "and the possession of the property devolved "on his widow, than the plaintiff suddenly "starts up from her long sleep and tries to "get possession by an alleged dormant per-"mission to adopt." The inference drawn by the Court below from that statement of facts, was that the whole conduct of the lady and the conduct of the family was inconsistent with the oral testimony which was given, and they preferred that inference so drawn from such conduct to the oral testimony. The Court then proceeded to deal with the evidence of Dr. Elton, which they considered to be the only oral evidence that might be entitled to credit. They came to the conclusion that it was mere hearsay testimony, in which opinion this Court also agrees.

Their Lordships are unable to see any sufficient ground whatever upon which they can say that the High Court in Bengal was wrong in preferring the conclusions to be drawn from these acts and the conduct of the parties to the oral testimony, that testimony being of a kind, which, in their Lordships' experience, is generally liable to be doubly suspicious, there being also an amount of conflicting evidence. There is also this fact which is not mentioned in the judgment, but which has struck their Lordships,—a document which is proved in evidence, which seems to be an authentic document, by which the father-in-law, years before his death, registers another deed or power of adoption in the same family, reciting in it that there was no power of adoption given in respect of his eldest son who is deceased,—a fact which apparently he had no reason whatever for inventing if it were not true.

On the whole, their Lordships are of opinion that there are no sufficient grounds for disturbing the conclusion which was arrived at by the High Court, and they will humbly recommend Her Majesty that this appeal be dismisseb with costs.

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The 5th December 1870.

Present:

Sir James W. Colvile, Lord Justice James, Lord Justice Mellish, and Sir Lawrence Peel.

Benamee purchase—Onus probandi—Life-interest.

*On Appeal from the High Court at Calcutta.**

Rajah Chundernath Roy

versus

Ramjoy Mozoomdar.

Plaintiff sued for the recovery of certain property on the allegation that though the property was purchased by *A*, his adoptive mother, benamee in the name of *B*, yet that she purchased it out of her own separate income so as to make it her property, and that plaintiff, as her heir, was on her death entitled to the property. The defendant denied that the purchase was made with the money of *A*, and averred that the property was purchased with the money of *B*, the person in whose name the purchase stood.

Held that the defendant's answer was substantially an argumentative traverse of the truth of the plaintiff's story, and that the material issue was, not whether the defendant's averment of purchase with the money of *B* was made out, but whether the plaintiff's story of purchase by *A* with her own money benamee in the name of *B* was true.

Held, further, that even if *A* purchased the property with her own money, yet nevertheless if she purchased it with the express intention at the time that after her death it should go to *B*, in whose name she purchased it, that would not be a purchase benamee within the meaning of the real issue in the case, and that it would make no difference in point of law whether *A* did or did not reserve a life-interest and control over the disposition of the proceeds of the property during her life.

THIS was a suit brought by Rajah Chundernath Roy, as son and heir-at-law of the late Rajah Anundnath Roy Bahadoor, to recover certain properties, six in number, from Ramjoy Mozoomdar, the nominal defendant being the guardian of Chundernath, *alias* Ramchunder Chuckerbutty, who is an infant; and the ground on which the suit was brought was, that the plaintiff was the heir of the Ranee Hurreepreah, who had been one of the widows of his father, of whom he was the adopted son, and to whom he had made some very liberal allowances—the properties in question having been purchased by her out of the income which she enjoyed. There is no doubt that, under these circumstances, he was her heir. But the question in dispute was whether the properties in question had been purchased by her, as it is called, benamee, that is to say, had been purchased in the name of other persons, but so as to be her property? The Court below have decided that they were not so purchased, but were purchased with an intention that they should go after her death to the defendant.

Now, the first objection taken by Sir Roundell Palmer was, that the defence relied on in the case was not open on the pleadings. For that purpose it is necessary shortly to refer to what the pleadings were. Now, the plaint states generally the circumstances under which the plaintiff says he became entitled, that Hurreepreah had purchased them in the way I have said, benamee, and accordingly as her heir they came to him. Then the defendant in his answer no doubt sets up a case which was not maintained by the evidence at all, that they had not been purchased with the Ranee's money, but had been purchased with the proper money of the persons in whose name the purchase was made. Then the material issue which was directed to be tried by the Court, being the first issue, was "whether Ranee Hurree-preah, the stepmother of the plaintiff, was entitled to, and in possesion of, all the contested properties by acquiring them benamee of the persons alleged by the plaintiff; or whether they were acquired by the several persons alleged by the defendant, and accordingly held in their possession, and have afterwards come to the minor, Ram Chunder?" Now, it is obvious that this issue, in substance, is this—is the plaintiff's story stated in his plaint true, or is the defendant's story stated in his answer true? It is, of course, a possible thing that neither of the stories may be true, and the question then arises which of these two alternatives of the issue is the really material one? Their Lordships think that the really mate-

* From the judgment of Kemp and Pundit, J. J., in Regular Appeal No. 454 of 1862, dated 2nd September 1863,—see Sevestre's Gap Number for 1863, page 150.

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rial one is the first part of the issue, *viz.*, is the plaintiff's story true? It is not as if the defendant's defence was, as we should say in the common law, a plea in confession and avoidance—a plea which admitted that the plaintiff's story was true, and then avoided it. If that had been the case, and the defendant had failed to prove his case, of course the defendant must have failed and the plaintiff ought to recover. But it is substantially what at common law we should call an argumentative traverse of the truth of the plaintiff's story, for it does not admit that one word of it is true, but sets up certain things perfectly inconsistent with it. The real truth is that the second alternative of the issue ought to be rejected, and the real question is "whether the Ranee Hur-"reepreah, the stepmother of the plaintiff, "was entitled to—" which I think must mean was entitled to *at the time of her death*, because that is the material thing, "and in possession of all the contested pro-"perties by acquiring them benamee of the "persons alleged by the plaintiff." If the plaintiff has failed to prove the affirmative of that issue, if it appears on his own evidence that they were not so purchased and did not so continue at the time of her death, the consequence is the plaintiff must fail, and the defendant may say—"It is "wholly immaterial whether I prove my case "or not; you have not proved yours."

Their Lordships are, therefore, of opinion that it was perfectly open to the Court to decide the case on the grounds on which they do decide it. Their Lordships are also of opinion that the Court below have not at all miscarried in point of law; that if the real truth of the facts is this, that though these properties were purchased—as unquestionably on the evidence their Lordships think they were—with the money of the Ranee Hurreepreah, yet nevertheless, if she purchased them with the express intention at the time that after her death they should go, as to those which were purchased first to Sheeb Soonduree, and as to those which were purchased afterwards to Ram Chunder, that would not be a purchase benamee within the meaning of the issue; that would not be a purchase on the terms that the property was to be absolutely hers; but would be a purchase with the intention of benefiting the person in whose name the purchase was made; and their Lordships are of opinion that it would make no difference in point of law whether she did or did not reserve a life-interest and control over the disposition of the proceeds of the property during her life. One may observe that on the evidence it would rather appear that she, during her lifetime, did bestow very considerable benefits on both the mother Sheeb Soondaree and the boy, so that practically in all probability she gave them quite as much as the proceeds of the property.

Well then the Court below not having miscarried in point of law, so far from having miscarried in point of fact, the evidence is very strong indeed that the purchase from the very beginning was made with the intention that the property should not go to her heir-at-law, but should go to Sheeb Soonduree, or if Sheeb Soonduree was dead should go to Ram Chunder. It is really quite sufficient to refer to a single witness at page 29. "The witness on hearing the deposition said "that his answer to the question by the "Court has not been taken down; my answer "is that the Ranee used to say that all these "properties were Ram Chunder's, and her "care was that they remain as Ram Chun-"der's." It is perfectly plain that she had purchased them with the original intention of benefiting him in order that after her death they might go to him.

That being the case, their Lordships are of opinion that they must advise Her Majesty that this appeal should be dismissed.

The 6th December 1870.

Present:

Sir James W. Colvile, Lord Justice James, Lord Justice Mellish, and Sir Lawrence Peel.

Prejudice against party to suit—Transfer of suit—Application to Zillah Judge.

On Appeal from the High Court at Agra.

Mohur Singh,

versus

Ghureeba and others.

Where there is a general feeling in a district against the party to a suit, and such party feels that he is not likely to have a fair trial before the local Judge with that feeling in the district against h m, his proper course is to petition the European Judge to remove the case into his Court and to try it in the first instance.

THIS case has been before three Courts in India, of which the High Court of course merely dealt with the points of law which were raised on special appeal, and have not been very strongly pressed here. There are

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two questions in the cause. The first is whether the respondents, the plaintiffs in the Court below, have succeeded in establishing that when their puttee was confiscated and sold under one of the penal Acts passed during the time of the mutiny, it was purchased by the appellant in the name of his son, upon the contract or understanding that upon payment of the whole purchase-money, of which the plaintiffs had already paid part, the rest being found by the appellant, they should be put in possession of the whole of their ancestral rights in the puttee? That is a question of fact; and if that agreement is made out to have been the understanding and contract between the parties, the second question is, what are the equities which should be applied to it?

Mr. Leith having to contend with the judgment of the two Courts which tried the question of fact, has very fairly brought to our notice certain grounds upon which their conclusion should be impeached, and it is impossible to deny that several of those grounds have some foundation. He has urged, first, that a considerable amount of the evidence admitted was mere hearsay evidence; secondly, that among the evidence which was improperly admitted was the conviction by the Magistrate, which ought not in any point of view to have been used as evidence against the party in the civil suit, according to the strict rules of evidence, and which having been reversed by the Judge, no matter on what grounds, had ceased to be a standing conviction against the appellant. The third ground taken was the state of feeling against the appellant in the district; and in particular the strong animosity existing between him and the tehseeldar and Syud Ali Shah, who were two of the witnesses; and the last ground upon which the finding of the two Courts was impeached was the strong improbability that the appellant, who had been instrumental in bringing to justice certain persons of this village connected with the plaintiffs, should have been the person chosen to make the purchase on their behalf.

It seems to their Lordships that giving full weight to all these objections, there is still sufficient and more than sufficient proof in the unsuspected evidence given in the cause to support the decrees against which the appeal is brought. Their Lordships, of course, do not give to a decree founded upon evidence which has been so impeached, the same weight which they would give to the finding of an Indian Court upon evidence against which no such objection can be alleged. But they are not in the position of a Court of law in this country before which, on a motion for new trial, it is shown that evidence improper to be admitted has been admitted before the Jury. The Court in that case are not judges of fact, and are unable to say what weight the Jury may have given to the evidence that ought not to have been admitted. But it is the duty of their Lordships, who are judges of the fact in such a case as this, to consider whether, throwing aside the evidence which ought not to have been admitted, there still remains sufficient evidence to support the decrees. Their Lordships, nevertheless, must express their regret that the Court of first instance in the case before them should have been as lax as it has been in the admission of evidence. The improper reception of evidence is always to be deprecated, if only from its tendency to provoke an appeal.

Now, setting aside all the hearsay evidence, setting aside the conviction—the proceedings in reference to which seem to have been of a somewhat singular character, and even for the sake of argument admitting that the tehseeldar's evidence is not to be entirely relied upon, though their Lordships are by no means prepared to say that that person is unworthy of credit, and resting solely on the evidence which was given by the bankers, and the person described as the zemindar of Baroot.—it seems to their Lordships impossible to say that the finding of the Court below was wrong. The bankers' evidence is peculiarly valuable, because it is clear upon the proceeding that the whole of the village of Baroot was sold together. The bankers were the persons who were employed by persons interested in the other puttee forming part of that village to purchase it on their account. They admit such a contract. They speak from their own knowledge to the fact that the Singhs bought in the same way for the benefit of the persons interested in the other puttee, and they speak also to payment of the earnest-money. The other witness is apparently a witness of greater respectability than we usually find in such a case. It is impossible for their Lordships sitting here to estimate the force of the arguments which have been brought against the testimony of these witnesses by Mr. Leith; it is impossible for them to say what may be the feelings which have possibly prompted their evidence against the appellant. Certainly the general feeling of the district seems to be strongly against him, and the conviction that the transaction which the plaintiffs have put forward is really a true transaction appears to be general. But can we thence infer that the respondents' case is a false story? It is just

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as likely to be true, and one can conceive no story which, if true, would be more likely to create a general feeling against the appellant. If he felt that he was not likely to have a fair trial before the local Judge with that feeling in the district against him, his proper course was to petition the European Judge to remove the case into his Court, and to try it in the first instance. But if he has not done that—if he has taken a trial in the ordinary Court, and that Court has found against him, and the evidence properly received appears to their Lordships to be trustworthy, or at least to be such that it is impossible for them to say that it is not trustworthy,—how can their Lordships be called upon now to set aside the finding of that Judge, confirmed as it was afterwards on appeal by the Zillah Judge?

In the Court of first instance, the Principal Sudder Ameen seems to their Lordships to have mistaken the effect of the contract, and to have held that the parties were entitled to recover only such a proportion of the lands as the sum which they had actually paid might be taken to represent. The Zillah Judge, Mr. Sapte, seems to have put a more correct interpretation upon the contract. He treated it as a contract upon which, on payment of the balance, they would be entitled to the whole. He did not fix a period at which this redemption, if one may so call it, was to take place; but that was set right by the decree of the High Court.

It, therefore, seems to their Lordships that on the whole substantial justice has been done in this case, and they will advise Her Majesty to dismiss the appeal.

The 7th December 1870.

Present:

Sir James W. Colvile, Lord Justice James, Lord Justice Mellish, and Sir Lawrence Peel.

Succession — Co-parcenary — Custom —Ancestral property.

*On appeal from the High Court at Calcutta.**

Umritnath Chowdhry

versus

Gouréenath Chowdhry and others.

By the common law of Hindoostan, the descent is in co-parcenary where no other custom or right is proved.

The fact that a settlement was made by the Government in the name of an elder son, and that he has continued to be solely registered from that time to this, affords no conclusive evidence against the title of the younger brother in property which was once the property of the father. The mere fact that one of two brothers was registered, so as to be the proprietor to the outer world, is not of great weight on that point, if there has been a continuous enjoyment of the property by both brothers upon equal terms.

THIS case, which has occupied the greater part of two days, appears to their Lordships, when reduced to its legitimate and reasonable dimensions, to be a very short case. The relevant and material facts are few and not substantially in dispute for any purpose which their Lordships have to decide.

The contention on the part of the plaintiffs below—the respondents here—is, that a certain estate, a zemindary with accretions which beyond all reasonable question had been made by the investment of the profits of that estate, was an ancestral estate which descended to them and the appellant, who was a cousin, in coparceny. It is admitted that by the common law of Hindostan, the descent is in coparceny where no other custom or right is proved. The case of the plaintiffs was that this property was ancestral property, which had belonged to their grandfather, one Hurjee, and descended from Hurjee upon the two sons, Bacharam and Sheebloll, the fathers of the respective parties.

The case mainly relied upon in the Court in India on the other side was, that there was no foundation whatever for this assertion; that the property was not ancestral property—that the grandfather never had any pro-

* From the judgment of Kemp and Pundit, J. J., in Regular Appeal No. 474 of 1862, decided 5th October 1863,—not reported.

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perty at all, but that it was an acquisition by Bacharam himself under a grant made to him individually--or as we should say in English law, an acquisition by him by purchase; so that he became a new root of descent, and so that the common title alleged to be derived from the grandfather had no existence.

Now, it has been proved to the satisfaction of the Court below, and proved entirely to the satisfaction of their Lordships,—indeed was hardly disputed at last in the arguments at the bar,—that this property was originally a zemindary, of which Hurjee, the grandfather, was possessed. Document after document, and all the evidence in the cause, go to show that Bacharam in the first settlement, then in the decennial settlement, and then in the perpetual settlement, claimed to have it made with him by reason of his hereditary right to the zemindary as hereditary zemindar. That being proved, that it was Hurjee's property, and that Becharam was entitled by descent, of course the next proposition would equally follow, unless there is something to exclude it; that is, that he would not be entitled to it himself, but that he and his brother would succeed to it as co-parceners.

Well, has anything occurred to divest that right which in a case of ordinary property was certainly vested in the two jointly at the time when the history of this case begins? Their Lordships are unable to find anything to alter the right which existed at the time when the descent was cast. The fact that the settlement was made in the name of the elder son,—whether, originally, when he was a minor, or not,—the fact that he has continued to be solely registered from that time to this, affords no conclusive evidence against the title of the shareholder. There is documentary evidence, on the other side, of his being recognized as a shareholder, but not very strong or very conclusive evidence. The mere fact that one of the two brothers was registered, so as to be the proprietor to the outer world, does not seem to their Lordships to be of very great weight any more than it did to the Court below; and in respect to the actual enjoyment of the property, there has been beyond all question a continuous enjoyment by both upon equal terms. The two lived together; the families lived together, they messed together, and all the marriage and funeral ceremonies and other ceremonies of their religion were performed at the joint expense out of the income of the property, and apparently, as far as their Lordships can see, upon equal terms, and not as the bounty of an elder brother to a mere dependant who had no right whatever to the property.

It appears to their Lordships therefore that the case as principally alleged in the Court below has entirely failed, and it becomes necessary to consider the other topics which have been very much relied upon at the bar here, as they were at a late part of the case in the Court below. It is alleged that, admitting it to have been Hurjee's property, admitting it to have been ancestral property in that sense, it was property which descended to Bacharam as the eldest male heir by reason of its being subject to a custom of primogeniture. The custom of primogeniture is stated in two ways, first as a custom of a district so as to bring it within the Regulation of 1800; that is to say, it is the custom of a district supposed to be a jungle mehal in zillah Bhaugulpore. Now of the existence in any known district whatever of anything which can be predicated as a jungle mehal in which this zemindary is situated, there is neither pleading nor evidence. There is nothing at all to show any custom, except a Collector's letter with respect to a custom extending to all the zemindaries throughout the whole Zillah of Bhaugulpore; and certainly it would be very strong indeed to hold, merely upon that evidence, that there was a custom proved extending to the whole of the Zillah of Bhaugulpore, or to the whole of any undefined district within that Zillah, of which the Court below says it has never heard anything, it being, they say, perfectly notorious that no such custom exists within that district. Well, then, the evidence of that custom appears to their Lordships to be absolutely nothing. Then, there is the other custom,—supposed to be a family custom, a custom of this particular family, under which custom it is alleged that Bacharam succeeded at such a time,—that is before the year 1794, in such a way as to exclude the title of his younger brother. Of that family custom there really is no sufficient allegation, if there be any allegation at all. Their Lordships find nothing on the pleadings to raise such a custom as that in the manner in which it ought to have been raised, if it was intended to have been pleaded and proved in this case. It is, in fact, inconsistent with the case almost entirely relied on by the defendant in the Court below; that is to say, of the new acquisition made by him under the grant or pottah from the Government. But if there be anything which is sufficient to raise it, which their Lordships do not see, there is an equal want of satisfactory evidence of any such custom. There is some trace in the Collec-

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tor's letter of a sort of general custom extending through the whole of Bhaugulpore, all the zemindaries being held by that kind of title; but the genealogical tree, which is the only thing otherwise which is in evidence, is certainly, in their Lordships' judgment, insufficient to found a family custom, which the Court below have held must be proved by something like what we should call in this country immemorial usage. It is a thing which cannot be predicated of a simple and single estate, the title to which dates from comparatively a short period of time back. Both these cases of family and local custom, the burden of which was entirely on the defendant, have failed, and that brings it back to the case which the plaintiffs below had to prove; that is the simple fact, that this was ancestral property of their common grandfather.

That being so, and it being substantially admitted that there was no other source from which the acquisitions could be made, the decree of the Court below seems to their Lordships to be right, and they will therefore recommend Her Majesty that the decree be affirmed and the appeal dismissed.

The 8th December 1870.

Present:

Sir James W. Colvile, Lord Justice James, Lord Justice Mellish, and Sir Lawrence Peel.

Title—Conveyance—Adoption—Deeds—Suspicion—Perjury and forgery.

*On appeal from the High Court at Calcutta.**

Kali Chunder Chowdhry,

versus

Shib Chunder Bhadoory and others.

Where a Hindoo executes a kobala in favor of another at a time when he has no title to the property, his subsequently becoming entitled as heir would not make the kobala good.

The mere circumstance that a deed of adoption is not registered, is no ground why the adoption should not be believed.

Instruments which are proved by all the attesting witnesses and against which there is no evidence on the other side, ought not to be set aside and treated as worth nothing on a mere possible suspicion of perjury and forgery.

* From the judgment of E. Jackson and Glover, J. J., in Special Appeal No. 3554 of 1864, dated 12th April 1865,—2 W. R., *Civil*, p. 281.

THIS is an action brought to recover a talook, called No. 396, Sakeer Mamood, and both the plaintiffs, who are respondents in this appeal, and the first defendant, who is the appellant, claim by deeds under the same owner, *viz.*, Godadhur Toee. A kobala under which the plaintiffs claim was the first executed in point of time. It was not a kobala executed to the plaintiffs themselves, but was executed to Kedar Nath Lahoory, who is the third defendant, and who subsequently executed another kobala to the defendants. But it was objected on the part of the first defendant in the Courts below, and also before us, that, at the time when Godadhur Toee executed that kobala under which the plaintiffs claim, he had no right or title to the property in question at all. It appears to be admitted on all hands in the Court below that if he had no title to the property at the time he executed that kobala, his subsequently becoming entitled as heir would not make the kobala good.

Now, the question whether he had any title to the property at the time he executed that kobala appears entirely to depend upon this,—whether Hurree Coomar Toee, who was the original owner of the property, had adopted Beny Chunder as his adopted son during his lifetime; because, if he had so adopted him, then Beny Chunder was the heir of Hurree Coomar and became entitled to the property on Hurree Coomar's death; and as Beny Chunder did not die until after the execution of the first kobala by Godadhur Toee, under which the plaintiffs claim, if the adoption of Beny Chunder was good, then that kobala was bad and the plaintiffs have not made out their title.

The whole question, therefore, turns on whether there was a good adoption of Beny Chunder by Hurree Coomar. The two Courts, the first Court before which the case was heard and the Court of Appeal have come to different conclusions on the question. The Judge of the first instance—although he mentions other grounds, which their Lordships do not think tenable for his decision—came to the conclusion that the adoption was good. He believed the evidence of it, and believed that the documents relating to it were genuine documents. One the other hand, the Principal Sudder Ameen came to the conclusion that the adoption never had taken place at all; he disbelieved the witnesses who spoke to it, and seems to have come to the conclusion that all the documents which were produced in support of it were forgeries.

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Now, their Lordships have carefully examined the evidence on the one side and on the other; and they are of opinion that the evidence in favour of the adoption very greatly preponderates. The adoption is proved by a considerable number of apparently respectable persons, and the documents necessary to constitute an adoption are produced and proved by the attesting witnesses. It will be right, however, to examine the reasons given by the Principal Sudder Ameen for refusing to believe that the adoption had taken place. In the first place, it is said that there are not sufficient members of the family and persons of the same caste called as might have been expected. The answer to that appears to be very clear, *viz.*, that it is admitted on all hands that Hurree Coomar had in fact no relations whatever except this Godadhur Toee, who was a very distant relation, and therefore it is impossible that others should have been called. Then, another objection that is made is that the priest of the family, who appears to have been the person who is alleged to have performed the ceremony, when called as a witness denies that there was any adoption at all. It appears, however, that this very priest is himself a witness to the deed of gift, and he denies that that deed was a genuine deed, and says that he himself, in fact, was a party to the subsequent fabrication of it; his story being that the adoption was a thing which had not taken place at all in Hurree Coomar's life-time, but was only thought of after his death. Their Lordships are of opinion that no weight whatever ought to be given to the evidence of a witness who himself comes and says, not only that the deeds were forged, but that he himself had been a party to the making of them. Then it is said that the barber also gives evidence against it. Whether the witness who is supposed to be the barber was the barber or not does not at all clearly appear. He does not himself say that he was a barber; he only says that he was a ryot who had the means of knowing, and who knew something about it, because, he says, he occasionally went to the house. But then it is a very strong confirmation of the truth of the adoption that, with one exception, all the witnesses who are called against the adoption and profess to say there was no adoption, admit that this boy, Beny Chunder, was, some say one year and some two years, before Hurree Coomar's death brought to Hurree Coomar's house, and there lived with him and was brought up in fact as his son,—one of them says with a view to adoption. Now, no doubt, that does not of itself make an adopted son or make him the heir; but when you find a larger body of witnesses, who appear to have had quite as much or better knowledge of the facts, come and say that the ceremonies of adoption were actually performed and that they were present at them, and that the deeds were genuine deeds, then the fact that these witnesses who deny the adoption are obliged to admit that the boy was being brought up in the house during Hurree Coomar's life-time very strongly confirms their evidence.

It is said also that the deeds were not registered. If they had been registered it would have been more clear, but it appears to be such a common thing not to register deeds that their Lordships cannot think the mere circumstance of their not being registered is any ground why the adoption should not be believed. Then, indeed, the Judge who disbelieves the adoption himself refers to the wuseatnamah, which was executed by the widow appointing the guardians, as a genuine instrument. If that is so it is the strongest evidence of the adoption, for it in terms recognizes the adoption as having been made.

It is important also to consider on which side the possession went, because if the adop-

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tion was recognized soon or immediately after Hurree Coomar's death and between his death and the death of the adopted son, and the adopted son was the party in possession and not the alleged heir, that is very much in favour of the adoption. Now the great weight of evidence clearly is that the adopted son was in possession. There was an inquiry before the Magistrate, which resulted in the adoption being recognized; the guardians of the infant took possession; they gave a lease of the property to the third defendant, under which he took possession and under which possession has, in fact, been kept up to the present time. Therefore, the possession has gone along with it, and though Godadhur Toee certainly seems to have executed this kobala to the party under whom the plaintiffs claim, he did not, as far as their Lordships can see, during the life of the adopted son take any other step whatever. It is proved by two witnesses that the purchase-money which he was to receive was not paid at the time; whether it has been paid afterwards is left in a great deal of doubt, and that circumstance tends to show that he was not the real owner in possession but a person who was merely selling a possible title.

Under these circumstances, their Lordships are of opinion that although, no doubt, it may be desirable carefully to examine cases of possible fraud, yet that instruments which are proved by all the attesting witnesses, and against which there is no evidence on the other side, ought not to be set aside and treated as worth nothing on a mere possible suspicion of perjury and forgery.

There was an appeal to the High Court purely on points of law, but those points have not been argued before their Lordships—in fact, they have been abandoned.

Their Lordships will therefore recommend Her Majesty to affirm the decision of the High Court dismissing the special appeal; to allow the appeal so far as it relates to the decree of the Principal Sudder Ameen, to reverse that decree, and to declare that in lieu thereof a decree should be made dismissing the appeal from the Court of first instance with costs; to declare further that any costs which the appellant may have paid in India other than the costs of the special appeal be repaid to him: the appellant to have the costs of this appeal except so far as they have been increased by appealing against the decree of the High Court.

The 8th December 1870.

Present:

Sir James W. Colvile, Lord Justice James, Lord Justice Mellish, and Sir Lawrence Peel.

Mortgage—Consideration-money—Foreclosure—Estoppel.

*On appeal from the High Court at Calcutta.**

Ram Surun Singh,

versus

Mussamut Pran Pearee.

A defendant who has executed a mortgage and formally acknowledged under his hand and seal the receipt of the consideration, money may, in a suit for foreclosure by the mortgagee out of possession, deny that the money was advanced, the mortgage deed not creating any estoppel.

In this case their Lordships are of opinion that it is impossible to treat this deed of conditional sale and mortgage as creating any estoppel. It is sought to be enforced by a person out of possession. It is in truth the case of a common mortgage in

* From the judgment of Steer and Levinge, J. J., in Regular Appeal No. 147 of 1864, dated 21st September 1864,—1 W. R., p. 156.

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which the defendant says there never was the money advanced. It is open to a mortgagor in this country to deny that the money, the receipt of which is formally acknowledged under his hand and seal, was advanced, and to cut it down to a nominal sum or nothing. That being so, and the instrument being relied upon by a person out of possession seeking to obtain possession through the medium of a foreclosure suit, it appears to their Lordships that there is nothing whatever to prevent the defendant from showing the real truth of the transaction. Then with regard to the supposed estoppel by pleading, it is equally clear that a pleading by two defendants against the suit of another plaintiff never can amount to an estoppel as between them. Their Lordships are satisfied that the decision of the High Court was quite right. Their Lordships will, therefore, advise Her Majesty that it be affirmed and the appeal dismissed with costs.

The 10th December 1871.

Present:

Sir James W. Colvile, Lord Justice James, and Lord Justice Mellish.

Issues—Practice—Appellate Court.

On Appeal from the High Court at Agra.

Mussamut Mitna

versus

Syud Fuzl Rub and others.

Observations on the settling of issues by Courts of original jurisdiction under the Code of Civil Procedure, and on the duty of an Appellate Court when an objection is made before it that the first Court did not lay down issues in a case.

It has candidly been admitted by the learned Counsel for the appellants that in this case they would despair of inducing their Lordships to interfere with the finding of the Courts in India upon the questions of fact, and the conclusions which they have drawn from the evidence on the record. The question upon the appeal, therefore, is narrowed to this, has there been in this cause such a mis-trial as renders it incumbent upon their Lordships to reverse the decisions under appeal, and to remand the case for the settlement of proper issues and a re-trial upon those issues?

Their Lordships are desirous to say nothing which may have the effect of introducing any laxity in the Courts of India in regard to the observance of those provisions of the Code which direct the settlement of issues, provisions which their Lordships regard as most important. But they do not find in the Code anything which says positively that the omission to settle those issues is fatal to the trial. With respect to the former decisions of this Court, it is to be observed that the decisions upon the regulations which preceded the passing of this Code of Procedure were not altogether uniform. Most of them show their Lordships' desire to maintain the strictness of the obligation on the Judges of the country Courts to record the points to be tried, but there is one which has been cited by Sir Roundell Palmer which certainly shows that they did not in all cases consider the omission to be fatal. Those regulations, moreover, contained words to the effect that no evidence should be given except upon points which had been recorded. The case in 11 Moore, which is a case upon the Code of Procedure, appears to have been complex, and the explanation given for what took place in that case certainly shows that their Lordships may have been exercising a discretion which cannot now be questioned. All these cases, however, differ from the present case in this respect. In this case the omission to raise the issues was brought before the notice of the Appellate Court. The Appellate Court expressed its regret, and their Lordships are glad to observe that it did express its regret that the Judge below had omitted to settle the issues. The Court, however, nevertheless conceived that it was not under any positive obligation to remand the case; but seeing that the parties had gone to trial knowing what the real question between them was, that the evidence had been taken, and that the conclusion had been in the opinion of the Appellate Court correctly drawn from that evidence, they thought it within their competence to affirm that decision without sending the case back for a re-trial. Their Lordships sitting here are not prepared to say that the Court had not power to do so under the 354th Section of the Code. At all events it appears to their Lordships that there is nothing in the

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Code which made it imperative upon the Appellate Court, or now makes it imperative upon their Lordships, to yield to that objection, and therefore, fully concurring in the observations made by the Appellate Court that it was the duty of the Judge to settle the issues, and that it was much to be regretted that he omitted to settle those issues, they still think that under all the circumstances of the case, substantial justice having been done, there has not been that fatal mis-trial of the cause which vitiates all the proceedings and renders a new trial necessary.

Their Lordships, in coming to this conclusion, have had regard to the circumstance that no objection seems to have been taken in the Court below to dealing with the case without the settlement of the issues. If the objection had been taken, their Lordships think that the appellant would have stood on higher grounds, and it would then have been very difficult to say that a trial proceeding in the face of the objection could be held to be regular for any purpose. They do not, however, mean to affirm that mere waiver, or rather the omission to take the objection, is in all cases sufficient to purge the irregularity. They are of opinion that if it had appeared that substantial justice had not been done, the objection might well have been taken when it was taken before the Appellate Court, and when taken ought to have prevailed. But being of opinion that there has not in this case been a failure of justice in consequence of the omission to settle the issues, their Lordships are not prepared to send it back for further litigation, and they must therefore advise Her Majesty to dismiss the appeal with costs.

The 10th December 1870.

Present:

Sir James W. Colvile, Lord Justice James, and Lord Justice Mellish.

Appeal—Hindoo widow—Succession—Estoppel.

On Appeal from the High Court at Agra.

Mussamut Oodey Koowur,

versus

Mussamut Ladoo and others.

Where a case, heard in review before the four Judges of the late Sudder Court at Agra, was left undecided (because the four Judges were equally divided in opinion) when the High Court in the North-Western Provinces was established, it was held that one of the Judges of the High Court sitting as a single Judge had jurisdiction under Section 27 of the Letters Patent to hear and determine the case.

B B, a Hindoo, had 2 sons, *K S* and *S L*, and a widow (*L*.) *K S* pre-deceased *B B*. *S L* was afterwards given in adoption by *B B* and *L* to the widow (*O*) of *K S*, but such adoption was invalid as *K S* had not given *O* permission to adopt. *B B* and his son *K S* then died, the latter surviving the former. Before his death, *B B* mortgaged the property in suit, and in a suit brought in the name of *S L* after his death against the mortgagees, *L* put in a petition in which she agreed that *S L* and *O* should alone be entered as the owners of the property and that her own name should be omitted. In a further suit for redemption of the mortgage, *L* put in another petition in which she said she had no claim whatever to the proprietary rights in the property, and that *O* in her own right and as guardian of *S L* was the proprietor and owner. *L* now sued the widow of *K S* alleging that she is the heir of *S L* and as such entitled to the property.

HELD that on the death of *B B*, *S L* became his heir, and upon the death of *S L*, *L* was entitled to the property.

HELD further, that *L* was not estopped by her petitions in the two suits referred to from claiming the property as heir to *S L*, as at the time she presented the petitions she had not in fact any interest in the property at all; and that assuming that *L* did intend to convey a part interest in the property, which she supposed or assumed she had, she could not, on any principle of law or justice, be prevented from setting up her real right as heir of her son when that right actually accrued.

THE first question in this case is, whether there was any jurisdiction in the Chief Justice for the North-Western Provinces to make the decree from which the appeal is brought, in the Court below? Now the matter has been inquired into, their Lordships are clearly of opinion that there was such jurisdiction. The appeal had been brought to the Sudder Adawlut of the North-Western Provinces, and the Judges of that Court had given a decision. Then an application had been made for a review, and an order was made that the case should be heard on review. It was so heard before four Judges, who were equally divided in opinion. By the Law as it then stood, as

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appears by the order made at the end of their judgment, they being equally divided in opinion, the case was, under the provisions of Section 7, Regulation VI of 1831, referred for the opinion of one or more Judges of the High Court of Calcutta. There was, however, a power by the 24th & 25th Vict. c. 104 for the Crown to erect a Court in the North-Western Provinces, and by Letters Patent of the 17th March 1866 the Crown did erect a High Court in the North-Western Provinces, which had the effect of abolishing the jurisdiction of the Sudder Adawlut. The consequence was that no final decision having been given on review, that proceeding was a proceeding pending which was therefore to be decided by the new High Court of the North-Western Provinces. The 27th Section of those Letters Patent is as follows:—"We do hereby declare "that any function which is hereby directed "to be performed by the said High Court of "Judicature for the North-Western Provinces, "in the exercise of its original or appellate "jurisdiction, may be performed by any "Judge;" and, accordingly, Sir Walter Morgan (the Chief Justice) did sit, apparently as a single Judge. He appears to have heard the parties and given his final decision, and that was the decision of the High Court of Agra, which their Lordships are of opinion had, under these circumstances, jurisdiction, and the appeal therefore is brought from that decision.

Now, the action itself is an action brought by one Hindoo widow, Mussumat Ladoo, against another Hindoo widow, Mussumat Oodey, the widow of her eldest son, to recover three several properties. The only question before their Lordships relates to two of those properties, because, as to the third property, all the Judges below agree that the plaintiff was entitled to recover, and there is no appeal as to that. The plaintiff brought the suit on the ground that the defendant was in possession of the property, but that she, the plaintiff, was entitled to it as heir-at-law of her son Shib Lall, and there appears no question that she was such heir-at-law. The property had originally belonged to Buldeo Buksh. He had two sons, of whom one, the husband of the defendant in the suit, died in the lifetime of Buldeo Buksh. There appears to have been some attempted adoption; that is to say, Buldeo Buksh and Mussumat Ladoo appear to have attempted to give their second son, who was an infant, as an adopted son to the widow of their eldest son. But it is admitted that for various reasons that adoption, if it were ever attempted, was wholly invalid according to Hindoo law; if for no other reason, at any rate for this reason that the husband of the widow who made the adoption had never given any permission to the widow to make such adoption, and it was admitted before us that the adoption was wholly invalid.

Well then, that being so, it is plain that the son Shib Lall on the death of Buldeo Buksh became solely entitled to the property; and upon his death his mother became entitled as his heir, and therefore, if the matter remained there, it is admitted that she would be entitled. But it is alleged that she had done certain acts and become a party to certain documents, the effect of which was, at any rate as to these two latter portions of the property, to prevent her from recovering.

Buldeo Buksh had mortgaged these two properties in question, and a suit had been commenced, first in the name of Shib Lall by his assumed guardian, probably in the first instance on account of this invalid adoption, against the mortgagees to redeem the mortgage, which was resisted by them on the ground, which it is now quite immaterial to consider, that the mortgage had been a real sale. Some proceedings had also taken place for the mutation of names: and it would appear that in those proceedings for the mutation of names, the Collector and the parties had wrongfully assumed that the two widows and the son were jointly heirs of Buldeo Buksh. Then it was said that the plaintiff being old and not wishing to interfere with the affairs, she had agreed that Shib Lall and Mussumat Oodey should alone be entered as the owners of the property and that her name should be omitted.

Then in the suit for the redemption of the mortgage, an objection was taken by the mortgagees that the suit was wrongly constituted, because Mussumat Ladoo, and not Mussumat Oodey, was the proper guardian of the infant and the proper person to bring the suit. On that occasion, Mussumat Ladoo presented a petition on which the matter before us principally turns, the main object of which unquestionably was to enable the suit to be carried on by Mussumat Oodey, either in her own name or as guardian of the infant, without joining the name of Mussumat Ladoo, and the entire contention on the part of the appellant before us is that by the proceedings which have been already described with respect to the mutation of names and by the language of this petition, Mussumat Ladoo in fact abandoned all her right to the property in question, so that when she became in

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point of law entitled to the property as heir of her son, she could no longer avail herself of that right as against the defendant. The petition is in these terms:—"Humbly showeth, the facts regarding the suit instituted "in this Court by Mussumat Oodey Koonwur, "the widow of my deceased son Kullyan "Singh, to recover possession by redemption "of mortgage of mouzahs Omeepore and "Umlera, pergunnah Chandouse, valued at "rupees 81,000 against Mussumats Kur-"reemoolnissa, Muhtab Koowur, and Chand "Koowur, defendants, are as follow:—Since "the date of Kullyan Singh's demise, Bul-"deo Buksh, my husband, and myself gave "our son Sheo Lall to Mussumat Oodey Ko-"wur to be adopted as her son, and since "then she has been his guardian and pro-"tectress. Moreover, owing to my old age, "infirmity, and imbecility, I also caused only "the names of Oodey Koowur and Sheo Lall "to be entered in the proprietary column of "the certificate of death of Buldeo Buksh, "and I have no claim whatever to the pro-"prietary rights in the two villages in "question, Oodey Koowur, however, herself, "and as guardian of Sheo Lall, being their sole "owner. I have now become very old and "imbecile, and have no strength to go about, "look after, or understand my affairs, and "Mussumat Oodey Koowur herself, and as "guardian of Sheo Lall my son, is in every "way proprietor and owner."

If that is to prevent her recovering the property now in question, it must do so either because it operated as a conveyance or as a contract to convey the interest which she now claims, or because it operated by way of estoppel. There is no other way in which it can operate. Now, did it operate either as a conveyance or as a contract to convey the interest to which she has now become entitled as heir of her son? Their Lordships are of opinion that it is quite impossible that it could so operate, and that for two reasons:—first, because at the time when she presented this petition she had not in fact any interest in the property at all, and certainly had not become entitled to any interest as the heir of her son who was at that time alive; and in the next place there is not the least reason to suppose that in the petition she in any degree contemplated a conveyance of any such right. That was not the right which they were then considering at all. The main object of the petition was simply to enable the redemption suit to go on, and to enable the persons who had begun it as plaintiffs—Oodey Koowur and Sheo Lall—to carry it on. There was nothing in the language and nothing in the position of the parties which could lead any one to suppose that she had any interest that she might hereafter acquire as heir of her son, in her contemplation at all. On these grounds, it appears quite impossible that it can operate either as a conveyance or as a contract to convey her subsequently acquired interest.

Well, now, is she in any way estopped? It is very difficult to see how she can possibly be estopped. There has been a difference of opinion among the learned Judges in the Court below as to the construction of this instrument,—whether it ought to be construed solely as relating to her rights as guardian, and to convey them, and not to relate to the property at all? The language certainly, in some parts of it, does appear to refer very strongly to an interest as owner, and probably it may be that the meaning of the instrument rather refers to her supposed interest as owner; but it appears to their Lordships hardly necessary conclusively to decide upon the proper construction of this instrument, because even assuming that it does refer to her interest as owner, that is to say, to her present interest as owner, and that she is assuming incorrectly that she has some interest as heir of her husband, their Lordships are of opinion that her stating that, and professing to resign that in favour of Oodey Koowur, could not possibly in point of law estop or prevent her from setting up her real right as heir of her son, when that right actually accrued. There is, in the first place, no consideration whatever for this conveyance of her particular interest; even if she had it, she receives nothing for it. Neither does Oodey Koowur act on any representation made by her, or alter her position in any way. There is no misrepresentation to Oodey Koowur of any sort or kind. Oodey Koowur was acquainted with the actual facts of the case, just as much as Mussumat Ladoo was. The real effect of the petition seems rather to be that they mutually agreed to represent what was not the fact, for the purpose of enabling a certain suit to be carried on. Their Lordships are of opinion that, assuming she did intend to convey a present interest in the properties, which she supposed or assumed she had, there is no principle of law or justice by which that can prevent her from setting up her real right when that right has accrued. It is true that this petition had the desired effect, and that Mussumat Oodey was allowed to carry on the suit, and afterwards when Shib Lall died, and Mussumat Ladoo immediately proceeded to present petitions to be allowed to carry on the suit instead of her, the Court, as their Lordships are disposed to think improperly prevented her

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from carrying on the redemption suit, would not grant that petition, and allowed the redemption suit to go on in the name of Mussumat Oodey, who had begun it, but that mistake cannot, as their Lordships think, possibly deprive her now of the right to which she is in law entitled, though it accounts for the judgment of the Judge in the first instance, who properly considered that it was no business of his to overrule or to differ from the judgment of the superior Court.

On these grounds their Lordships are of opinion that this petition cannot possibly operate either as a conveyance, or as a contract to convey, nor by way of estoppel, so as to deprive the plaintiff of her right to recover all these properties, and their Lordships entirely agree in the judgment of Sir Walter Morgan, which was practically to the same effect. Their Lordships, therefore, will advise Her Majesty that this appeal ought to be dismissed, and the judgment of the Supreme Court of Agra ought to be confirmed, with costs.

The 12th December 1870.

Present :

Sir James W. Colvile, Sir Robert Phillimore, and Sir Joseph Napier.

Appeal to Privy Council—Guardian—Costs.

*On Appeal from the High Court at Calcutta.**

Ranee Bistoopria Putmadaye,

Nund Dhul and others.

The guardian of an infant who filed an appeal to the Privy Council has no right to insist that the appeal should go on when the infant, on coming of age, applies to withdraw from the appeal. If the guardian has incurred costs, he may have a claim to be recouped from the estate of the infant, if he has any.

In this case we understand that the lady represented by Mr. Bell, as guardian of an infant who was represented to have been duly adopted as the son of her late husband, instituted a suit to recover certain property from the respondent who was in possession under a claim that the infant was the son and legal heir of the deceased. The suit was heard by two Courts. It is unnecessary for us, upon this application, to consider further whether the decision both passed against the title of the infant was right or wrong. We will assume that she may have had legitimate ground for applying in the Court below for leave to appeal to this Board.

That leave was granted in 1866 when the boy was still admittedly an infant. So far the proceedings seem to have been entirely regular. The transcript came home in 1867. The record was printed here, and the only thing which can be suggested as any irregularity may have been the lodging of the petition of appeal so late as 1870, after the infant had come of age and was for all purposes *dominus litis*.

It appears that the proceedings which are embodied in the supplementary record have taken place in India, and the effect of them is to show that upon being called into that Court the infant expressed his desire te abandon the appeal, and that the Court ultimately felt that it could not decide that question, and, the appeal having been transmitted here, sent the whole of the proceedings for the adjudication of their Lordships.

In that state of things the respondent applies that the appeal may be dismissed, and the application is resisted by the lady who was originally the guardian of the infant.

At one time it appeared to their Lordships that it might possibly be necessary to ascertain more clearly that the son is a consenting party to this application, which could only be done by directing the Court in India to take further proceedings, in order to have the fact ascertained. But looking to these proceedings and considering what the Court has done, it appears to their Lordships unnecessary to take that step and to put the parties to the further delay and expense which it would involve. When the suggestions were made to Mr. Leith their Lordships had not sufficiently adverted to the terms of the Mookhtearnama. We knew that the boy had made a clear admission to the Moonsiff, which had satisfied the Judge and the High Court, that he was of age and that he had executed that Mookhtearnama; but it did not, as it appeared to us at that time, follow that he had adopted all the statements in the petition which was presented under the Mookhtearnama. But when you come to look at the Mookhtearnama, of which he has admitted the execution, it seems very clear that he knew what he was about and what his Mookhtear would do under that instrument.

* From the judgment of Steer and E. Jackson, J. J., passed in Regular Appeal No. 287 of 1864, decided on 16th March 1865,—2 W. R., Civil, p. 232.

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He says:—"Now I have attained majority, "and considering that no other profit will "arise by carrying on the said case than a "useless expenditure of money, and with the "desire of withdrawing from the said case, "I do appoint Jugmohun Doss Putto Naik, "inhabitant of Saooda Khotee of Pergunnah "Mayahagun in Zillah Midnapore, as Mookh-"tear in my behalf, in order to engage a "Pleader of the High Court, and agree that "the Pleader of the High Court in Calcutta "who will be appointed by the said Mookh-"tear will file a petition of withdrawal from "the said case, and the said withdrawal will "be one as if filed by me, and completely "valid."

Therefore, it seems to their Lordships that they have sufficient evidence before them in these proceedings that the young man is a consenting party to this application.

The question, then, is reduced to this—whether the lady who is represented by Mr. Bell has really such an interest in the appeal or such a *locus standi* in this Court as entitles her to resist this application and to insist that the appeal shall go on, although the party in whose name it is brought wishes to withdraw from it.

Their Lordships are of opinion that she has not. If she has incurred costs there can be no appeal for mere costs; having incurred costs on behalf of the infant in this suit, she may have a claim to be recouped from his estate, if he has any; but that does not entitle her to prosecute this appeal in his name against his will, with probably but faint chances of success.

It was thrown out that the decree had had not dealt with the title of the defendant, and that she might have a preferable title to him; but the obvious answer to that argument is this—there has been a clear adjudication that the nominal plaintiff in this suit had no title. If the lady herself, as widow, has a better title, that title cannot be litigated in this suit, but must be litigated in an independent suit, in which, rejecting the adoption, she would come forward as the next heir of the deceased.

Therefore, we do not see that we should be justified in keeping this appeal upon our records. But considering the peculiar nature of the application and the position of the parties, it does not seem to us that we can do anything but dismiss the appeal *simpliciter*, saying nothing about costs. There is no proof that the infant has undertaken to pay the costs; and we also think that we ought not to give to either side the costs of this petition.

The 16th December 1870.

Present:

Sir James W. Colvile, Sir Robert Phillimore, and Sir Joseph Napier.

Alluvial lands—Local investigation—Ameen—Appellate Court.

*On Appeal from the High Court at Calcutta.**

Ranee Surut Soonduree Dossee,

versus

Baboo Prosunno Coomar Tagore.

Reversed, on a consideration of the facts, the judgment of the High Court which set aside a decision of the lower Court as to the position of certain chur lands in the Brahmapootra, when the decision of the lower Court was founded on a long and careful local investigation which was conducted by an Ameen who visited the spot and whose integrity was unimpeached.

An Appellate Court in India ought not to interfere with the result of a local enquiry except upon clearly defined and sufficient grounds, which must be expressed in its judgment.

THE appellant and respondents in this case are the representatives of two zemindars, who, some six-and-thirty years ago, engaged in litigation concerning the title to certain chur land thrown up by the river Brahmapootra.

This litigation was begun by a suit, brought in 1834, by Prosunno Coomar Tagore, whom it will be convenient to describe as the respondent, for the recovery of 5,000 beegahs of the land in question. In the course of that suit, and in the year 1835, a map of the land in dispute, with the land and water immediately surrounding it, was made by an Ameen, named Goureepersaud Moitro under the authority of the Court; and in that map the different churs are delineated and marked with different numbers from 1 to 7 inclusive.

This first suit was successful, and Prosunno Coomar Tagore obtained a decree for about 5,000 beegahs of chur land. In 1845 he brought a second suit for 14,000 beegahs of like land, and obtained a decree from the Court of first instance. The defendants then appealed; and pending their appeal, and in July 1849, the parties came to a compromise, which was embodied in a decree of

* From the judgment of Kemp and Seton-Karr, J. J., in Miscellaneous Regular Appeal No. 505 of 1861, decided 9th April 1863,—not reported.

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the Sudder Dewanny Adawlut, dated the 3rd of July 1849, and was thereby directed to be carried into effect.

This compromise is set out at page 17 of the record. Its effect was that the churs marked in Gouree Persaud's map as Nos. 5 and 7 with 1,663 beegahs and 15 cottahs of chur No. 6 were to belong to those who are represented by the appellant; and that the churs Nos. 1, 2, 3, and 4, with the rest of chur No. 6, were to belong to the respondent. The boundaries, if the parties differed about them, were to be settled by arbitration; and if the parties could not agree to appoint arbitrators, were to be fixed through the Court Ameen in execution of the decree.

If then this map, which was the basis of the compromise, had correctly described the land as it then existed, nothing remained to be done but to measure off the 1,663 and odd beegahs from chur No. 6, and to put the parties into possession of their respective shares.

Unfortunately, the land which was the subject of the compromise was in some sort the creation of the river Brahmapootra, which is said after each annual flood to be apt to shift its course and to effect considerable changes in the alluvial deposits on either side of its channel. And thus it came to pass, that as soon as the parties proceeded to carry out the compromise, a contest arose whether, either between 1835 and 1849 or at some subsequent period, the river had not so changed its course as materially to alter the configuration of some of the seven churs and their bearings to its main stream. The only effect, therefore, of the compromise was to convert a dispute touching the title to lands into one touching the identification of parcel; the principal question being, not how chur No. 6 was to be divided, but where churs Nos. 5 and 7, which unquestionably belonged to the appellant's zemindary, were to be found; and this dispute has given rise to the intermittent litigation which, after lasting for more than fifteen years, was, in 1863, closed by the decree now under appeal.

The following is a short summary of that litigation:—Some time after 1849 and before April 1853, the respondent was put into possession of a considerable part, if not of the whole, of so much of the land contained in the seven churs as then lay on the western side of the Brahmapootra; and the possession so taken was confirmed by an order of the then Principal Sudder Ameen of Rungpore, dated the 19th of April 1853. But that order was, on the appeal of the other party, set aside by Mr. Dunbar, one of the Judges of the Sudder Dewanny Adawlut, whose order of the 24th of September 1853 directed the Principal Sudder Ameen to reopen the inquiry, but apparently did not disturb the possession already given to the respondent. Some delay in giving effect to this order took place in consequence of the respondent's having contrived to strike the execution case off the file; but it was restored under an order of the Sudder Dewanny Adawlut, dated the 14th February 1855.

The case was then investigated by the Principal Sudder Ameen; each party filed a map before him; he himself held a local investigation and made or caused to be made the map of 1855; and finally on the 27th of June 1856 passed an order overruling the objections made to the record of his investigation by the respondent in the petition set forth at page 5 of the record, declaring the possession given to the respondent to be null and void, and directing that possession should be given to the parties in accordance, as their Lordships understood the order, with the present contention of the appellants. No change, however, seems ever actually to have been made in the possession of the land, of which possession was given by the Moonsiff. The respondent appealed against the last mentioned order, and the question was again re-opened by Mr. Torrens' order of the 30th of January 1857, which remitted the case to the Principal Sudder Ameen with directions that in respect of those parcels which he had given to the then respondent (the present appellant), he should again allow execution of the decree, and after that prepare a map (better than the present map), so that it might clearly appear for the perusal of the appellate Court, and in other respects, what was the former and present course of the River Brahmapootra over the disputed lands, as stated in the map of Gouree Persaud Ameen.

The execution of this order was somewhat delayed by the rainy season, during which a local investigation was impossible; but on the 2nd of December 1857 the Principal Sudder Ameen passed an order for the appointment of an Ameen acquainted with measurement by the compass. From one cause or another, however, nothing effectual was done under this last order until December 1860, when Kalidass Moitro, the Ameen, proceeded to the spot, made a careful local investigation, prepared the map which bears his name, and on the 13th of April 1861 filed the elaborate report which is at page 35 of the record. That report, though it did not precisely adopt the

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representations of either party, in the main supported the contentions of the appellant. It was adopted by the Principal Sudder Ameen, who, on the 1st of August 1861, passed a decree finding that churs Nos. 5 and 7 were where the appellant placed them, and not where the respondent placed them, directing that possession should be given accordingly, and also giving the necessary directions for ascertaining and making over that part of chur No 6 (as to the position of which there seems to be no controversy) which under the compromise belonged to the appellant.

The respondent appealed against this decree. The High Court reversed it, finding that churs Nos. 5 and 7 were where the respondent placed them, and varying the Principal Sudder Ameen's decree accordingly. The present appeal is against that decree, and the first question for their Lordships' determination is whether it can be supported. It rests entirely upon the assumption that churs Nos. 5 and 7, which unquestionably were on the west of the main stream of the Brahmapootra when the map of Gouree Persaud was made in 1835, are now by reason of the altered course of that river on the eastern side of it. If that is not made out, the reasons assigned for the judgment wholly fail.

Upon what does this assumption purport to be founded? "On an examination of the "maps filed in the cause, and on the expla- "nations and arguments of the pleaders on "both sides." What the latter may have been their Lordships are unable to say. But having given full consideration to the able argument of Mr. Doyne on behalf of the respondent, and having carefully examined the maps, they are unable to see any satisfactory grounds for coming to the conclusion contrary to the finding of those who have investigated the question on the spot; that the river has, since 1835, by making for itself a new channel to the west of its former channel, so changed its course as to put either of the churs described by Gouree Persaud as Nos. 5 and 7, or whatever may remain of either of them, its eastern instead of its western bank.

It would be strange indeed if this conclusion necessarily resulted from a mere comparison of the maps, since it is opposed to the expressed convictions of the Ameen Kalidoss Moitro, who made the last and most scientific of the maps, and to that of the Principal Sudder Ameen, who conducted the local investigation and made the map of 1855. Mr. Doyne, indeed, has argued that the conclusion of the High Court may have been an inference, and would have been a legitimate inference, from the application of what he treats as the known law of the formation of churs to certain newly-formed chur land appearing in parts of Kalidoss Moitro's map. But the High Court has not assigned this as one of the grounds of its judgment. Nor are their Lordships, considering the disturbing forces which may exist in a river of so vast a volume and of such irregular action as the Brahmapootra, and also the positions of the several portions of chur land indicated in the map, by any means satisfied that the inference is legitimate or so certain that it ought to outweigh the positive findings the of Ameen.

Again the High Court observed that the Principal Sudder Ameen had not, in their opinion, duly considered the landmarks by which in both maps, when duly compared, the situation of churs 5 and 7 may be satisfactorily identified. The Court has omitted to state specifically to what landmarks it refers as instances of this omission. The instance most pressed in argument has been that of the tamarind trees appearing on the east side of the river in Gunga Persaud's map. But the real position of those trees, if they still exist, was also the subject of controversy; and after investigations on the spot, the Ameen rejected the respondent's theory concerning it. There is nothing to show that he was wrong in this. It is obviously impossible to draw that conclusion from Gunga Persaud's map, which, it is admitted, was not made by compass or according to scale.

Another point made in the argument, though not adverted to in the judgment, is the bearing of the village of Kompopoor to the land alleged by either party to be chur No. 5. It cannot be said that the Ameen has neglected to consider this landmark. And his explanation of the discrepancy in this respect between his map and that of Gunga Persaud, *viz.*, that the village, of which the position is loosely indicated, is erroneously placed on the latter to the south instead of to the east of the river Jhelye, appears to their Lordships to be plausible.

Their Lordships then are unable to see any satisfactory grounds for the assumption which is the foundation of the judgment of the High Court. They would themselves be very slow to interfere with the judgment of an Indian Court upon a question of this nature. But they have to deal here with conflicting judgments, of which one is founded on a long and careful local investigation; and the other

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overruling the former, is supported by no reasons that their Lordships can pronounce to be satisfactory. And their Lordships may observe that the considerations which make them reluctant to set their judgment against that of an Indian Court upon such a question as this, ought to influence in some decree the Appellate Court in India and to prevent its interference with the result of a local inquiry, except upon clearly defined and sufficient grounds. Such grounds the Appellate Court may have thought it had in this case, but it has failed to express them. Against its judgment their Lordships have now to weigh the elaborate report of the Ameen and the judgment founded upon it. The integrity of the Ameen is unquestioned; his careful and laborious execution of his task is proved by his report; he has not blindly adopted the assertions of either party; and without going minutely into details, their Lordships think it sufficient to say that they see no ground for impugning the accuracy of his conclusion upon what they conceive to be the broad and cardinal issue upon which the determination of this case depends, *viz.*, whether the lands which represent churs Nos. 5 and 7 of Gunga Persad's map are now on the east or still on the west of the main channel of the Brahmapootra. On the contrary, they believe the conclusion of the Ameen to be correct. And they are fortified in that conviction by the following considerations:—

It is to be observed that this controversy was by no means of recent date. The question was not whether the change alleged had been effected by the action of the river between 1835 and 1863. It appears by the respondent's petition at page 5 of the record and the maps that his contention was certainly as early as 1855, and possibly as early as the Moonsiff's proceeding, that the lands which represent the churs Nos. 5 and 7 of the compromise were then on the eastern side of the main course of the river. That this was in fact the case in 1849 is in the highest degree improbable. Though it is too clear that the parties by a compromise made upon loose data merely shifted the ground of contention instead of determining their disputes, it is almost inconceivable that they should have drawn and executed, as they did, the instruments of compromise upon the footing of Gungapersaud's map, without adverting to so great a change in the position of the churs relatively to the main channel of the river, if such a change had then taken place. The change then, if it ever really took place, must have taken place between 1849 and the Moonsiff's proceeding, or the year 1855; and in that case it might easily have been proved. It would then have been recent and notorious, yet in 1855 the Principal Sudder Ameen after local investigation decided against the respondent.

Again their Lordships upon the evidence see no reason to doubt that the land which the respondent treats as chur No. 5 is in fact the Pookamaree chur, and an accretion on an estate which never belonged to the appellant's family, and now belongs to Government,—an estate of which the Moonshee Chur, one of the landmarks of the map of 1835, formed part. There is nothing which induces their Lordships to believe that any of those whom the appellant represents were ever in possession of that chur. Yet the High Court without adverting to this point affirmed it to be the chur No. 5 of the compromise, and directed that the respondent should be maintained in the possession of it.

Upon the whole, then, their Lordships have come to the conclusion that it is their duty to advise Her Majesty to allow this appeal; to reverse the decree of the High Court; to direct that in lieu thereof the appeal to that Court from the decree of the Principal Sudder Ameen be dismissed, and the last mentioned decree affirmed with costs. The appellant must also have her costs of this appeal.

The 19th January 1871.

Present:

Lord Cairns, Sir James W. Colvile, Sir Joseph Napier and Sir Lawrence Peel.

Practice—Evidence.

Lalljee Tahoo and others,

versus

The Collector of Tirhoot.*

The concurrent judgments of two lower Courts as to the weight to be attributed to evidence will not be interfered with unless there has been some violation of the ordinary principles upon which causes ought to be tried.

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* From the judgment of Morgan and Pundit, J. J. in Regular Appeal No. 437 of 1863, decided 21st April 1864,—not reported.

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THEIR Lordships are clearly of opinion that there was no compromise concluded here in such a way as to prevent the character and particulars of the claim being re-considered upon the petition to review. On the contrary, provision was made in the original order to keep alive the right of either party, if dissatisfied, to have a petition of review. We then find that upon that petition of review, the Court of first instance was entirely dissatisfied with the evidence in support of the plaintiffs' claim. We find that the Court of appeal, there being no ground of appeal on the question of rejection or reception of evidence, arrived at the same conclusion. They considered that the evidence was of a suspicious and unsatisfactory nature, and it would be quite impossible for this tribunal upon a question of fact of this kind, and where the controversy is as to the weight to be attributed to evidence, to differ from the decision of the two Courts below, unless their Lordships found that there had been some violation of the ordinary principles upon which causes ought to be tried. We do not find that there was any miscarriage of that kind in this case, and therefore we must humbly advise Her Majesty that this appeal should be dismissed with costs.

The 19th January 1871.

Present:

Lord Cairns, Sir James W. Colvile, Sir Joseph Napier, and Sir Lawrence Peel.

Limitation — Joint Family — Mortgage—Redemption—Sections 5 and 13 Act XIV of 1859.

*On Appeal from the High Court at Calcutta.**

Radhanath Doss and others,

versus

Gisborne and Company.

Section 13 of Act XIV of 1859 deals with suits between one or some member or members of a joint family, and some other member of the joint family complaining of an ouster of some members by others, or of a failure by the member in occupation to account for profits, or to pay maintenance where it is due. That Section does not apply to a suit in which one member representing the rest of the members sues to redeem a mortgage in which the title of the plaintiff to redeem is questioned, and the question of joint or not joint property has only to be decided incidentally for the purpose of establishing that title as against strangers.

Before a person can obtain the benefit of Section 15 of Act XIV of 1859, he must clearly and distinctly show that he fills the position of the person contemplated by that Section as a person who ought to be protected, and he must show three things: first, that he is a purchaser according to the proper meaning of that term; second, that he is a purchaser *bona fide*; and third, that he is a purchaser for valuable consideration. Meaning of the term purchaser in this Section defined.

THE claim in this case, which led to the decision which is under appeal, was a claim in substance for the recovery of property at present in the possession of the respondents, Messrs. Gisborne and Company. The recovery of that property was sought by the appellants on the footing that it had been made the subject of a conditional sale in the year 1828; and that they, the appellants, had now the right to redeem the property,—the amount for which the property had been conditionally sold or mortgaged having been paid off by the receipt of profits. This mortgage, made in the year 1828, was made by a person of the name of Kunhya Lall as mortgagor, to one Russick Lall as mortgagee. The appellants say that Kunhya Lall was the member of a joint family, of a family joint as regards this property, and that they, the appellants, were the other members of that joint family, and that the mortgage was made either with their previous approbation or their subsequent assent. Russick Lall, beyond doubt, was the native agent of the firm of Shawe and Hawes, and the mortgage, beyond doubt, was made to Russick Lall, because as the law stood at that time Englishmen could not have held immoveable property in this part of India in their own name. That law having subsequently been altered, Russick Lall assigned over to his principals, Shawe and Hawes, the property which he thus held for them in mortgage. Subsequently Shawe relinquished his share to Hawes, and finally by a deed executed in the year 1841, the details of which will afterwards have to be referred to, Hawes passed over or conveyed the property to the present respondents, Messrs. Gisborne and Company.

Now the first question which arises in this state of things, is as to the right of the plaintiffs to redeem this property? Their possession as members of a joint family is denied by the respondents, who contend that there is no evidence that the family was joint, or that this property belonged originally to any person other than Kunhya Lall the mortgagee. Upon that question Mr. Maddocks, the District

* From the judgment of Norman and Campbell, J. J. in Regular Appeal No. 400 of 1865, decided 15th May 1866,—5 W. R., p. 253.

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Judge, before whom the case first came, has delivered a very elaborate and careful judgment, in which he has come to the conclusion that the joint ownership of the property was made out in favor of the appellants, and, although it was not necessary for the High Court of Calcutta, in the view they took of another part of the case, absolutely to decide this question, they do not appear to have disapproved of the conclusion on this point at which Mr. Maddocks had arrived. The evidence having been so fully and satisfactorily commented upon by Mr. Maddocks, their Lordships do not think it necessary to say more than this, that looking to the form of the Government settlement of this property, looking to the history of the family which is in evidence, looking to the accounts going down to the year before the date of the mortgage showing the dealings of the family between themselves, looking to the ikrarnamah executed between Kunhya Lall and the other members of the family almost contemporaneously with the mortgage of 1828, looking to the dealings with the mouzah Ugda which was excepted out of the mortgage of 1828, although forming part of the whole estate, their Lordships are satisfied that this property was the joint property of the family and that Kunhya Lall was mortgaging it with the assent of, and as the manager for, the whole family.

Their Lordships would add to the general description of the evidence which has satisfied them of this, a reference also to the statements which were made very shortly after the conveyance of 1841 to Messrs. Gisborne and Company. In 1843 a suit was brought by the present appellants, or some of them, against Messrs. Gisborne and Company, making parties also Russick Lall and Kunhya Lall. The plaintiffs in that suit were nonsuited upon technical grounds, but in that suit the plaintiffs had stated their title substantially in the same way that it is now stated, and in the answers to that suit their Lordships find that Mr. Barnes, a member of the firm of Gisborne and Company, and the other members of the firm of Gisborne and Company, stated that the plaintiffs' suit was totally false, and that the reasons of the falsity of the plaintiffs' suit were stated in the answer of Russick Lall, another defendant, and that that answer was sufficient. They, therefore, referred their case to the answer of Russick Lall, and were content to adopt it as the statement of their case. Now Russick Lall, as has been said, was the native agent of this indigo factory at the time of the mortgage in 1828. He must have known perfectly well everything connected with the title and the circumstance of the family, one member of which was making a mortgage to him; and what Russick Lall, having these means of peculiar knowledge, said in the year 1843 was this, — "Oh! Administer of Justice, "let your presence consider the fact that al- "though the plaintiffs have no right and in- "terest in the said mouzahs, yet even it is "clearly evident from the contents of the "former plaint that the plaintiffs themselves "have admitted that the said Kunhya Lall "Doss, by the advice and with the concur- "rence of the plaintiffs sold the property in "dispute to me"—that of course means mortgage—"for the sum of rupees 17,011 "with the object of liquidating the money "due to the said gentleman from Kunhya Lall "Doss, under the deed of mortgage dated "the 25th May 1826." Russick Lall was, therefore, content to affirm at this time, and Messrs. Gisborne and Company were content to adopt his statement, that Kunhya Lall had mortgaged the property by the advice and with the concurrence of the plaintiffs,—advice and concurrence which would have been utterly useless and unmeaning unless the plaintiffs had been joint owners of the property.

Their Lordships, therefore, on this part of the case, have no hesitation in accepting the conclusion of the Court of first instance, and they have the satisfaction of thinking that in that respect they are not differing from the opinion of the High Court of Calcutta, although it was not absolutely necessary for that Court to decide the question.

The next objection which was taken to the title of the plaintiffs to redeem is this. It is said that the conditional sale having been made in the year 1828, and the condition of that sale being for liquidation of the amount of mortgage-money in eleven years,—a year afterwards, in November 1829, the ikrarnamah which contained the condition making the transaction a mortgage was returned by Kunhya Lall and Russick Lall with an endorsement which is set out at page 235 of the record. The endorsement is partly defaced, but it runs thus—"(Defaced) the said mehal, "according to the conditions of the ikrar "(defaced), the Government revenue, and in- "terest and the consideration being (defaced): "therefore I have returned this ikrarnamah "to Russick Lall Doss, the purchaser. The "mouzahs stated in the ikrarnamah I have "absolutely sold. Dated the 27th Kartick "1237. Kunhya Lal Doss, Zemindar." It is said that the meaning of this endorsement, which was partly defaced, is, that it amounted to an assertion that the profits of the zemin-

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dary were insufficient to pay the principal and interest and the Government revenue, and that, therefore, the ikrarnamah was returned by Kunhya Lall to Russick Lall.

Now, without going further, their Lordships are compelled to say that is a transaction which, upon the face of it, is almost incredible. The property was mortgaged by a usufructuary mortgage to run over eleven years. The mortgagee was bound, on the face of the deed, to pay the Government duty. The mortgage created no personal liability with regard to the payment of the debt. If the debt should be paid in the course of eleven years, the land would be free, if not paid, at all events the mortgagor would be in no worse condition than he was at the end of the first year. There is no consideration moving to the mortgagor for the release of the equity of redemption. It is said that the district in which the property was situate was a district which, as regards its produce, was liable to the uncertainties of dry seasons; but although that might lead to a diminution of the produce in one year, on the other hand, the absence of drought and the presence of moisture in another season might lead to a more plentiful crop, and the uncertainty is one which might have a double bearing as regards the ultimate result of the conditional sale.

But it is further to be observed that this allegation of the return of the ikrarnamah, and the production of it with the endorsement was never heard of until about two years subsequently, when one Bholanath having sued Kunhya Lall upon a debt of his own due to Bholanath, was taking proceedings to sell this property, or to sell the equity of redemption of it, as being the property of Kunhya Lall. Then it was that the return of the ikrarnamah was set up and that this endorsement was produced. The moment that defence was set up it was challenged—challenged not merely by Bholanath, but by the other members of the joint family—and steps were taken to dispute it. It is true that from circumstances connected with the attempted sale of Bholanath going off, the question was not ultimately decided at that time, which is very much to be regretted. The primary Judge decided against the transaction,—decided that it was not a real transaction, but a fraudulent one to defeat the creditor. There was an appeal to the appellate tribunal. The appellate tribunal thought that an investigation of the circumstances should take place, and sent it back for that purpose. The biddings at the sale not having been sufficient to lead to a sale taking place, the primary Judge thought that it was unnecessary to persue that investigation. But both at that time and at every time since when the return of the ikrarnamah has been set up, the transaction has been challenged as an unreal and fictitious transaction.

Their Lordships are of opinion that it is an incredible transaction on the face of it, and they cannot arrive at any other conclusion than that it was a transaction between Russick Lall and Kunhya Lall, for the purpose of defeating the proceedings of the creditor Bholanath.

Their Lordships must add this further observation: the mortgage or conditional sale of 1828 is clear and undisputed. It lies upon those who desire to set up any title putting an end to the mortgage to establish their case by evidence which is clear and satisfactory. That onus certainly is not discharged in this case; and their Lordships therefore are of opinion that on this point also the title of the appellants is made out, and that unless on some other ground yet to be considered they are precluded from redeeming, they are not precluded by the pretended return of the ikrarnamah. Upon this point also their Lordships, in substance, agree with the view of all the Judges in the Court in India.

We come now to the remaining part of the case, which is this. Assuming the title of the plaintiffs to redeem to be made out, the respondents, Messrs. Gisborne and Company, claim the benefit of the statutes of limitation, and assert that the time during which the title of the plaintiffs to redeem could be in force has elapsed. In the first place, they say that the appellants are barred by the 13th Section of the law of limitations, that is to say, the Section which speaks of suits for enforcing the right to share in any property, moveable or immoveable, on the ground that it is joint family property. It is not necessary to repeat that Section at length, for their Lordships are of opinion that it is a Section which deals with suits between one or some member or members of the joint family and some other member of the joint family, complaining of what we should term in this country an ouster of some members by others, or of a failure by the member in occupation to account for profits, or to pay maintenance where it is due. The present case is a case by no means of that description. In the present case the foundation of the title of the plaintiffs is a mortgage, which, as has been already said, was in its inception.

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in substance, the mortgage of the whole of the joint family. The circumstance that it is not the whole of the members of the joint family, but only some who now come to recover their share of the property, does not make this a dispute in any way between members of the joint family as to the question of whether the property is joint or not. It is merely a question of the title of the plaintiffs to redeem, and the question of joint or not joint property has only to be decided incidentally for the purpose of establishing that title as against strangers.

The respondents then allege that they are entitled to the benefit of the 5th Section of the same law,—"In suits for the recovery "from the purchaser, or any person claiming "under him, of any property purchased *bonâ* "*fide* and for valuable consideration from "a trustee, depository, pawnee, or mortgagee, "the cause of action shall be deemed to have "arisen at the date of the purchase." Now, questions of very considerable importance have been raised and argued as to the meaning of this Section. Their Lordships desire to say that the provision of the Section is founded, no doubt, upon considerations of high policy,—of a policy which their Lordships do not at all doubt is one which is extremely beneficial to India, having regard to the circumstances of that country. But their Lordships cannot fail to observe that the provisions of the Section are of an extremely stringent kind. They take away and cut down the title, which *ex hypothesi* is a good title of a *cestui que trust*, or of a person who has deposited, pawned, or mortgaged property; they cut down that title as regards the number of years that the person would have had a right to assert it; from a very great length of time, sixty years, they cut it down to twelve years. It is, therefore, only proper that any person claiming the benefit of this Section should clearly and distinctly show that he fills the position of the person contemplated by this Section, as a person who ought to be protected. Their Lordships think that in order to claim the benefit of this Section a defendant must show three things:—first, that he is a purchaser according to the proper meaning of that term; second, that he is a purchaser *bonâ fide*; and third, that he is a purchaser for valuable consideration.

Now, what is the meaning of the term "purchaser" in this Section? It cannot be a person who purchases a mortgage as a mortgage, because that would be merely equivalent to an assignment of a mortgage; it would be the case of a person taking a mortgage with a clear and distinct understanding that it was nothing more than a mortgage. It, therefore, must mean, in their Lordships' opinion, some person who purchases that which *de facto* is a mortgage upon a representation made to him, and in the full belief that it is not a mortgage but an absolute title.

Now, it is important in this case to consider how it is that in pleading in the first instance the transaction which here has taken place, the respondents have put their title. In page 14 of the record, in the sixth head of their statement, they express themselves thus—"The defendants, as purchasers for "a just consideration, have all along held "adverse possession of the disputed property "for more than 12 years without notice of "any legal right as co-partners, *i. e.*, if any "right had existed pertaining to the plaintiffs, as well as to those persons from whom "the defendants have acquired their right. "Thus, in such a case, also the plaintiffs' "claim is, by reason of limitation, inadmissible." There is no averment there of any fact; it is a statement that as purchasers they are entitled to the benefit of the Statute, but when they come to their averment of facts, their statement is this: the second head is, "On the 16th May 1838, A.D., Russick Lall "Doss sold the said mouzahs to Messrs. "William Shawe and William Hawes for "Rs. 17,011, and caused the names of the "Messrs. William Shawe and William Hawes "to be entered in the Government records "on the excision of his own name, and Mr. "William Shawe sold his share to Mr. "William Hawes, who after that sold it to "Messrs. Gisborne and Company and Mr. C. H. "Barnes, and Mr. C. H. Barnes sold his 4 "annas share to Messrs. Gisborne and Com-"pany and mutation of names took place." This is a statement which puts the title of Gisborne and Company exactly in the same position as the title of Shawe and Hawes. It alleges that Russick Lall sold to Shawe and Hawes, that Shawe and Hawes sold to Hawes, and then Hawes sold to Gisborne and Company. It draws no distinction between the various transfers of the property, but puts them all exactly on the same footing. Now, an allegation or a plea of a purchase for value is perfectly well known and understood, and the averments in that plea are not matters of technicality,—they are matters of substance. In pleading a purchase for valuable consideration in this country, the very first averment in the plea is that the person selling either was seised, or alleged that he was seised, for an absolute title, and

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then the plea goes on to say that being so seised, or alleging that he was so seised, he contracted to sell, and did sell and convey that absolute title asserting it to be such to the purchaser, who paid his money for that which was thus sold. There is not a fragment of an averment in the whole of this pleading of that kind. The pleading is perfectly consistent with the transaction having been nothing more than the purchase, that is to say, the transfer of that which was a conditional title, or a title by way of mortgage.

We turn then from the pleading to see what is the evidence of the transaction in the case. Now, there is no evidence at all of any negotiation for this purchase, of any specification, or schedule, or inventory of what the property was that was to be included in the general purchase of the factory which was taking place. There is no evidence of any allegation or statement on the part of the vendors, which would lead Messrs. Gisborne and Company to believe that this was an absolute title which they held to the property in question. The only evidence that there was a purchaser at all is the production of the purchase-deed to which reference is now made.

The purchase-deed is at page 296. It contains a recital of the manner in which the vendor, the first party to the deed, Hawes, had had conveyed to him the various factories which were to be handed over to Gisborne and Company.. It then contains this recital of the contract between Hawes and Gisborne and Company, page 297 :—"And whereas "the said John Dougal, George Dougal, "Charles Jones Richards, Matthew Gisborne, "and John Richards have contracted and "agreed with the said William Hawes for "the absolute purchase of the said several "indigo factories or works and premises "hereinafter described, at and for the price "or sum of Company's Rs. 2,10,000; and the "same are intended to be conveyed and as-"sured unto the said John Dougal, George "Dougal, Charles Jones Richards, Matthew "Gisborne, and John Richards, and their "heirs, in the manner hereinafter expressed." It is a contract for the absolute purchase, but the absolute purchase of those premises which are afterwards described in this deed and intended to be conveyed by it. When we turn to what these premises are, we find first an enumeration of the Indigo Factory; then this addition—"All lands cultivated and uncul-"tivated to the said several and respective "Indigo Factories or sets of works respec-"tively belonging or in any wise appertain-"ing;" and further on, page 299—"And all "the estate, right, title, interest, use, trust, "property, possession, possibility, claim, and "demand whatsoever, both at law and in "equity of them, the said William Hawes, "Robert Molloy, and James Cullen and each "of them in, to, out of, or upon the said "several and respective Indigo Factories on "sets of works, lands, hereditaments, chat-"tels, and premises, and every or any part "or parcel thereof." Now assume that there was in this commercial house, as a part of their property in trade, a mortgage securing to them the debt which has been mentioned; assume that that was perfectly well known to every person connected with them and to the purchasers. No more fit or apt deed could have been devised than this, for the purpose of conveying a title to that mortgage, as the rightful title upon which the property was to be held by the purchasers. The deed, in other words, is perfectly consistent with it, not having been the intention of any person to this transaction to do more than to hand over this along with all the other property which the commercial firm possessed, according to whatever might be the right and true title upon which each portion of the property was held. Their Lordships, therefore, can find in this deed no evidence of an averment on the part of the vendor, or of any belief on the part of the purchaser that the property Mohecanwan was a property which the vendors claimed to hold by what we should call in this country a fee-simple title.

Under these circumstances, their Lordships think that the first requisite in the law of limitation is not made out, and that the respondents here are unable to show, or at all events have not shown, that they are purchasers of this specific property as an absolute property in contradistinction to a mortgage property upon a contract by the vendor to convey the property to them as an absolute property.

This would be sufficient to decide the case; for, of course, unless the whole of the three requisites exist, the benefit of the statute is not obtained. Their Lordships, however, think it right to go further, and to say that they are not satisfied that even if this objection did not exist, Messrs. Gisborne and Company are able to show that they are *bonâ fide* purchasers. It is unnecessary to impute, and their Lordships would not desire to impute, to Messrs. Gisborne and Company any dishonesty whatever in the transaction, or any moral obliquity in their dealings in this matter.

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But what their Lordships have to observe is this: Messrs. Gisborne and Company must be regarded as dealing in this case upon one of two footings. Either they were aware in the year 1841, when they took this conveyance, of all that had passed between this native family and the predecessors in title of Gisborne and Company, by way of allegation and averment and claim upon the one side and upon the other, that is to say, they must either have been aware of all the contents of the papers connected with the litigation which had taken place in previous years,—or, if not aware of the contents of those papers, they must at all events have been aware of the original conditional sale of 1828, and of the alleged return of the ikrarnamah with its endorsement. It has not been very clear to their Lordships upon which of these two footings the Counsel for the respondents would desire Messrs. Gisborne and Company to be dealt with. At one time it rather appeared that their Counsel would wish it to be considered that they knew nothing, or should be taken as knowing nothing, but the conditional sale and the alleged return of the ikrarnamah. At another time their Counsel appeared desirous to refer to certain portions at all events of the proceedings, which had taken place between the conditional sale and the year 1841. But assume that they were not aware of the details of that litigation; assume that Messrs. Gisborne and Company knew nothing but what has been called the bare title to the property, the conditional sale, the alleged endorsement upon and return of the ikrarnamah, and the transfer subsequently from Russick Lall to Hawes and Shawe. Their Lordships are of opinion that looking to the clear and undisputed mortgage in the first instance—looking to the transparent unreality of the transaction connected with the alleged return of the ikrarnamah, the mere production of the endorsement upon that ikrarnamah as the description of the cause for its return was amply sufficient to put any persons in the position of Messrs. Gisborne and Company upon an inquiry and consideration as to whether that transaction could be a real transaction, or whether it could be a transaction which could form part of the title of a purchaser. On the other hand, if, as seems to have been rather the opinion of the learned Judges below, and certainly seems much more consistent with all the facts of the case,—if it be taken that Messrs. Gisborne and Company were perfectly aware of all the accounts in the factory, and of all the details of the litigation and of all the claims that had been made before with regard to this property, then their Lordships consider that their attention was pointedly and distinctly called to the infirmity of title in this case, and that with their attention so called they could not be considered to be *bonâ fide* purchasers.

Therefore upon both grounds, both upon the ground that they are not purchasers within the meaning of the law, and upon the ground that if they were purchasers they are not, in the sense in which the words are used in the law, *bonâ fide* purchasers, their Lordships think that Messrs. Gisborne and Company are not entitled to the benefit of this Statute.

It would perhaps be right that their Lordships should advert also to an argument which was adduced, although not very warmly pressed, that under the 10th Section, Messrs. Gisborne and Company might find protection. The 10th Section says—"In suits in which "the cause of action is founded on a fraud, "the cause of action shall be deemed to have "first arisen at the time at which such fraud "shall have been first known by the party "wronged." This, in their Lordships' opinion, is not an action founded upon fraud in that sense. It is an action upon title to recover the possession of property to which the plaintiffs are entitled, which clearly they must recover, unless there be some specific protection given to those now in possession of it by virtue of the other sections of the statute to which reference has been made.

This being the opinion at which their Lordships have arrived, they will humbly recommend to Her Majesty that the decree of the High Court of Calcutta should be reversed, and that in place of it an order should be made dismissing the appeal to the High Court and dismissing it with costs. That would set up again the decree of Mr. Maddocks, the Zillah Judge. Their Lordships are content to allow that decree to stand, and are unwilling to enter upon any criticism of the precise form of it, because no argument has been adduced before their Lordships upon the footing that, supposing the decree in substance to be right, any modification should be made of it in detail. Their Lordships, therefore, will leave that decree to be the decree in the case, and will only further add that the appellants should also have the costs of this appeal.

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The 20th January 1871.

Present:

Lord Cairns, Sir James W. Colvile, Sir Joseph Napier, and Sir Lawrence Peel.

Res judicata—Judgment of the Revenue Court—Redemption.

On appeal from the High Court at Agra.

Khugowlee Sing and others

versus

Hossein Bux Khan.

The rule laid down by the Judges in the Duchess of Kingston's case on the law of estoppel is not technical or peculiar to the law of England, but is perfectly consistent with the second Section of the Code of Civil Procedure.

The decision of a Revenue Court in a summary suit for arrears of rent brought by A against B and others, in which B set up an ekrarnamah under which he claimed on behalf of himself and others to hold certain land as rent-free which suit was dismissed by the Revenue Court, who held the ekrarnamah to be valid, is no bar as *res judicata* to a suit for redemption by B against A on his title as mortgagee, in which B set up the same ekrarnamah.

THIS appeal having been heard *ex parte*, their Lordships were desirous, before they determined it, carefully to read and consider the evidence in support of the case of the absent respondents, the plaintiffs in the suit.

The suit was in the nature of a redemption suit, and was brought to recover from the appellants certain property on the allegation that their title was originally that of mortgagees by way of conditional sale; that the mortgage debt had been satisfied; and that, accordingly, the plaintiffs were entitled to recover possession of the land with mesne profits from the date of such satisfaction.

The case of the appellants was that they, or those whom they represent, had been in possession of the lands for upwards of twenty years under two deeds of absolute sale executed in consideration of rupees 9,800 on the 12th of March 1843, and confirmed by two decrees of the Civil Court passed on the confession of their vendors, the plaintiffs in the present suit.

The plaintiffs, not denying that this was the ostensible title of the appellants, insist that the true transaction was a mortgage by conditional sale for securing the sum of rupees 4,000 with interest, and that this was effected by the ekrarnamah of even date with the deeds of sale, which is at page 10 of the records.

It was therefore essential to the plaintiff's case to establish the validity of this ekrarnamah.

The Zillah Judge who tried the cause in the first instance decided that it was not a genuine instrument, and dismissed the suit. But the High Court of Agra on appeal reversed his decision, and decided in favour of the plaintiffs upon the ground which their Lordships will next consider.

This judgment of the High Court does not profess to proceed upon a review of the general and conflicting evidence given in the cause. It is founded solely upon the omission of the Judge below to give due weight to the fact that the ekrarnamah had been declared to be valid and genuine by the Deputy Collector of Futtehpore in proceedings which will be afterwards considered,; and it treats that finding as *res judicata* between the parties.

Those proceedings are referred to on the face of the plaint; and their Lordships will therefore assume that the point, though not made the subject of a formal issue, was sufficiently raised on the pleadings.

Their Lordships, however, are of opinion that the judgment of the High Court reversing that of the Zillah Judge cannot be supported on this ground.

In the course of the argument, one of their Lordships quoted from the opinion delivered by the Judges in the Duchess of Kingston's case the following passage:—

"From the cases relative to judgments "being given in evidence in civil suits, "these two deductions seem to follow as "generally true: first, that the judgment "of a Court of concurrent jurisdiction "directly upon the points is, as a plea, a "bar, or as evidence, conclusive between the "same parties upon the same matter direct-"ly in question in another Court; second-"ly, that the judgment of a Court of ex-"clusive jurisdiction, directly upon the "point, is in like manner conclusive upon "the same matter, between the same par-"ties, coming incidentally in question in "another Court for a different purpose. "But neither the judgment of a concurrent

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"or exclusive jurisdiction is evidence of "any matter which comes collaterally in "question, though within their jurisdiction, "nor of any matter incidentally cognizable, "nor of any matter to be inferred by argu- "ment from the judgment."—I Smith's "'Leading Cases,' p. 424.

There is nothing technical or peculiar to the law of England in the rule as so stated. It was recognized by the civil law, and it is perfectly consistent with the second section of the Code of Procedure under which this case was tried, which says—

The civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they claim.

Now, what were the proceedings which in this case were assumed to afford evidence in favour of the validity of the ekrarnamah which the appellants were not at liberty to dispute? They are at pages 6 and 7 of the record. It appears from them that the appellants in March 1863 brought a summary suit for arrears of rent before the Deputy Collector against one of the plaintiffs in the present suit. They alleged that he was an occupier of a small portion of land not exceeding 37 beegahs, being part of the land in question, under a pottah and kuboolyut. The defendant in that summary suit denied the case of the plaintiffs (the present appellants), alleged that the transaction of 1843 was a conditional sale, produced the ekrarnamah, and contended that under a particular stipulation in it he and the other vendor or mortgagor were entitled to hold 75 beegahs rent-free. The appellants then, as now, denied the validity of this ekrarnamah. Evidence was taken on both sides; and the Collector holding that the appellants had failed to prove their case, and that the defendant in the summary suit had proved the ekrarnamah, dismissed the claim. On appeal to the Zillah Judge this dismissal was confirmed, but on the ground that the appellants had failed to prove that the defendant was a cultivator paying rent, and that their claim was barred by limitation. And the Judge remarked that the Deputy Collector had made a lengthy inquiry with reference to the papers filed by both parties, which had no connection with the present claim.

On special appeal to the Sudder Court the dismissal of the claim was again confirmed, the Court observing that the question whether the plaintiffs (the appellants) were out-and-out purchasers or only conditional purchasers under the deeds of the 12th March 1843 did not arise in the case.

From this statement it appears that the ultimate decision of this claim for rent did not turn upon the validity of the ekrarnamah. But if the judgment of the Collector had been final in the matter before him, his incidental finding that the ekrarnamah was a valid instrument would not be conclusive between the parties in the present litigation. For the question before him was not the issue now raised between the parties, and his decision was not that of a Court competent to adjudicate on a question of title. He had only a special jurisdiction to try summary suits for the recovery of rent.

The *eadem causa petendi*, and the judgment of a Court of competent or concurrent jurisdiction, are both wanting here. Their Lordships, therefore, being of opinion that the decree under appeal cannot be supported on the only ground which the Judges of the High Court have assigned for it, will proceed to consider whether the evidence in the cause, taken as a whole, affords any sufficient reason for disturbing the decree of the Zillah Judge.

It is not denied that on the 12th of March 1843 the deeds of absolute sale were executed; that on the 14th of March they were produced in the Civil Court, where decrees were passed upon them; and that on the 1st of May 1843, the proceeding for the mutation of names, which is set forth at page 27, took place. The last was not without opposition. One Furzund Hossein Khan put in objections founded on the right of pre-emption under the Mahomedan Law, and on a claim to a small portion of the property sold. The former objection was overruled; but it could only have been made to an absolute sale; and the fact that it was made is an additional proof that the transaction was then treated as, and understood to be, an absolute sale. In the plaint, indeed, it is alleged that the transaction was represented to be an absolute sale, and not what it really was,—amortgage, in order to avoid any claim founded on the right of pre-emption. But this statement appears to their Lordships to be founded on a misconception of the law of pre-emption, and

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therefore to afford an argument against the truth of the plaintiffs' case. Three years later, in September 1846, part of the property was seized by a judgment-creditor of the vendors. The appellants came in as objectors, claiming as absolute owners ; and their objection prevailed, though the ekrarnamah, according to the plaintiffs' case, had then been registered, and, if a valid document, would have left in them an interest capable of being taken in execution.

The plaintiffs have given no explanation whatever why they consented to the decrees. Although in 1846 there was this execution against them, there is no suggestion that in 1843 they had any interest for making that which was in fact a mortgage appear to be an absolute sale. The probabilities of the case, therefore, resulting from the history of the *res gestæ* are all against the validity of the ekrarnamah.

But what is the direct evidence of the execution of that instrument ? The evidence of the two first witnesses, Jhoo Khan and Khadir Bux, who are not subscribing witnesses, appears to their Lordships to be worthless. The evidence of the attesting witnesses who are called is not consistent. Sheadun Putwarry, who from his position might have been a more trustworthy witness, is not called. In addition to the discrepancies and other circumstances tending to cast suspicion on the testimony for the plaintiffs which have been stated by the Zillah Judge, their Lordships have to observe that the document impeached purports to have been executed on the same day as the undisputed deeds of sale ; that by several witnessess it is sworn to have been executed at the house of Mahomed Sidiq, the writer of the bills of sale ; yet all these witnesses say that they saw no instrument but the ekrarnamah executed. It is difficult to see why, if the ekrarnamah was really executed on the 12th of March 1843, and in the house of the appellants' agent, it was not executed with the deeds of sale and attested by the same witnesses. Again, as the Judge has observed, the witnesses for the plaintiffs fail to prove the payment of the rupees 4,000 which they allege to have been the consideration for the mortgage ; whilst the witnesses for the appellants have proved to the satisfaction of the Judge, the payment of the 9,800 rupees which they allege to have been the consideration for the sale. It lay on the plaintiffs to prove the validity of the instrument on which they rely. The oral evidence was conflicting, and the Zillah Judge came to a clear conclusion that the witnesses for the plaintiffs were not to be believed and that the witnesses for the appellants were trustworthy. Their Lordships would, for obvious reasons, be slow in any case to overrule the opinion expressed by the Judges in whose presence the testimony was given touching the credibility of native witnesses. In the present case their own conclusion, formed upon a perusal of all evidence in the cause, is substantially in accordance with that of the Zillah Judge. They are of opinion that he was right in holding that the plaintiffs had failed to establish the validity of the ekrarnamah, which was the foundation of their case, and in dismissing their suit. Their Lordships will accordingly advise Her Majesty to allow this appeal, to reverse the decree of the High Court, and to direct that in lieu thereof a decree be made dismissing the appeal against the decree of the Zillah Judge with costs. If the appellants have paid any costs under the order reversed, these costs must be refunded, and they must also have their costs of this appeal.

The 20th January 1871.

Present :

Lord Cairns, Sir James W. Colvile, Sir Joseph Napier, and Sir Lawrence Peel.

Document—Stamp.

On appeal from the High Court at Bombay.

Mantappa Nadgowda

versus

Baswantrao Nadgowda.

The plaintiff sued his elder brother for a share in certain family property. The defendant raised a question of family custom, and relied on a certain deed of release which he said the plaintiff had given him, but the existence of which the plaintiff denied. That document was not stamped, though on the face of it it was stated that it was to be stamped. No objection was taken on that score to the document before the first and the Lower Appellate Courts, who considered that the document was a genuine document executed by the plaintiff. After its production it had an insufficient stamp of 2 annas put upon it. The High Court, on appeal, left the deed as part of the evidence in the case, but qualified its effect and the extent of its operation by making it a deed of release, releasing so much of that which the plaintiff might otherwise claim as would be covered by the insufficient stamp of 2 annas.

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HELD that the High Court might either have refused to admit the document for want of a stamp, or—which would be more correct—it might have required it to be properly stamped and the penalty paid into Court; but the course taken was entirely without precedent, without principle, and without authority.

THE first question raised in this case is as to the existence of a custom in the Nad Gowdki family, by which on descent, where there was more than one brother, it is alleged that the younger brothers did not, according to the ordinary law, share with the elder in a division of the property, but received maintenance, or an allotment of property in lieu of maintenance, in place of sharing in the whole property. Their Lordships observe in the first place that this custom has not been pleaded by the defendants, and they would therefore feel a difficulty in knowing exactly what the precise terms of the custom are which the appellant desires to rely upon. But further than that after considering the evidence, their Lordships find no sufficient evidence of any custom of the kind alleged at the bar to have prevailed in the family. They therefore think it unnecessary to consider the question raised by the High Court in India, as to whether in this part of India a custom of the kind suggested might or might not be valid. That is a question which would properly arise for determination as soon as it was ascertained that in point of fact such a custom had prevailed. Their Lordships, however, find quite sufficient materials upon which to dispose of this case in the dealings that have taken place between the appellant and the respondent.

It appears that there were three brothers, the appellant being the eldest, the respondent the second, and another brother, not a party to this record, who was the third. It appears that upon the descent of the family property, the brother who is not a party received an allotment of land in lieu of maintenance, and did not claim to be and was not allowed to be a sharer in the property. It appears further that the respondent, on the 17th of October 1852, entered into an engagement, evidenced by a deed of that date, between himself and the appellant, his elder brother, to this effect. The deed is addressed by the respondent to the appellant—"I, Baswantrao, son of Kiddiga-"nappa, resident at Kasba Kelur, execute a "deed of release to the following effect:— "As differences arose in the family between "me and you I live separate, my continu-"ance in the house being impossible. As "it was customary from the time of our an-"cestors for grants for maintenance to be "allowed, I asked for land for the support "and maintenance of my family, and ac-"cordingly you have given me for mainte-"nance the land and houses described be-"low." Then follows a description of the property, and the deed continues—"You "have thus made me a grant of land and a "house. I shall have no connection with "the payment of the debts contracted both "by ancestors and by yourself. Whatever "debts there may be, you will pay or re-"ceive payment. You, as being born in "the elder line, will in the same manner as "the first-born descendant used to do from "the time of our ancestors enjoy the Nad "Gowdki Wutton, the Boodihall, and Kada-"paty estate, the Halli Chaorat land, the "Chaorat of this Kusba, the land of Gowd-"ki Wutton, and whatever else may be, "together with the Rasoom [cash allowance "or fees] Bak-bab, and the rights and pri-"vileges [of the hereditary office]. I have "no right to claim them. You will con-"tinue to pay as heretofore the Nad Gowd-"ki, Mahal Joodee, and the Gowdki "Joodee, and enjoy the whole of the Wut-"ton for yourself. You will allow no dis-"pute to be raised about the land and house "now granted to me. I shall enjoy the "said house and land and live in peace; with "the exception of the two, namely, the "fields and the house, I have no right over "the rest of the Wutnee land and property; "you will not be liable for the payment of "any debts, etc., which I may contract. "As there was no stamp available for the "occasion, I have drawn this upon plain "paper. I promise to get the stamp within "eight days from this date, and write "the deed upon it and take this paper "back. In case I should fail to procure "the stamp and give the deed written upon "it, I agree to pay all the expenses and "the penalty which may be incurred for "getting this paper stamped. To this "effect I deliver and sign this deed of re-"lease of my own free will and in my sound "mind."

Now if that is a valid deed, if it is not impeachable on the ground of fraud or any other ground, it appears to their Lordships that here is a clear and distinct contract between the appellant and the respondent, by which the respondent accepts an allotment of specific land, obtains certain benefits by being relieved from the family debts, and makes stipulations with his brother which are binding and enforceable,—which would

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be binding and enforceable probably in any case, but are still more so when the transaction is one in the nature of a family arrangement. It is true that the arrangement is made upon the expression of belief on the part of the respondent that he was acting in accordance with the custom of the family. It is very probable that that belief was founded upon fact, and the existence of that belief on his part does not in any way detract from, but rather adds to, the stringency and the effect of the family arrangement. It ought to be added that this deed having been executed on the 17th October 1852, the respondent appears to have entered into possession of the allotted property, to have remained in possession until the year 1861, when the plaint was instituted, without any complaint except that the portion allotted to him by way of maintenance was too small, which complaint again appears to have been met by an increased portion allotted for the purpose of increased maintenance.

Therefore, I repeat, if this be a valid document, and not open to challenge on the ground of fraud or upon any other ground, their Lordships would be slow to fail to give effect to a family arrangement of the kind thus expressed, followed, as it has been, by enjoyment and possession for a period of ten years.

Well, then, is there any ground for impeaching this document? Now, in the first place, it is to be observed that in the plaint filed by the respondent there is no challenge of this document whatever. It is not sought to set aside the document on the ground that he was misled, that he had not sufficient advice, or that he was ignorant of his rights at the time he executed the release. But when the document was presented as a defence on the part of the appellant, then the respondent challenged it, not upon the ground of fraud or ignorance of his rights, but upon the allegation that the document never had existed at all and that he never had signed such a document. Upon that issue evidence was entered into on both sides. The two Courts before whom the case was first heard—the Court of first instance and the Court of first appeal—weighing that evidence, considering it very fully and very carefully, disbelieved the evidence of the respondent and held that the document was beyond doubt a genuine document executed by him. The second Court of appeal did not differ from that conclusion arrived at by the first two Courts, but the second Court of appeal made this objection to the document. It appeared that in the first instance it had not been stamped at all: indeed, on the face of it, it professed to be a document written on plain paper, the stamp for which was afterwards to be supplied by the respondent. After it was first produced it appears to have had a stamp of two annas put upon it, and the High Court took notice that that was an insufficient sum to cover the amount of the property at stake. Now, admitting that the stamp was insufficient, which may be assumed, it appears to their Lordships that there were two courses which might have been taken by the High Court. They might have refused to admit the document for want of a stamp. Their Lordships do not say that that would have been a correct course. But it would have been a possible course. They might have refused to admit the document for want of a stamp, or they might under the Acts and Regulations for that purpose have required the document to be properly stamped and the penalty paid into Court for the purposes of revenue. As to rejecting the document *in toto* for want of a stamp, there would have been this serious difficulty—that there does not appear to have been any objection raised to its admission in either of the first two Courts; and it is difficult to see how, that being the case, it would have been a just course to have rejected *in toto* the document in the Court of last appeal. However, the Court of last appeal did not take either of those courses. It did not reject the document. It did not do what obviously would have been the more correct course—require the deed to be stamped and the penalty to be be paid, but it left the deed as part of the evidence in the case, just in the way in which it had been placed among the evidence by the Court of first instance, and it qualified its effect and the extent of its operation by making it a deed of release, releasing so much of that which the plaintiff might otherwise claim as would be covered by the insufficient stamp of two annas. Their Lordships cannot do otherwise than express their surprise at the course thus taken, which appears to their Lordships to be entirely without precedent, without principle, and without authority.

Their Lordships, therefore, find the deed as part of the evidence in the case. They are prepared to say that being evidence in the case, they think the full and natural weight should be given to it as part of the

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evidence in the case; and being of that opinion, they have already said that the deed not being challenged on the ground of fraud or on the ground of any ignorance of right, is the expression of a valid family contract between the brothers, acted upon by both and not now to be disturbed.

Their Lordships, therefore, will humbly advise Her Majesty that this appeal should be allowed, that the decision of the High Court should be reversed, and the first decision which dismissed the plaint of the respondent be restored, and that the appellant should have his costs of this appeal as well as of the hearing in the Court of second appeal in India.

The 20th January 1871.

Present:

Lord Chelmsford, Sir James W. Colvile, Lord Justice Mellish, and Sir Lawrence Peel.

Mortgagee—Conditional sale—Redemption—Law of the Forum.

On appeal from the late Sudder Court at Madras.

Pattabhiramier *versus* Vencata Row Naiken and another.

Under the law of the Madras Presidency, the interest of a mortgagee under a deed of conditional sale becomes absolute, according to the terms of the contract, by the mere failure of the mortgagor to redeem at or before the time specified in the deed.

As regards Bengal, a Full Bench decision of the High Court, ruling to the same effect in cases to which Regulation XVII of 1866 does not apply, referred to with approval.

The ruling in the present case not intended to interfere with any rule of property established by judicial decisions, so as to form part of the Law of the Forum, wherever such may prevail, or to affect any title founded thereon.

In this case the appellant claims to be the absolute owner of the lands in question under several conveyances from the first and second of his co-defendants in the suit or from those whom they represent. That the title of his vendors or their ancestor was originally a mortgage title is undisputed; and the suit out of which the appeal has arisen was brought in October 1853 by the representatives of the mortgagor to redeem the property, alleging it to be still redeemable. The decision of the Court of first instance was in their favour, but that was reversed by the Principal Sudder Ameen of Combaconum, who decreed in favour of the appellant. His decree was reversed by the late Sudder Dewanny Adawlut of Madras on special appeal; and the present appeal is against the decree of that Court.

The Sudder Court having no jurisdiction to determine on special appeal any question of fact, and there being no cross-appeal to Her Majesty in Council against the decree of the Principal Sudder Ameen, their Lordships must accept his findings on the facts as conclusive.

Those findings were:—

1*st*.—That the original contract between the mortgagor and the mortgagee was contained in the deed of conditional sale, dated the 13th June 1808, which is at page 71 of the record, and is there called Exhibit No. I; and that the plaintiffs had failed to establish that there was any other instrument of mortgage.

2*nd*.—That Exhibit No. 2, purporting to have been executed on the 16th June 1816, upon which the appellant had relied either as a confirmation of the then absolute title of his vendors or as a conveyance or release of the right of redemption to them, was not a genuine document.

3*rd*.—That certain letters put in by the plaintiffs in order to prove acknowledgements by the mortgagees that the mortgage was a subsisting and redeemable mortgage as late as 1851, were also forgeries.

The conclusion of law which the Principal Sudder Ameen drew from his first finding was that under Exhibit No. 1 the title of the mortgagees became absolute on the 10th of June 1813, by reason of the failure of the motgagor to redeem at that date; and the special appeal was admitted to try the correctness of that conclusion. Hence, the sole question for their Lordships' determination is whether, under the law of the Madras Presidency, the interest of a mortgagee under a deed of conditional sale does or does not become absolute, according to the terms of the contract, by the mere

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failure of the mortgagor to redeem at or before the time specified in the deed.

This form of security being common in India, the question is of very general importance, and on that ground the appellant obtained Her Majesty's special leave to present this appeal, which after considerable delay has, unfortunately, come on to be heard *exparte*.

The contract embodied in Exhibit No. 1 was that the mortgagee should hold possession of the land for five years paying the Government revenue; that the mortgagor should repay the principal and redeem the land on the 10th of June 1813; and that in default, the mortgagee and his posterity should enjoy the land as if the transaction were an absolute sale, with the right of alienating the same by gift, sale, &c.

The transaction then was one of mortgage by bye-bil-wufa or kut-kobala usufructuary; the usufruct of the property to be taken in lieu of interest. And the first question that suggests itself is, was there any rule of law to prevent the Court from giving effect to such a contract, according to the intent and meaning of the parties plainly expressed by its language?

That this form of security has long been common in India in notorious. The fact is stated in the preamble to the Bengal Regulation No. 1 of 1798. That such contracts were recognized and enforced according to their letter by the ancient Hindoo law appears from several passages in Colebrooke's Digest (vol. 1, pp. 183, 187, 188 and 193). That they were equally recognized and enforced between Mahomedans is shown by Mr. Baillie in his introduction to his learned work on the Mahomedan law of sale. If the ancient law of the country has been modified by any later rule having the force of law, that rule must be founded either on positive legislation or on established practice.

Nothing concerning such contracts is, so far as their Lordships are informed, to be found in the Statute Law relating to the Presidency of Madras except Regulation XXXIV of 1802. The 8th and 9th Sections of that Regulation extended to Madras the provisions of the 10th and 11th Sections of the Bengal Regulation No. XV of 1793. Both these Regulations were passed with the object of fixing the legal rate of interest and of preventing the taking of interest in excess of it; and both have since been wholly or in great part repealed with other usury laws by Act XXVIII of 1855. The clauses in question affected only that part of the contract now under consideration which related to the usufruct of the property. As to that they may have made it necessary, contrary to the intention of the parties, to take upon a redemption an account of the rents and profits as between mortgagor and mortgagee in possession, compelling the latter to set what he might have received in excess of legal interest against the principal; but they neither extended the time of redemption nor imposed upon the mortgagee, when the mortgagor had failed to redeem within the stipulated period, the obligation of taking any judicial or other proceeding in order to make his title absolute.

In Bengal there was further legislation. In that Presidency a Regulation (No. XVII of 1806) was passed which allowed a mortgagor, who had executed such a security as that now in question, to redeem at any time before the mortgagee had finally foreclosed the mortgage by taking the proceedings which the Regulation made essential to foreclosure.

It is, however, unnecessary to observe that this Bengal Regulation had of itself no force in the Presidency of Madras. And their Lordships cannot find, either in the Madras Regulations or in the Acts of the Indian Legislature subsequent to the Charter Act of 1834, any statue by which similar provisions have been enacted for Madras.

That, in cases to which Regulation XVII of 1806 does not apply, the interest of a mortgagee under a deed of conditional sale becomes absolute according to the terms of contract by the mere failure of the mortgagor to redeem within the stipulated period, has recently been decided by a Full Bench of the High Court of Bengal in the case of Surreefoonissa *v.* Shaikh Enayet Hossein, 5 Weekly Reporter, p. 88. In that case the mortgage both date the 30th of November 1801; the mortgage was made payable on the 28th of September 1806. The mortgagor sued for redemption, and the mortgagee admitted that there had been no foreclosure pursuant to the Regulation. The High Court, however, ruled that if the Regulation did not apply, the interest of the mortgagee became absolute on the 28th of September 1806, and finding that the Regulation had not been promulgated, and therefore had not become operative in the district until the 7th of January 1807, dismissed the plaintiff's suit. The point so decided is also assumed to be law in the judgment delivered at this Board in the case of Forbes *v.* Ameeronissa Begum, 10 Moore, Indian Appeals 348*; and unless it be law,

* 5 W. R., P. C., p. 47.

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it is difficult to see why the Regulation of 1806 was passed.

Their Lordships have been unable to discover that there has been any course of decisions in the Court of Madras which can be set against the authority just cited. The utmost that can be gathered from this record is, that some uncertainty concerning the operation of these contracts may have crept into the Lower Courts of Madras. If the Principal Sudder Ameen was right in thinking that this afforded a reason why the appellant had sought to strength his title by the production of the false deed No. 2, it is to be observed that the plaintiffs, on the other hand, showed their sense of the uncertainty of the law by setting up the false case that another form of mortgage had finally been substituted for the deed of conditional sale. Moreover the Sudder Court does not rest its judgment upon decided cases. The first reason advanced in support of that judgment is clearly untenable. That a party is precluded from relying upon a title established by a deed conclusively found to be genuine, because he has foolishly and wickedly set up a false deed which, if treated as a conveyance and not as a mere confirmation, may be inconsistent with that title, is a proposition for which there is no foundation either in reason or in law. Nor does the second reason assigned for the judgment appear to their Lordships to be better founded. It assumes that an obligation lay on the mortgagee to do some act by way of enforcing what is not very correctly termed the penalty, and that there could be no adverse possession against the mortgagor until there had been a tender and refusal of the mortgage-money. But this assumption implies that in some way or another the rights and obligations of the parties as defined by the contract had been qualified by a known rule of law. Their Lordships have already stated that, so far as they can discover, no such qualifications have been introduced as in Bengal, by any act of legislation into the Statute Law applicable to Madras. What is known in the law of England as "the equity of redemption" depends on the doctrine established by Courts of Equity, that the time stipulated in the mortgage deed is not of the essence of the contract. Such a doctrine was unknown to the ancient law of India; and if it could have been introduced by the decisions of the Courts of the East Indian Company, their Lordships can find no such course of decision. In fact the weight of authority seems to be the other way. It must not then be supposed that in allowing this appeal, their Lordships design to disturb any rule of property established by judicial decisions so as to form part of the Law of the Forum, wherever such may prevail, or to affect any title founded thereon.

Their Lordships therefore being of opinion that the decree under appeal is erroneous and ought to be reversed, and that the special appeal to the Sudder Court ought to have been dismissed with costs, will advise Her Majesty accordingly. But considering the great and unexplained delay which has taken place in the prosecution of this appeal, they do not think that they ought to give the appellant the costs of it.

The 20th January 1871.

Present:

Lord Cairns, Sir James W. Colvile, Sir Joseph Napier, and Sir Lawrence Peel.

Questions of fact—Boundary case.

*On appeal from the High Court at Calcutta.**

Maharaj Koomar Baboo Guneshur Singh

versus

Doorga Dutt and others.

Follows the principle on which the Privy Council have hitherto acted in appeals on questions of fact, and confirms the concurrent decisions of the Lower Courts on a question of fact as to boundaries, where the local knowledge of local Judges and the observation of the local witnesses are all important.

If it could be shown us in this case that there was a clear miscarriage of justice, that is to say, that there was no evidence whatever which would have warranted the conclusion at which the Court below has arrived, or that in the conduct of the trial, in the mode in which the evidence was adduced, in the course that was pursued as to holding the balance of justice between the parties in the course of the trial, there was a clear departure from the ordinary principles which regulate judicial proceedings, then their Lordships, notwithstanding the decision of the two Courts below, would

* From the judgment of Peacock, C. J., and Bayley and Kemp, J. J. in Regular Appeal No. 36 of 1862, decided 11th November 1862, not reported.

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have entertained and considered the appeal. But their Lordships are clearly of opinion that when the question is one simply of fact, and when, above all things, that question of fact is a question of fact as to boundaries, where the local knowledge of local Judges and the observation of the local witnesses are all important, they would be departing from what has been the practice of this tribunal if they were to act in opposition to the well-considered judgment of the two Courts from whom the appeal comes. It is admitted, and could not be otherwise than admitted, that there is evidence which, if believed, would have justified those judgments. Their Lordships are of opinion that the Courts below were the best tribunal for deciding the question whether the evidence was credible or not, and they would be entirely unwilling to disturb their judgments.

Their Lordships, therefore, will humbly advise Her Majesty that this appeal should be dismissed with costs. In the view which has been expressed of the case, it is unnecessary to consider or to express any opinion upon the point as to the Statute of Limitations.

The 21st January 1871.

Present:

Lord Cairns, Sir James W. Colvile, Sir Joseph Napier, and Sir Lawrence Peel.

Compromise—Excess land—Wasilat.

*On appeal from the High Court at Calcutta.**

Nilcomul Lahoree and others

versus

Gonomonee Dabea and another.

Where the parties to a suit which went up on appeal to the High Court entered into an agreement in 1826, by one of the terms of which it was stipulated that both parties should provisionally take possession of certains portions of the land in dispute, but that either party would be at liberty within 12 months from the date of the agreement to apply to the proper tribunal to effect a rectification in the quantity of land which each was to hold permanently, and one of the parties did make such application to the local Judge, who refused to entertain it on the ground that the appeal (which under the agreement was to be abandoned) was still before the High Court, it was held by the Privy Council that the local Judge should either have entertained the application himself as an original suit, or have kept possession of it until a petition had been presented to the Sudder Court to make the agreement a proceeding of that Court, and to have an order giving effect to it by way of compromise.

Where the final rectification of the shares of land resulted in the respondent getting a larger portion than he had held provisionally under the agreement, and the respondent was put into possession of the additional share in 1854, his right to wasilat for such portion followed as a matter of course unless barred by some final impediment, and limitation in a suit by him for such wasilat it was held began to run from 1854 when the rightful partition was completed.

THERE is some obscurity and difficulty in this case, arising chiefly from the length of time during which the litigation has unfortunately continued, and from some of the proceedings in the course of that litigation not having been conducted with the perfect regularity which would have been desirable. But disembarrassing the case as far as possible from those difficulties, the facts appear on examination to be simple, and the law applicable to them to be without doubt.

Now what their Lordships find is this. So long ago as the year 1828, there was a controversy between the two persons whom I will term the appellant and respondent, although there has been a change of interest since that time, and there are now more appellants than one and more respondents than one. The appellant apparently had become possessed by purchase of the zemindary in question, and had sold a four annas share of it to the respondent. The respondent appears to have desired the fulfilment of that bargain, to be let into possession and to have the wasilat or mesne profits for the four annas share during the time he had been kept out of possession, and he instituted a suit for that purpose and obtained a decree from the Court of first instance. He was ordered to be put into possession. The owner of the larger share appealed to the Sudder Court, and pending the appeal the possession of the respondent was suspended and the appellant was left in possession of the whole. In that state of things, the parties apprehending the delay and expense of the prosecution of the case in the Sudder Court, and the owner of the smaller share being anxious to get into possession of his property, came to an agreement which is upon record at pages 25 and 26. The substance of that agreement was this. The facts that I have stated were recited. The agreement provided that there should be an immediate possession given to the appellant and to the respondent of portions at all events of cultivated land—an immediate separate possession of portions of the cultivated land which were taken provisionally, and only provisionally, to be as near as then could be ascertained the proper proportion to which each was entitled, *viz.*, a share of twelve annas

* From the judgment of Loch and E. Jackson, J. J., in Regular Appeal No. 477 of 1863, decided 3rd May 1864,—not reported.

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and a share of four annas. Those proportions were mentioned by some general names and descriptions which need not now be specified. But then, as it was apparently obvious to both parties that that division and that possession would not be accurate with regard to the real rights of the parties, it was carefully stipulated that it should be only provisional, and that it should be subject to rectification. The parties, therefore, proposed that the rectification should take place in this way. If either desired it in the course of the ensuing twelve months, he was to have an arbitrator appointed, that is to say, he was to propose some person who would be acceptable to the other person concerned, and the rectification was to take place by the award of the arbitrator; but if the arbitrator was not appointed, then the person who was injured by his not being appointed, was to have liberty to appeal to what is termed the Hakim, which has been very properly considered to be the proper tribunal—whatever it might be—to appeal to the proper tribunal for the purpose of having effect given to this agreement as to the rectification of shares. There was a provision that the appeal in the Sudder Court was not to be proceeded with, and that an application was to be made to the Sudder Court to have that appeal dismissed and this instrument of compromise put upon record in place of the decree. Then the agreement contained this clause. It is a clause relating to wasilat, but it is a clause which, as their Lordships think, is not a clause to be read as giving a right in certain cases to wasilat, but as defeating a right to wasilat which it is assumed would exist if it is not taken away. It was natural to suppose, and it would naturally follow, that if upon the rectification of the provisional arrangement made by this agreement, it should appear that one or other had been for a time in possession of a larger share of the zemindary than his proper proportion, the person so in possession of the larger share would have to pay wasilat or back rents—mesne profits—to him who had had the share which was not adequate to that to which he was entitled. It was provided, therefore, in these words—"Should "any one amongst us both, through negli- "gence, fail to appoint an arbitrator, then "he who should think this injurious to his "right, shall, within the said period, apply "to the Judges of Court"—that is the Hakim "—for determination of the matters above- "mentioned; if by not doing this within the "said limited period, any one should bring "a suit for the excess after the expiration "of the limited period, then he shall have "no claim for wasilat of the same which "had accrued during the period of dispos- "session; if the claim for wasilat be made, "that will not be valid."

I repeat, their Lordships think this is clearly a clause of defeasance of forfeiture of that which otherwise would plainly be the right of the person in possession, of the share less than he was entitled to. It is obvious that an arrangement of a different kind might have been made. The rents might have been impounded, they might have been kept *in medio*, or in the hands of some third party, until it was ascertained what was the true proportion which each should be put in possession of. That would have been clearly inconvenient to both parties; that was the very thing they wanted to avoid. Both parties, therefore, were put into possession of that which was the nearest estimate that could be made of their respective rights, in order that they might enjoy the advantages and the profits of the land, but that was all subject to rectification as to the quantity, and therefore subject also to making good to the party injured any excess of profit which the other might have derived.

That being the agreement made in 1826, we have next to consider what took place in the twelve months which followed the date of the agreement. The agreement was dated the 22nd September 1826. What followed was this:—On the the 26th June 1827, both parties applied by petition to the Commissioner of the district in which they both lived, putting before him this deed of compromise and asking him to send it to the Sudder Court. The Judge to whom the application was made thought this was an irregular proceeding, that they ought themselves to forward it to the Sudder Court if they desired it. But two days afterwards, on the 28th June 1827, the respondent presented a petition in his own name to the same Commissioner, the local Judge, asking that effect might be given to this arrangement, and that proceedings might be taken in substance to rectify in his favour the division that had been made of the land by the agreement. The Commissioner gave in substance the same answer which he had given to the former petition, that the suit was before the Sudder Court and that the application should be made to the Sudder Court.

Now at this point of the case their Lordships must express their opinion that the application of the respondent being in the

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nature of an original claim founded, not on the former cause of action, but upon the agreement made in 1826 and the special terms of that agreement, the application to the original Judge might well have been entertained by him, and at all events they are not prepared to say that that application was made so improperly, so irregularly, to a person so entirely devoid of jurisdiction, as to lead to a forfeiture under the clause to which reference has been made, on the score that the respondent had not applied within twelve months to the proper Hakim on the subject. Their Lordships are of opinion that the Commissioner to whom the application was made might well either have entertained the application himself as an original suit, or at all events might have kept possession of it until a petition had been presented to the Sudder Court to make this agreement entered into in 1826 a proceeding of that Court, and to have an order giving effect to it by way of compromise. However, the Commissioner took a different view; but that in their Lordships' opinion cannot, if the proceeding was a proper proceeding on the part of the respondent, have the effect of subjecting the respondent to forfeiture under the clause of the agreement.

On the 13th September 1827, it appears that application was made to the Sudder Court by the appellant to make the compromise a proceeding or record of that Court and to give directions for carrying it into effect, which the Sudder Court on the 28th February 1828 ordered accordingly. That of course was after the expiration of the twelve months.

Their Lordships, therefore, are of opinion on this part of the case that the decision of the High Court from which the present appeal is brought was a correct decision and that the High Court were warranted in holding that there had been no forfeiture of the right to wasilat under this clause in the agreement, by reason of the respondent not taking the proceedings within the twelve months.

It is necessary now to refer to the subsequent proceedings in order to dispose of the second part of the case as to the Statute of Limitations. On the 28th August 1828, the respondent applied to the local Collector for a rectification of partition of the zemindary. That was not in the form of a plaint or of an original action, but in the form of a petition. The Collector thought that the Sudder Court having had seizin of the appeal in the original cause, he had not jurisdiction to entertain this petition; and accordingly an application was made in the year 1832 to the Sudder Court by the respondent to rectify the division of the land. It is somewhat difficult to understand whether this is to be looked upon as an original proceeding, or as a proceeding carrying out and continuing the chain of the former proceedings in the case. Their Lordships are disposed to think that it is in the latter point of view that it ought to be looked at. There was the original suit in 1826 to which I have already referred; there was the compromise; there was the petition in the Sudder Court to have effect given to the compromise; and there was then this further proceeding in the Sudder Court to give that particular effect to the compromise which consisted in the rectification of the division of the zemindary. On the 28th July 1853, that is, after a lapse of twenty-one years, a scheme for the rectification of the partition was submitted to the Sudder Court by the Officer who had been assigned for the purpose, and on the 25th April 1854 the Sudder Court confirmed that scheme. On the 25th July 1854, the respondent, who had been found by that scheme to be entitled to a very considerably larger share of the zemindary than he had been in possession of, was put into possession of the additional portion to which he thus was found to be entitled.

Now, I have stated already that their Lordships are of opinion that, consequential upon the agreement of 1826, there would be the right of claim for wasilat or mesne profits, if it should be ascertained that either party had not, according to the provisional partition then made, been put into possession of the share to which he was rightfully entitled. Whether either party was in possession of a larger share than his proper share could not be ascertained, and was not ascertained, until the rightful and proper partition was finally made. Until that period it was a matter of doubt and uncertainty whether there would be any claim for mesne profits or wasilat at all, and of still greater uncertainty, necessarily, what the amount of that claim might possibly be. On the other hand, when once it was ascertained that either party had been in possession of a share smaller than his own, his right to wasilat would follow as a matter of course, unless barred by some special impediment which at present does not appear in the case. Therefore, in the year 1854, when possession was given to the respondent of the additional share to which he had thus become entitled, his right *primâ facie* would be also to receive

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from the appellant that proportion of the mesne profits of the land which would represent the excess, in possession of which the appellant had been, and out of possession of which the respondent had been kept. Their Lordships are not prepared to say, that without any substantive or original proceeding, and merely by means of an application to carry into effect the compromise in the suit, this right to wasilat might not have been asserted and enforced. But the course which was taken by the respondent was this. He did not apply by petition or in the original chain of proceedings, but he commenced on the 28th January 1862 a separate and original suit to recover this wasilat, but to recover it as a claim which flowed out of the former proceedings. Now, putting aside for a moment the lapse of time between July 1854 and January 1862, their Lordships, although they do not affirm the regularity or the necessity for the plaint of 1862 as an original preceeding, are notwithstanding of opinion that if there is any irregularity, there is not such an irregularity in originating that separate proceeding as should disentitle the respondent to his claim for wasilat, if he otherwise was entitled to it; and that he was otherwise entitled to it, their Lordships have already expressed to be their opinion.

Is then the claim of the respondent limited in any, and what way, by any Statute of Limitation? Their Lordships are of opinion that it is impossible to show that the Statute of Limitations, the Act of 1859, which cuts down a right in cases of this kind to six years, was in force in Assam at a period which would make it applicable to this suit, and that therefore may be put aside. The other period of limitation is the limitation of twelve years. If the law of limitation on that score is applicable at all, it could only be by analogy, and not by any positive words of the law. But when their Lordships consider all the circumstances of this case, they are of opinion that it would be contrary to the spirit and object of the Statute of Limitations to apply that law, even by analogy, in the present case. Their Lordships do not desire to treat this case as a case of trust, as it appears to have been viewed by the High Court from whom the appeal comes. Their Lordships are unable to see that the appellant and respondent stood to each other in the position of trustee and *cestui qui* trust. But their Lordships consider, as they have already said, that the right to wasilat was a right distinctly flowing out of, and consequential upon, the right to the rectification of the partition, that the right could not have been ascertained or enforced until the rightful partition was completed, that is to say, in the year 1854, and that it is to the year 1854 they must look as the period when the right to wasilat would accrue. If that is so, their Lordships do not think the lapse of time between 1854 and 1862 should disentitle the respondent to that which he otherwise would be entitled to. In saying this, their Lordships do not mean to affirm that it may not be in the power of the appellant to show any special circumstances, which he may be able to show, which should limit, as a matter of equity on the part of the Court, the claim of the respondent to mesne profits to some period short of the whole number of years between 1854 and 1862, during which the respondent was kept out of possession of the larger share to which he was entitled. They desire to leave that question open. It will be open to the appellant in taking the account for which the case has been remitted to the Court of first instance by the High Court to show any special case (if he is able to show it), by way of appeal to the equity of the Court to shorten the account which otherwise would have to be taken of the mesne profits. Their Lordships leave that view of the case, if it can be presented by the appellant, entirely untouched by what has now been said.

On the whole, therefore, their Lordships are of opinion that in substance the decision of the High Court is correct; they think that the present appeal ought not to succeed, and they will humbly advise Her Majesty that it should be dismissed with costs.

The 8th February 1871.

Present:

Sir James W. Colvile, Sir Joseph Napier, Lord Justice James, and Sir Lawrence Peel.

Adoption—Will—Long possession.

*On appeal from the High Court at Calcutta.**

Rajendro Nath Holdar

versus

Jogendro Nath Banerjee.

The case of a Hindoo claiming by adoption under a Will which was put forward shortly after the testator's death and which was acted upon and recognized for a period of 27 years by the whole family, the validity of

* On appeal from the judgment of Trevor and Glover, J. J., in Regular Appeal No. 260 of 1866, decided 8th April 1867,—7 W. R., *Civil*, 357.

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which Will was questioned in a suit brought by the person adopted against members of the family, was considered to be analogous to a case in which the legitimacy of a person in possession is questioned a very considerable time after his possession has been acquired by a party who has a strict legal right to question his legitimacy. In such a case, the defendant in order to defend his status should be allowed to invoke against the claimant every presumption which reasonably arises from the long recognition of his legitimacy by members of the family or other persons.

Judgment of the Appellate Court, which differed from the Lower Court as to the evidence with respect to the validity of the Will, reversed.

THIS case had been extremely well argued on both sides; but their Lordships having had time to examine the evidence, and having now weighed the arguments on both sides, have come to a clear conclusion that this appeal ought to be allowed, and the grounds of that conclusion I am now instructed to state.

The question is one touching the right of succession to the estate of one Kali Prosad Holdar, a Brahmin, who seems to have been possessed of a considerable estate, including certain spiritual rights and privileges connected with the worship of the Goddess Kalee in the well-known temple in the vicinity of Calcutta. Kali Prosad died on the 16th Assin 1244, a day which corresponds with some day in September 1837. He left a widow, a mother, and four sisters. The mother predeceased the widow and died in 1855; the widow died in July 1864. Of the four sisters, two are dead—one of them without issue, the other leaving a daughter. And of the two surviving sisters, one is childless, and the fourth only has male issue, namely, the respondent Jogendro Nath and the infant respondent Kameeka Nath Banerjee, and these two persons, if Kali Prosad died intestate, are the persons who, according to Hindoo Law, would be entitled to inherit the estate in succession to the widow.

Shortly after the widow's death in 1844 the respondent, Jogendro Nath, suing *in formâ pauperis*, commenced this suit in which he claims to recover an eight annas share of the estate from the appellant, who claims under an adoption by the widow alleged to have been made by virtue of a testamentary disposition of her husband, and from the other persons claiming interests in the estate under that testamentary disposition. The infant brother is made a defendant *pro formâ* on the record, and is represented by his father and guardian Kasseeputtee Banerjee.

The appeal, however, has been argued as if the litigation were confined to the adopted son of the widow, who is in possession, that is the Appellant, and the respondent Jogendro Nath; and in that point of view it will be convenient to consider it.

The issues are stated at page 18: they are these—"Whether or not the suit is barred "by the Statute of Limitation? Whether "or not the Will, the Dan Unnoomottee "puttro of the 6th Assin 1244, B. S, alluded "to in the written statement filed by the de-"fendant Rajendro, was a genuine document: "if so, whether the defendant had been, ac-"cording to the Shastras, adopted by Matun-"ginee Dabea, widow of Kali Prosad Holder, "deceased?" The next issue is—"Whether "in event of the aforesaid deed of gift being "not proved, the plaintiff is entitled, under "the Hindoo Law, to succeed to the estate or "property included in the suit? and if so, "whether he is entitled to possess the whole "estate or not?"

Of these issues the second alone, and perhaps only part of the second, is material. The first issue, that upon the Statute of Limitations, was originally determined by the Principal Sudder Ameen, the Judge of first instance, in favour of the defendant. His decision was reversed on appeal, and it has been candidly and fairly admitted at the bar by Mr. Bell that it is impossible to impeach that decision; that, according to the authorities in India, time would only begin to run against the respondent from the date of the widow's death.

Again the third issue, it may be assumed, would, if it were necessary to try it, be necessarily found in favour of the respondent, the plaintiff in the suit, to the extent of the interest claimed by him in the estate, namely, a moiety or eight annas.

With respect to the second issue, it has been suggested by Mr. Doyne that it may admit of the contention on his part that the adoption of the respondent was invalid, because it was not made with the consent of the mother, which the Will made a condition precedent to any adoption. But their Lordships, as they have already intimated, do not consider that that point is in terms open upon the issue, the latter part of the issue being "whether the defendant had been, according "to the Shastras, adopted by Matunginee "Dabea, widow of Kali Prosad Holdar, de-"ceased." Those words really raise only the question whether all the ceremonies, and whatever other requisites the Hindoo Law has made essential to an adoption, had been complied with. Their Lordships would not have held the parties strictly bound to the terms of the issue, if they had seen any trace

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that it had been understood in any other sense in the Court below. But they cannot find that that was the case, that it ever was raised below that the mother had not given her consent to that adoption; and they are confirmed in this by looking at the grounds of appeal which were filed by the respondents in the High Court in which he takes these two points with reference to the adoption—"The Lower Court has failed to "consider that Matunginee had no right to "adopt under the existing Hindoo Law of "adoption. There is no proof to show that the "ceremonies and formalities prescribed by the "Hindoo Law were legally performed, and the "defendant's adoption ought to have been "cancelled on that score." There is not a word suggesting that the mother's consent had not been given. Under these circumstances, if the mother's consent were necessary under the Will, as to which their Lordships give no opinion, it must be presumed that that consent was given.

That part of the issue which relates to the validity of the adoption according to the Shastres was found by the Court of first instance in favour of the appellant. The High Court has intimated no opinion, as it was not necessary for them to decide that point, whether the judgment in that respect was right or not; but their Lordships have heard no reason whatever, and no grounds have been shown before their Lordships at the bar, for impugning that part of the decision of the Principal Sudder Ameen.

The sole question, therefore, on which the determination of this appeal depends, is the validity of that Dan Unnoomottee puttro, which it will be convenient, as it is in its nature testamentary, to call in the observations which I shall hereafter make "the Will." This Will purports on the face of it to have been executed on the day of the testator's death. The effect of it, so far as it is necessary to read the passage, is correctly stated in the judgment of the High Court. The Judges say—"This deed," as they call it, "it will be observed, gives his wife Matun-"ginee permission, with the consent of his "mother Jeomoney, to adopt one son. It "makes a present division of his property "into seven annas and nine annas, but post-"pones the enjoyment of it by the parties for "whom the several shares are intended until "the death of his mother, who, during her "lifetime, is to be the proprietor and manager "of the whole sixteen annas of his property, "and to pay his debts out of the nine annas "share, and other expenses of maintenance, etc., out of the sixteen annas. On "the death of his mother his four sisters are "to take possession of their seven annas "share; and in case of any one of them dying "childless, her share is to descend to the "children of the other sisters. The nine "annas share is to be the property, without "power of alienation, of Matunginee during "her life, and after her death it is to descend "to her adopted son." I stop there because I am not clear that the Judges have really given the true construction of the concluding clauses of the Will in what follows, and it is unnecessary to consider whether that construction is right or not.

The earliest production of the document was within ten months of the testator's death, in August 1838. In that month Jeomoney, the mother of the deceased, came forward as executrix, as we should say, under this Will, claiming to be substituted as decree-holder in a suit in which her son had recovered a decree in his lifetime. The widow appeared on that occasion by her mooktear to support her mother-in-law's application. The Judge seems to have required, or the parties to have tendered, proof of this instrument. The writer of the instrument was examined, and one, if not two, of the attesting witnesses were also examined. The evidence, such as it was, seems to have satisfied the Judge, at all events for the purposes of the application, that the document was to be treated as a true document; and accordingly the mother was substituted as the decree-holder.

So far, therefore, the widow, who was the heiress-at-law of the alleged testator, was supporting the alleged testacy. In 1844, however, there seems to have been some change in her disposition in that respect and some disagreement in the family, and she then made the application which is found at page 69 of the record, to sue *in formâ pauperis*, in order to assert her rights as heiress-at-law. She appears from that document at that time to have left her husband's house and to be residing in her father's house, where, of course, she would be under the influence of parties who would urge her to assert her extreme rights, and if they considered it necessary for her rights to do so to dispute the Will. Whatever she may have actually done after that in the suit does not appear, but it is clear that in 1845 that litigation was compromised, and she reverted to her original position of a person supporting the Will and taking under it. The compromise is at page 75. The effect of it was that the Will was

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admitted as the foundation of the rights of the family, but the mother retired from that position in which the Will placed her of being mooktear of the whole estate,—the person managing the estate with whatever beneficial interest that management might give her, and supporting the whole family out of the proceeds of the whole estate; and that she thenceforward agreed to be entitled to receive maintenance only, and to put the widow in the possession of that which the Will gave to her and the sisters—in immediate possession of that which the Will gave to them. Now, that compromise has been very much relied upon by Mr. Doyne as affording an argument against the validity of the Will. Their Lordships are unable to accede to the argument which he has laid before them. His contention is that it must be presumed that the mother would not have agreed to those terms unless she knew that the Will was a false document and was afraid of its validity being contested in open Court. But, on the other hand, it may equally be said that the widow would not have agreed to relinquish her claim to the whole estate, if she had known that the document could not be proved in open Court, and that she had every chance of gaining her suit. Without imputing such a motive to the mother, it seems not wholly unnatural to suppose that she might be guided in that by the advice of members of the family,—that they might have put before her that the estate would very likely be wasted in litigation,—that the proof of a Hindoo Will when a true document is always an uncertain thing, and that being advanced in years and having her daughters put in possession of seven annas of the property, her position would not be materially worse, and that she might fairly agree for the sake of peace to make the sacrifice which she did make. On the whole, their Lordships think that it is impossible to draw any conclusion from that compromise which militates strongly against the evidence in favour of the Will.

From that time forth, with perhaps one exception, the family appear to have acted consistently upon the Will. This compromise was filed in 1845. The adoption was, I think, in 1848; but, intermediately, there are several proceedings both before and after the adoption in which all the family put forward this Will claiming under the Will; and in fact there is nothing, except the document to which I am now about to refer, which shows that the Will was questioned by any of the immediate family of Kali Prosad. That document is the one filed on the part of the respondents, and is at page 33 of the record. It is the petition of the widow when a party, a relation of the family, who had recovered a decree for costs against the mother, was seeking after the mother's death to get these costs from the widow; and she, after stating that she had no connection with the widow as heir, that the heirs of the mother were her daughters, no doubt does in the second paragraph of her petition speak of having been induced to consent to a division of the whole sixteen annas by collusion. But this document is filed in the Court by her mooktear; it does not seem to have been signed by her, and their Lordships, considering that in this very document she describes herself as the mother and guardian of the son adopted under the Will, cannot ascribe any importance to it, or suppose that this statement is anything but one of those statements which a native mooktear is so apt to put in without much regard to the truth of what is alleged in it in order to gain some immediate object in the suit in which it is filed. The adoption took place with great publicity and formality, was known to all the members of the family, and must be presumed to have been made under the Will.

We therefore find that for a period of 27 years this Will was, with the exceptions I have mentioned, acted upon and recognized by the whole of the family of Kali Prosad, and that the legal *status* of the appellant was acquired under it with the knowledge of all the members of the family. If the document had been a frabrication, and if there were persons who might have intervened and have contested the Will, the presumptive heir, who was in existence before his title was defeated by the birth of the present respondent, might have come forward in one way or another and contested the Will. Therefore there arises from all these circumstances a very strong presumption, which their Lordships do not feel themselves at liberty to disregard, in favor of the Will. No doubt these circumstances, as the law stands, are not conclusive against the respondent. He has the right to call upon the appellant, the defendant in the suit, to prove his title; but their Lordships cannot but feel that while he has that extreme right, every allowance that can be fairly made for the loss of evidence during this long period by death or otherwise—every allowance which can account for any imperfection in the evidence—ought to be made; and on the other hand, that in testing the credibility of the evidence which is actually given, great weight should be given to all those inferences and presumptions which arise from the conduct of the family with

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respect to the Will, and to the acts done by them under the Will. The case seems to their Lordships to be analogous to one in which the legitimacy of a person in possession is questioned, a very considerable time after his possession has been acquired, by a party who has a strict legal right to question his legitimacy. In such a case the defendant in order to defend his *status* should be allowed to invoke against the claimant every presumption which reasonably arises from the long recognition of his legitimacy by members of the family or other persons. The case of a Hindoo claiming by adoption is perhaps as strong as any case of the kind that can be put; because when, under a document which is supposed and admitted by the whole family to be genuine, he is adopted, he loses the rights—he may lose them altogether—which he would have in his own family; and it would be most unjust after long lapse of time to deprive him of the *status* which he has acquired in the family into which he has been introduced, except upon the strongest proof of the alleged defect in his title.

With these observations, their Lordships proceed to consider the direct evidence as to the validity of this Will. They do not propose to go into it at any great detail. It was fully considered in the first instance by the Principal Sudder Ameen, himself a Brahmin, who has embodied his conclusions in a judgment, the careful preparation and expression of which seems to their Lordships to be highly creditable to that native Judge. He came to a clear conclusion that the witnesses who were called by the respondent to show that Kali Prosad was in such a state of body that it was impossible that he could have executed this Will, were persons of no credit and not to be believed. He, also weighing all the circumstances, giving weight to the probabilities of the case, and considering the positive testimony which had been adduced before him, came to a clear conclusion that the Will was genuine and ought to have been affirmed. Upon appeal to the High Court the learned Judges of that Court, for reasons which they have not recorded, but which may easily be presumed to have been a desire to examine the subscribing witnesses for themselves, and also to examine the subscribing witness who had not been called in the Court below, the father of the respondent, re-examined the three witnesses who had been examined, and examined for the first time Kasseeputtee Banerjee. Of the evidence then taken, it may be said that the witnesses who were re-examined do not appear to have been in any degree shaken, and the cross-examination of one of them, Shiboram Chatterjee, elicited some fuller account of the preparation of the Will, which is not altogether immaterial, if true, to the appellant's case. Of the evidence of Kasseeputtee Banerjee it is sufficient to say that it amounted only to this, that though his name did appear upon the document, it had been added some twenty days after the death of the testator at the instigation of the mother, who told him that the arrangement was for the benefit of his future son and that her consent was necessary to any adoption. He does not venture to express a conviction one way or the other as to the truth or falsehood of the Will, and it is obvious that his statement, taking it in the most favourable sense, that he merely put his signature at that time to a document of which he had not witnessed the execution, on that persuasion, does not entitle him to very much credit. If, on the other hand, he did it believing the document to be a forgery, he would, of course, be entitled to much less credit, and therefore his evidence is not that upon which any reliance can be placed, and the Judges of the High Court do not appear to have grounded their judgment upon it. All they say as to the evidence of Kasseeputtee Banerjee is—"We think it better to form our "opinion on the merits of this case irrespective "of anything contained in it; although, "notwithstanding the equivocal position in "which he stands on his own showing, we "we are inclined to think that there is some "truth in what is stated as to the origin of "of the deed now before the Court." That, therefore, may be left out of consideration.

Now, if the two judgments are looked at in opposition to each other, it would appear that the learned Judges of the High Court have in the first place differed somewhat from the Principal Sudder Ameen in his appreciation of the probability that such a document as this should have been executed. They say—"As the Principal Sudder Ameen "has remarked, it is contended by the plain-"tiff that that deed was a concoction of Kalli-"prosad's mother, Jeomoney, who fabricated "it to provide for her daughters, for whom a "Hindoo mother has greater affection than "for male children, and that it was only to "quiet the wife that nine annas of the pro-"perty was allotted to her: whereas by the "defendant it is urged that Kalliprosad's "four sisters were, according to the custom "of the family, married to Koolin Brahmins, "who never take their wives to their home "or otherwise maintain them; that mindful "of their helpless situation and of his own

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" salvation, he made a provision for the former " at the same time that he provided for the " maintenance of the latter; and that as a duti- " ful Hindoo son, he made the mother manager " and proprietor; that, moreover, Kalliprosad's " income was about rupees 800 a year, and " that one quarter of seven annas of that sum, " viz., 85 rupees per annum, was not an out-of- " the-way sum for each of his sisters. There " is no doubt that this deed is for the benefit " of the sisters of Kalliprosad Holdar, and that " it is only in case his adopted son has issue " that nine annas of the property can remain " away from the sisters or their heirs even- " tually. Without going so far as saying " that there is an antecedent improbability " in this distribution of the testator's pro- " perty, the Court has no hesitation in saying " that that distribution is unusual. A per- " mission is not given to the wife to adopt " more than one son, and the adopted son's " patrimony is cut down, and it does not " become vested in him until after his mother's " death, and if he dies issueless the property " goes to the testator's sisters and their heirs. " As to the necessity of Kalliprosad providing " for his sisters married to Koolins by a deed " of that sort that is not so apparent. Whilst " they live in the family-house the obligation " would remain on Kalliprosad and his heirs " to maintain them and their children, but to " divide his estate in this way is to go beyond " the obligation which the Hindoo Law im- " posed on Kalliprosad. Again, the Court " does not see the justice of considering the " adopted son of a stranger, and of contrast- " ing him in the position of a stranger with " that of the testator's sisters. After the " adoption the adopted son is no longer a " stranger; he is the person who procures " the salvation of his adopting father, and " therefore in the face of so great a benefit " accruing to the testator from the son " adopted, any permanent diminution of the " property left to him, even to the amount of " four times 85, 340 rupees a year, bears " the semblance of injustice."

On this it is to be observed that the principal point upon which they differ from the Principal Sudder Ameen, is the probability of them the provision made for the sisters by giving specific shares in the property, instead of giving them mere allowance for maintenance; and it may be very true, as the learned Judges say, that these sisters being married to Koolin Brahmins, there would remain the obligation on Kalliprosad or his successors to maintain them. The whole question was, however, raised before the Principal Sudder Ameen, who, as a Brahmin, is at least as likely as the Judges of the High Court to know what a Brahmin would be likely to do in those circumstances, and he has expressed an opinion that the provision was not an unnatural one for the testator to make in those circumstances. Again, it is no doubt true that greater power is given the mother than she would have naturally under the law, and that the interest of the adopted son is postponed, and that the disposition is altogether different from that which might have been made by a man who had in his mind the single object of leaving an adopted son.

It is possible, and it has occurred to their Lordships, considering that evidence which points to the provisions of the Will having been discussed a day or two before its actual execution, and to the relations subsisting between the members of this family, that there may have been something like a compromise in the testator's mind, namely, that there may have been some pressure upon him on the part of his mother to make a larger provision for his sisters: on the other hand, that he was anxious to carry out the principle, dear to every Hindoo, of having an adopted son, and that the actual disposition may have been the result of some such a compromise. But their Lordships have to observe that they are not dealing here with a question whether a disposition has been obtained by any undue influence or under any pressure of that kind, but upon the issue whether this document is a forgery or is the Will of the testator.

Another point upon which the learned Judges of the Sudder have intimated some dissent from the Principal Sudder Ameen was the credit to be given to two of the witnesses examined, namely, the two young men, Denonath Holdar and Koylas Chunder Banerjee. They say of that—" We do not believe " the statement of Denonath Holdar and " Koylas Chunder Banerjee on this point. " They were both boys: no intelligible reason " is given for their being at Kalliprosad's at " such a time, and the evidence before us as " to the duration of Kalliprosad's sickness, as " to his state two days before his death, and " as to his state on the day of his death, even " if it be credited, does not admit of our be- " lieving at the same time that he entered into " those explanatory conversations with the " witnesses which in their depositions they " detail." The observation that is founded upon the age of these two witnesses might have some force, if this document were now produced for the first time and their names were found upon it as subscribing witnesses. But the argument is all the other way, when it is considered that

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the document was beyond all question produced in 1838; because it is in the highest decree improbable that if persons were concocting a forgery, they would call into their councils two boys sixteen or seventeen years old, who would be manifestly from their youth not likely persons to be entrusted with the secret. They have given an explanation which seemed plausible to the Principal Sudder Ameen, and seems plausible to their Lordships, for their presence on that occasion. The explanation is that a message came to the father of one of them to go to the house, that he was prevented by business from going to the house, and he said to the son—"Will you go?" The son met a companion, also apparently a relation of the family, and they went together. There may be some little exaggeration as to the amount of explanation given, but their Lordships see no reason, as the Principal Sudder Ameen saw no reason, why their statement that the testator did actually acknowledge before them that the document was his Will should be discredited.

Therefore, going through the whole of these two judgments, it appears to their Lordships that really the *ratio decidendi*, or at least the turning point in the minds of the learned Judges, was the impression which they derived from the inspection of the letter M. Now that point was not taken for the first time before the High Court. The suggestion seems also to have been made in the Court of the Principal Sudder Ameen, and he, as we understand his judgment, thought that there was nothing in it. Now, with great respect for the knowledge which the two learned Judges of the High Court possessed, as their Lordships doubt not, of the Bengalee language, their Lordships cannot but think that upon such a point as that, the native Judge examining a letter in his own alphabet, is more likely to be a competent Judge than the two European Judges. But independently of that, it appears to their Lordships to be a very unsafe ground of decision. The evidence as to the absolute prostration and insensibility of the testator at the time has been discredited. No doubt his own witnesses state that he put this letter, feeling too weak to write his name at full. But it is impossible from the mere inspection of the letter, as it appears to their Lordships, to be able to predicate with any degree of certainty or accuracy, that the man was too weak to make the impression with his pen which he is said to have made. It is impossible to say what momentary rally of strength might take place to do an act of such brevity as that; and, therefore, their Lordships are unable to give to that, which is after all merely the impression of these two Judges derived from actual inspection, the weight which has been given to it. They cannot think (considering that the evidence, supported as it is by the presumptions to which reference has been made on the whole greatly preponderates in favour of the genuineness of this instrument), that the mere appearance to the eyes of those Judges of that letter is sufficient to outweigh it; and therefore their Lordships, however great their respect for the judgment of the High Court, feel that it is their duty in the present case to advise Her Majesty to allow this appeal, to reverse the judgment of the High Court, and to direct that in lieu thereof an order be made dismissing the appeal to the High Court. The party having sued *in formâ pauperis*, their Lordships will further recommend that an order be made dismissing the appeal to the High Court with such costs, if any, as according to the practice of that Court are given to an appellant suing *in formâ pauperis*, and the repayment of any costs that have been paid by the appellant; and their Lordships, considering that they are dealing with an heir-at-law questioning this Will and supporting a judgment which has really been in his favour setting aside the Will, are not disposed to make any order as to the costs of this appeal.

The 3rd February 1871.

Present:

Sir James W. Colvile, Sir Joseph Napier, Lord Justice James, and Sir Lawrence Peel.

Succession—Family custom.

On appeal from the High Court at Madras.

Serumah Umah and another,

versus

Palathan Vitil Marya Coothy Umah and another.

If it is contended that the succession to property is regulated by any special family custom, that custom ought to be alleged and proved with distinctness and certainty.

THE suit out of which this appeal has arisen was instituted by two ladies, who were

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the daughters of one Patha Kutti. In the course of the litigation they died, and a daughter of each of them was substituted in the room of her mother as plaintiff on the record. It may be assumed that the persons so substituted, the appellants, were the representatives of the original plaintiffs, and, in determining the appeal, it will be more convenient to speak throughout of the original plaintiffs as if they had carried on the litigation to the end.

The suit was brought against those who may be taken, for the purposes of the appeal, to have been the representatives of one Moidin Kutti, the son of one of the plaintiffs, and it was brought to recover property which by the admission of both parties was once the property of Patha Kutti The history of that property it may be convenient shortly to mention. It was purchased from one Amaneth by Kunju Hajji, who was one of the sons of Patha Kutti. He afterwards died. There appears to have been a partition of his estate among the persons entitled thereto, under, as their Lordships collect from the proceedings, the general Mahomedan Law, and this particular property was assigned to and became vested in Patha Kutti as one of his heirs. Patha Kutti died in 1842, and before her death, *viz.*, some time in 1839, her grandson Moidin, in some character or another, unquestionably entered into possession of the property. He retained that possession up to the time of his own death in 1858 or 1859—a period of about twenty years. Upon his death his widow and other representatives entered into possession, claiming as his heirs or under a title derived from him. The plaintiffs thereupon instituted this suit to recover possession of the property from them. The defendants relied both upon the long possession of Moidin and upon a title founded upon a deed of purchase from Patha Kutti. In that state of things it was necessary that the plaintiffs should recover by the strength of their own title; and they were met in the first instance by the plea of the Statute of Limitations founded upon the long possession of Moidin. The Zillah Judge, looking to the nature of the suit, has very properly overruled that plea as a bar to the trial of the suit; because the question whether the suit is barred by the Statute of Limitations or not, necessarily depends upon the determination of the principal issue raised in the suit, namely, whether the long possession of Moidin Kutti was adverse or fiduciary; whether he was in possession of his own right as proprietor of the estate, or whether he merely managed the estate as the agent first of his grandmother and afterwards of the plaintiffs in the suit. It was therefore essential to the plaintiffs' case to establish the latter proposition.

What is the case which they make? It is that Moidin was first appointed manager by the grandmother; and that he was afterwards appointed to or continued in such management by them. But if he continued in possession in the character of agent or manager, it lies upon them to show that they at the death of their mother, Patha Kutti, were entitled to assume the character of principals. And, as their Lordships understand the pleadings and the evidence, in order to do this they say :—We do claim a right to inherit the property as the general heirs, under the Mahommedan Law, of Patha Kutti; but we contend that either by some act done by her in her life-time, or by some special custom of descent attaching to this property, we and we alone, although she had other persons who would under the general law have been co-heirs with her, became entitled to the whole of the property, either beneficially or with reference to some semi-religious trust; and therefore that Moidin Kutti, who continued in the possession of the estate as manager, was the agent of us and of us only; and that we only are entitled to recover the whole property. This, notwithstanding some confusion in the argument at the bar, and a suggestion that the plaintiffs might be suing as some of the heirs on behalf of all the heirs, appears to be really the effect of the title alleged and sought to be proved.

Then, upon what does the proof of this title rest? It appears to their Lordships to rest solely upon the oral testimony of three witnesses, who are entitled, no doubt, to all the advantage derivable from the fact that the Judge who saw them, the Zillah Judge, has stated that their demeanour in the box impressed him favourably. But when examined, that testimony appears to their Lordships to fall very far short of the evidence which is necessary to prove such a case as that which they were brought to support. They are none of them, it is to be observed, members of the family; almost all of them are described as Mopla merchants.

It is important to revert to the former history of the property. It is shown that it certainly passed to Patha Kutti under the general Mahomedan Law. It cannot therefore be said that it is property of which the devolution is governed by any local law or custom. If it is contended that the succession to it is regulated by any special family custom, that custom ought to have been alleged

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and proved with a distinctness and certainty which are wholly wanting here. If the evidence of these witnesses is examined, it really is not clear upon what they rest the plaintiffs' title. They seem to allege that some of the property of this Mopla family was governed by one law, and that other part of their property was governed by another law. It is admitted that this particular property came into the family, came to Patha Kutti under the general law; but then it is said that, by some act of hers done in her life-time, she transferred it to what is called the tarwad or family property, and made it subject to a different law of devolution, the nature of which is neither stated nor proved with that degree of certainty which is required to establish so special a case in any Court of Justice.

Therefore their Lordships, notwithstanding the favourable manner in which the Judge may have spoken of the demeanour of these witnesses, feel bound to concur with the High Court in refusing to believe the story to which they depose.

Two other witnesses were called to prove that Moidin accounted to his mother and his aunt for the proceeds of this property. They do not appear to be persons very likely to have been present at such a transaction. They attempted to prove that on one occasion, *viz.*, in 1850 or 1851, he accounted for the whole of the period during which he had then been in possession, but they did not agree in the account which they give of what passed on that occasion. One of them stated that the accounts were delivered to the plaintiffs; the other denied that any accounts were so delivered. This, therefore, seems to be evidence to which their Lordships cannot give any credit.

The Judge of first instance seems to have proceeded more upon the supposed defects in the defendants' proof of their title than upon the strength of the plaintiffs' title, and he called in aid various documents which had been proved in the case and to which our attention has also been directed. But of those documents, the exhibits numbered from A to F, it is to be observed that, although they may here and there afford an inference which tends to throw suspicion upon the genuineness of the defendants' deed, their general tendency is to contradict the case of the plaintiffs and to support the case of the defendants; because they show that during his twenty years' possession, Moidin was sometimes sued as the proprietor of the estate; and that as proprietor of the estate he petitioned the Collector for a remission of revenue. These proceedings took place publicly in the district; they can hardly have failed to come to the knowledge of the plaintiffs who, if their present case were true, would have called their manager to account for taking upon himself the character of absolute owner, when, in fact, he was a mere agent.

The plaintiffs, therefore, seem to their Lordships to have failed to prove that which was the substance of their case, namely, that the possession of Moidin was as fiduciary and not an adverse possession; and if that be so, they were unquestionably out of time in bringing their suit, which ought to be dismissed on that ground. This being their view of the case, their Lordships do not think it necessary to express any strong opinion as to the genuineness of the defendants' deed. It is the less necessary to do so since the judgment of the High Court does not, as their Lordships understand it, positively affirm that the deed was genuine. It assumes no doubt, as their Lordships must assume, that in some way or another, and by virtue of some act of his grandmother, Moidin came into possession of this property on his own account and for his own benefit. And their Lordships may observe that that view of the case is corroborated, not only by the acts which he did, but by the transfer to him, which is admitted, of the original sunnud, and the deed of partition forming the title to the estate. Mr. Leith indeed has endeavoured to explain that possession by attributing it to his character as an agent. But in their Lordships' opinion, it is far more reasonable to suppose that if the plaintiffs had been the true proprietors of the estate, they would, in accordance with native habits, have kept their title-deeds in the recesses of the zenana, and would not have entrusted them to a mere manager. And if this was likely to happen under ordinary circumstances, *à fortiori* it would have happened in a case in which, according to the evidence for the plaintiffs, the management of this property was by family custom vested in the females of the family.

On the whole, then, it appears to their Lordships that the judgment of the High Court was correct, and they must accordingly humbly advise Her Majesty to dismiss this appeal with costs.

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The 20th February 1871.

Present :

Sir James W. Colvile, Sir Joseph Napier, Lord Justice James, and Sir Lawrence Peel.

Contract—Consideration—Nullity.

*On appeal from the High Court at Calcutta.**

Guthrie

versus

Abool Mozuffer Nooroodin Ahmed.

In a case in which the plaintiff alleges that he agreed to sign and that he executed a deed of sale for a consideration of a sum of money, in consequence of pressure put upon him and in order to get back certain papers, &c., of his which had been abstracted by the defendant and his servants, he cannot, whether under the English or Mahomedan Law or under the general rule of equity and good conscience, be entitled to treat the deed as a mere nullity and be allowed both to avoid the contract and to retain the money.

This appeal is against two decrees which have been made in a suit instituted in December 1862 by one Cazee Nusseeroollah to recover possession of certain lands with mesne profits, and to set aside a deed of sale purporting to have been executed by him on the 11th of October 1855, in consideration of 4,000 rupees, to one Mr. Harry Inglis.

The suit was brought against the widow and representative of Mr. Inglis, who died about the beginning of 1861. The Judge of Zillah Sylhet made a decree in favour of the plaintiff on the 13th of December 1862, and his decree was affirmed by the High Court of Calcutta on the 30th November 1863. Both plaintiff and defendant have since died, and they are represented—the former by the respondents, the latter by the appellants on the record.

The issues settled in the cause are thus stated at page 171 of the Appendix :—

1. Did plaintiff voluntarily and on receipt of the sum set forth in the koballah, referred to in the plaint, execute to Mr. Inglis the deed in question, or was the same forcibly taken from him by the latter ?

2. In the event of the koballah being proved to be *bonâ fide* executed for value received, in that case is defendant in possession of only the talooks therein specified, or has she in addition taken possession of other seegga lands in addition to that appertaining to the talooks ?

It appears, therefore, that besides the principal question as to the validity of the conveyance impeached, there was a subsidiary question as to the extent and description of the lands held by the defendant under colour of it.

It will be convenient in the first instance shortly to consider what in September 1855 was the position of the parties to the transaction and their relation to each other.

The Cazee was a native landholder, and also a Mahomedan holding an office in the Court of the Judge of Sylhet. He had acquired this property in 1844. Mr. Inglis was a European, resident at Cherra-Poonjee, and engaged in various mercantile speculations, some of which, it may be presumed, rendered the possession of this particular land desirable to him. He had been in possession of it under a peishgee lease granted to him by the Cazee, which in terms expired in August 1855 ; but he contended that, by virtue of an instrument subsequently executed by the Cazee for securing a further advance of 200 rupees, he was entitled to retain possession until the whole of what was due to him had been paid off. The Cazee, on the other hand, treating the interest of Mr. Inglis as determined, had on the 16th of August 1855 granted a lease of the lands for four years to one Mr. Sweetland, as agent for Moran and Co., a European firm which seems to have been rivals in trade of Mr. Inglis. The result was probably a state of things not unfrequent in India, *viz.*, that in which two European speculators are striving in competition with each other to obtain land from a native proprietor, and the native is playing fast and loose with both of them. On the 10th of Assin 1262, B. S., corresponding with the 24th September 1855, Mr. Inglis's agent presented a petition in the Magistrate's Court, stating his master's title to the land and the lease to Sweetland, and praying for the intervention of the Magistrate on the ground of an apprehended affray. And, on the preceding day, the Cazee had filed a petition in the Judge's Court, stating the loss of his boat containing his official and private seals, his register book, and other property ; and insinuating that they had been abstracted

* From the judgment of Phear and Kemp. J. J., in Regular Appeal No. 636 of 1862, decided 30th November 1863.

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and concealed by the contrivance and machinations of the amlah of Inglis, resident at a place called Chattuck. This petition did not conclude with any prayer for relief, but ends with this statement:—"I, by way of precaution, submit this petition reporting the matter as stated, and am engaged in search of the property. I will submit a detailed account of whatever may come to light hereafter." So stood things immediately before the execution of the deed of sale. In speaking of what next occurred, it will be convenient, when a date is mentioned, to use the Hindoo month Assin, which covers the whole of the transactions.

The deed of sale was executed on the 26th of Assin at Chattuck in the house of one Brijomohun, the dewan or native manager of Mr. Inglis at that place.

On the following day, the 27th of Assin, the Cazee filed a petition in the Magistrate's Court, which contained the following statement of the circumstances under which, as he alleged, the deed had been extorted from him.

On the 3rd of Assin he left Sylhet in a boat, taking with him his official and private seals, his registry book, two gold mohurs, &c. On the way he received information of the loss of an elephant from his zemindaree at Pharrar Poonjee, and in order to seek for and trace out the elephant, he went to that place, which he reached on the 6th of Assin. He met there one Dhuneeram Doss, an agent of Mr. Inglis, who, after welcoming him with news of the recovery of the elephant, took him to his lodging and gave him betel and tobacco. On his return to the ghaut he found his boat and property gone. On this Dhuneeram took him back to his lodging and promised to find the boat, but returned in the evening with 40 or 50 armed khasheas, who ultimately were reinforced by 400 or 500 clubmen. His companions were arrested, imprisoned, beaten, and oppressed. He himself was told that Mr. Inglis was very angry with him for having granted the lease to Mr. Sweetland, and that there was no chance of his saving his life unless he would sell the property to Mr. Inglis. On the next day Dhuneeram Doss again visited him, and told him that unless he agreed to sell the property, he would not get back his boat and property, nor would he able to save his honour. Under this pressure he promised that after his return home he would "in some way or another get back the lease from Sweetland and sell to Mr. Harry." He then returned home in another boat, and presented his petition of the 9th Assin in the Judge's Court. Some days afterwards he again left Sylhet in the company of Biddyanund Raj, the mookhtear of Inglis, went to Chattuck, where he fell into the hands of Dhuneeram Doss and Brojomohun Dewanjee and others, who told him that unless he would sell the mehal to Mr. Harry and receive back his property, he would not be able to recover the latter or return home without risking his life and honour. They kept him under restraint for four or five days, and finally on the 26th of Assin compelled him to put his signature to the deed of sale, on which they had already put the impression of his private seal. They then returned his property with some slight exceptions, and released him from confinement. After detailing all these outrages, the petition prayed the Magistrate to cause a local investigation to be held; to have the houses of the parties implicated searched for the property said to be missing; to call for and consider the forged deed of sale which they had thus forcibly got signed, and to issue an order suspending its registration. The Magistrate, on the 19th of October 1855, made an order for a local investigation by the Darogahs therein-named.

In the other proceedings which followed on the execution of the deed there seems to have been some delay, which is probably to be accounted for by the fact that at that season all the offices were closed for the Doorga Poojah holidays.

On the 14th of November 1855, the deed was registered on the appearance of Biddyanund Rai, describing himself as the mookhtear of the party executing, and on the usual evidence of execution. By a petition presented on the following day the Cazee protested against the registration.

On the 18th December 1855, the Magistrate, pronuncing it to be one of the grossest cases that had ever come before him, dismissed the Cazee's complaint, and by another and substantive proceeding fined him 200 rupees for having brought a false charge. The first of these orders was affirmed; the latter was reversed on appeal by the Zillah Judge on the 23rd January 1856.

That the Cazee should after this have delayed to bring the present suit for nearly six years, is a circumstance which, if unaccounted for, would raise a strong inference against the truth of his case. But this delay is in some measure explained by the interme-

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diate litigation which took place touching the lease to Mr. Sweetland, and which lasted until May 1861. In the course of that litigation to which the Cazee, seeking to get the benefit of an alleged ekrar, as well as Inglis and the persons claiming under Sweetland were parties, the validity of the deed of sale of the 11th October 1855 came incidentally in question, and was affirmed by the decree of the Principal Sudder Ameen of the 14th of May 1861.

Their Lordships now proceed to consider the case made by the Cazee in the present suit, and the evidence by which it is supported. He has discarded the whole story of the evidence to which, as he alleged before the Magistrate, he was subjected on the 6th or 7th of Assin. It was, indeed, incredible that one on whom such outrages had been perpetrated should return a few days afterwards to perform the promise which had been extorted from him, and place himself again in the power of those who had maltreated him. Moreover, the fact that personal violence was offered to him on that occasion was inconsistent with the statements in his petition of the 9th of Assin. He does not, however, recommend himself to credit by throwing over the more improbable portions of a story which had been judicially declared to be false, in order to make the rest more plausible. His case in this suit is that the adherents of Inglis led astray the elephant; that having thereby brought him to Pharrar Poonjee, they (about the 6th of Assin) concealed his boat and the property therein; that afterwards, and in order to get his chattels returned, he was induced to go to Chattuck, where, on the 26th of Assin, the creatures of Inglis shut him up, and fraudulently having got a deed of sale drawn up in respect of the talooks desired him to sign it: that although he had refused to do so, yet being well aware that there was no chance of saving his life and reputation unless he attached his signature thereto, he signed and left it, and proceeding to the Criminal Court lodged a complaint which had been dismissed. The gist of his case, therefore, is still duress not only of goods but of person,—personal restraint and danger to his life and reputation. And, accordingly, the latter part of the first of the settled issues was as above stated—"Was the deed forcibly taken from him by Mr. Inglis?"

The decrees under appeal must be taken to find this issue in favour of the plaintiff; and either to rule that in consequence of the violence done to him he was entitled to treat the deed as a nullity and to recover the lands without returning the consideration-money, or to negative the fact that the alleged consideration of 4,000 rupees was paid to *him*. They do not in terms find whether he did or did not receive that sum.

That the money was in fact paid by Inglis's people and received by the Cazee, their Lordships on the evidence have no doubt. The payment is sworn to by the defendants' witnesses, and they are confirmed by at least three of the plaintiff's witnesses, *viz.*, Gazee Buksh, Gholam Hossein, and Kumuruddee, who all admit that the money reached the Cazee's boat. In his earlier deposition before the Magistrate, Gholam Hossein admits this fact even more explicitly, and also his own participation in counting the money. Nor does the Cazee anywhere expressly deny that he received the money. From the Magistrate's order it appears that on the investigation of his complaint he did not dispute, if indeed he did not expressly admit, the payment of the 4,000 rupees.

Again, their Lordships are of opinion not only that the evidence in the cause falls very far short of proof that the Cazee was subjected to personal violence of the nature and degree stated in the plaint, but that it is insufficient to warrant the general conclusion that the deed was forcibly taken from him. It appears from the testimony of the more credible witnesses produced by him, *viz.*, Gholam Hossein and Kumuruddee, that so far from being "shut up," he lived two days or more during which the negotiation was going on board his boat which was lying off the ghaut at Chattuck; that he passed freely from his boat to and from the house of Brijomohun the dewan; and that he was in communication with a jemadar of police, who would doubtless have protected him had his liberty been threatened. These witnesses further admit that on the first day of the negotiation, and before there was any show of personal violence, he agreed to grant to Mr. Inglis a permanent lease of the land, though he refused to grant a putnee. The earlier deposition of Gholam Mahomed which, as made *recente facto*, is far more trustworthy than the testimony given by him in this suit, contains an admission that after two days' negotiations, and before going to the house of Brijomohun for the last time on the 26th of Assin, the Cazee had agreed "to dispose of the mehal for the sum of 4,000 rupees." It further admits that he signed the deed and handed it to Kumuruddee to be sealed. The only pressure to which this deposition, if taken to be true throughout, shows that the Cazee yielded was the fear that unless he signed he would not get

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back his missing property. The statement that though he had told the witness that he would not have been able to save his reputation unless he affixed his signature is indeed thrown in at the end of the deposition. But no fact which renders that statement probable is proved. Against this testimony the evidence of the witnesses from the bazaar is worthless. But even their testimony does not amount to proof of the allegations in the plaint. Their Lordships are, therefore, of opinion that the plaintiff in the suit altogether failed to establish the case alleged, and that the evidence in the cause was insufficient to warrant the decrees under appeal.

Their Lordships need hardly remark that in coming to this conclusion, they have not been insensible to the difficulty which they always feel in disturbing the concurrent judgments of two Indian Courts upon an issue of fact. They observe, however, that they have not here to deal with a consistent case deposed to by the witnesses for the plaintiff, and contradicted by the witnesses for the defendant—a case of which the determination depends on the credit to be given to the witnesses on one side or the other. In this case their Lordships' conclusion is very much founded on the inconsistencies and imperfections of the plaintiff's proofs. Moreover, the finding of the Courts below is inconsistent with the result of the investigation of the Magistrate held immediately after the transaction, and with the finding of the Principal Sudder Ameen already adverted to in favour of the validity of the deed. The judgment of the Zillah Judge contains several inferences which do not appear to their Lordships to have been warranted by the facts before him, and it treats the order of the Magistrate dismissing the complaint of the Cazee as reversed, whereas it was confirmed on appeal. The judgment of the High Court is a mere statement that the Judges of that Court saw no reason to differ from the finding of the Zillah Judge.

Their Lordships, however, regret to say that they are by no means prepared to affirm upon the evidence before them, that the conduct of Inglis and his agents throughout these transactions was fair, honest, and straightforward. The defendant allowed her defence to be conducted so as to leave her case open to grave suspicions. She has failed to explain what the nogotiation really was which induced the Cazee, who a few days before was in a state of hostility, to make the sale. Brijomohun, Dhuneeram, and Biddyanund Mookhtear were all subject to the gravest imputations, yet not one of them was called as a witness to deny the charges against him. They are not shown to have been dead when the cause was tried; it is pretty clear Brijomohun at the least was then alive.

They had to meet not merely the charge of violence, but the imputation of having contrived, by means of the abstraction of the Cazee's goods, to trick him into coming to Chattuck where he would be under their influence, and of having made the detention of his goods the means of pressure upon him From the latter imputation they have certainly not relieved themselves. Nor has Biddyanund shown by what authority he represented himself to be the mookhtear of the Cazee when he procured the registration of the deed. The non-delivery of the title-deeds, upon which stress was laid in the Zillah Court, seems to their Lordships to be a circumstance of no moment, since it is consistent with either view of the transaction: for those documents are not likely to have been with the Cazee at Chattuck, and his repudiation of the deed followed immediately on its execution. Nor are their Lordships disposed to think that the consideration for the purchase was at the date of the transaction inadequate. The lands, whatever be now their value, were then recently settled;

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and the peishgee leases afford some criterion of their then annual value.

Let it, however, be assumed that Inglis' amlah entered into the alleged plot to bring the Cazee to Chattuck; that they caused his goods to be abstracted and made the execution of the deed of sale the condition of their restoration; and that, on his side, he agreed to sell, and executed the conveyance in order to get back his goods, but with a mental reservation that he would take the earliest opportunity of impeaching the transaction. The testimony of his most trustworthy witness scarcely carries the case beyond this. What, on such a case, would be his rights? The contract was complete, and he could only be relieved from it in a suit properly framed for that purpose upon proof of facts entitling him to that relief, and upon the terms of accounting for the 4,000 rupees with interest. Whatever be the law applied to such a transaction, whether it be the law of England which, in this case, was the law of the defendants, or the Mahomedan Law, which was the law of the plaintiff, or the general rule of equity and good conscience, which was the law of the Forum, these consequences would equally follow. The plaintiff could not insist that he was subjected to such duress as destroyed his free agency and entitled him to treat his deed as a mere nullity. He could not both avoid the contract and retain the money. For the law of England it is sufficient to cite Skeate *v.* Beale, 11 Ad. and Ellis, p. 983, or Sheppard's "Touchstone" p. 61. The Mahomedan Law on the point may be found in the 3rd volume of the Hedaya, pp. 454 to 458. The Cazee, however, did not take this course. He thought to gain an advantage over his opponents, by making the transaction the groundwork of false charges which would bring them within the scope of the criminal law. Whether he might have succeeded in establishing a case for such equitable relief, as is above suggested, their Lordships are not in a position to say, since no such case has been alleged or proved before them. On this appeal they can only say that he has failed to prove the case made, and that his suit ought to have been dismissed. To such a case the rule laid down in Hickson *v.* Lombard, L. R., 1 House of Lords, p. 324,* clearly applies.

Their Lordships, therefore, will humbly advise Her Majesty that this appeal should be allowed; that the decrees under appeal be reversed; and that in lieu thereof a decree be made dismissing the suit with costs in both the Courts below. Their Lordships would, however, further recommend that this dismissal be without prejudice to any question as to the lands alleged not to have been comprised in the purchase-deed, or to the title of any person other than the Cazee or those claiming as his representatives. They deem this reservation to be necessary, inasmuch as the evidence as to any lands being held by Mrs. Inglis in excess of those conveyed by the deed is altogether unsatisfactory; and a claim appears to have been advanced by certain members of the Cazee's family under a title alleged to be prior to that conveyed by the deed, which was not tried—and could not have been tried—between them and the defendant.

* In delivering opinion in this case, Lord Cranworth said:—"I subscribe most readily to the doctrine that where pleadings are so framed as to rest the claim for relief solely on the ground of fraud, is not open to the plaintiff, if he fails in establishing the fraud, to pick out from the allegations of the Bill facts which might, if not put forward as proofs of fraud, have yet warranted the plaintiff in asking for relief. A defendant in answering a case founded on fraud, is not bound to do more than answer the case in the mode in which it is put forward. If, indeed, relief is asked alternatively, either on the ground of fraud, or failing that ground then on some other equity, a plaintiff may fail on the first but succeed on the latter alternative. But, then, the attention of the defendant has been distinctly directed to it, and he has been called on to answer the case according to both alternatives. There is nothing of this sort in the pleadings of this case.

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